

TEXTE

99/2017

The legal debate on access to justice for environmental NGOs

A discussion of arguments and positions concerning access to justice for environmental NGOs as well as a legal comparative contribution to the further discussion of access to justice for environmental NGOs

Summary and English appendices (national reports)

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environmental NGOs as well as a legal comparative contribution to the
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Summary and English appendices (national reports)

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Abstract

The scope of access to justice in environmental matters in Germany is determined by European and International provisions. Since the ratification of the Aarhus Convention (AC) Germany is bound to this system of legal protection and guarantee of participatory rights. Moreover the provisions of Art. 9.2 AC have been implemented as European law especially through Art. 11 EIA-Directive (2011/92/EU) and Art. 25 IPPC-Directive (2010/75/EU).

The implementation of these international and European provisions into the German legal system has partially led to difficulties: On the one hand its content and scope are controversial to a certain degree. On the other hand the objective to improve the execution of environmental law provisions must be achieved in accordance with the traditional German legal system of administrative law.

Therefore this study examined legal questions on access to justice – of environmental-NGOs, individuals and municipalities – and the extent and the intensity of the judicial review which are of special importance for the implementation process of the Aarhus Convention in Germany. Hence the German legal debate as of October 2016 was analysed and on some selected legal aspects a comparative study concerning the national legal systems of France, Italy, Poland, Sweden and the United Kingdom was conducted.

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0 Summary

0.1 Starting points and questions of the study

The report documents the results of the research project called “The legal debate on access to justice for environmental NGOs – an academic discussion of arguments and positions concerning access to justice for environmental NGOs as well as a legal comparative contribution to the further discussion of access to justice for environmental NGOs in environmental matters”. It was conducted from October 2014 until November 2016. The study was therefore finished before the legislative procedure on the amendment of the Environmental Appeals Act (EAA) was finished. For this reason the study is often referring to the “Draft Law for the alignment of the Environmental Appeals Act and other provision to European and international requirements of 5 September 2016.”¹

The intention of the study as described in the project assignment was to answer specific questions on access to justice in environmental matters in Germany. The scope thereof is determined by European and international provisions: Since the ratification of the so-called Aarhus-Convention (AC) Germany is bound to its system of access to justice and participatory rights. Besides the provisions of Art. 9.2 AC were implemented in European law with Art. 11 EIA-Directive (2001/92/EU) and Art. 25 (2010/75/EU) IPPC-Directive.

The implementation of these international and European provisions into the German legal order has partially led to difficulties: On the one hand their content and scope are controversial to a certain degree. On the other hand the objective to improve the execution of the environmental law provisions through access to justice must be implemented in accordance with the traditional German legal system of administrative law.

Therefore the study’s goal is to support the partially difficult implementation of the legal provisions of the Aarhus-Convention on access to justice in the national administrative legal order by answering specific questions – with a focus on access to justice of e-NGOs. By thus the state of scientific research will be completed and open questions will be clarified. Selected aspects will be further examined in a comparative study of the implementation of the provisions of the Aarhus Convention on access to justice in the national legal orders of France, Italy, Poland, Sweden and the United Kingdom.

The legal questions which have to be examined for the implementation process of the Aarhus Convention in Germany are structured as follows:

- Access to justice by e-NGOs, individuals and local communities
- Intensity and scope of judicial review
- Legal costs

The following six questions on “access justice” were answered in section 2 and 3 of the report:

- *How exactly can you distinguish the legal requirements of Art. 9.2 AC on one hand and of Art. 9.3 AC on the other? Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (e-NGOs) and report the professional discourse among legal scholars and the relevant national case law.*
- *How has Art. 9.3 AC hitherto been implemented in the national legal system of other member states of the EU (France, Italy, Sweden and the United Kingdom)?*

¹ Draft Law for the alignment of the Environmental Appeals Act and other provision to european- and international requirements of 5 September 2016, BT-Drs. 18/9526.

- *What requirements and insights for the design of a legal protection regime in accordance with Art. 9.3 AC follow from the results of the first question for the German legislator?*
- *How does the formal structure of e-NGOs determine its access to the court in other member states of the EU?*
- *Does the Aarhus Convention require uniform or at least similar rules on access to courts, standing and legal protection for individual and for collective (e-NGO) actions in environmental law?*
- *Does the Aarhus Convention or the Grundgesetz (German constitution) require the alignment of the rules on access to courts, standing and legal protection of municipalities with those that apply to e-NGOs?*

The intensity and scope of the judicial review was analysed in section four of the report by answering the following three questions:

- *Does the national legal system of other EU member states (Italy, United-Kingdom, Poland, Sweden and France) include restrictions on access to justice for e-NGOs, which are comparable to the “material” preclusion (materielle Präklusion) of section 2.3 EAA (Umweltrechtsbehelfsgesetz)? If so, how is this evaluated in the professional legal discourse (relevant literature/case law) with special regard to its conformity with EU law and the Aarhus-Convention?*
- *What are the requirements and limitations as to the intensity and the scope of judicial review in Germany and are they justified?*
- *What are the requirements and limitations as to the intensity and the scope of judicial review in Italy, the United Kingdom, Sweden and France in comparison to German law? Are these limitations in conformity with EU law (especially concerning the principle of effectiveness)?*

Finally in section five the “legal costs” have been taken into focus by answering the following question:

- *Have the requirements of Art. 9.4 AC been implemented in Germany in compliance with the Convention, in particular concerning the granting of legal aid and the awarding of experts' fees?*

0.2 Access to Justice

The questions on “access justice” which were examined in sections 2 and 3 of the report concern the scope and delimitation of the provisions of Art. 9.2 AC and Art. 9.3 AC and their implementing requirements for the domestic law with regard to the rights of action of e-NGOs, individuals and local communities.

Therefore, in particular, the exact scope of the access to justice guarantees under Art. 9.3 AC had to be determined. Whereas the scope of Art. 9.2 AC concerning the rights of action of e-NGOs has been clarified by the case law of the European Court of Justice (ECJ) and the decision-making practice of the Aarhus Convention Compliance Committee (ACCC) as well as by the (German) federal legislation implementing this case law, the exact content of the more openly formulated legal protection requirements of Art. 9.3 AC is partially unclear – including the rights of action of e-NGOs. Therefore this issue was further examined by way of a legal comparison with other EU member states.

Moreover the legal requirements for the recognition of e-NGOs and the question of whether this recognition is conditional for access to justice in the EU member states France, Italy, Sweden, the United Kingdom and Poland were evaluated in a legal comparison as well.

Finally, the rights of action of individuals and local communities and whether their rights have to be aligned with those of e-NGOs were examined.

Hence the study first focused on the special significance of the Aarhus-Convention for **access to the courts of e-NGOs** (cf. section 2). As a result it became obvious that although substantial clarification has been provided by legislators, professional discourse among legal scholars, jurisprudence as well as by the ACCC, some legal uncertainties still remain.

The question of the review of provisions not directly protecting the environment seems however to be clarified with the findings of the study. Under Art. 9.3 AC the review of such provisions has to be affirmed in accordance with the decision-practice of the ACCC and in contrast to the jurisprudence of the Federal High Administrative Court and the prevailing theory among legal scholars in Germany (see 2.3.4 of the extended report). Therefore the draft law of the federal government is correctly renouncing the requirement of section 2 para. 1 no. 1 EAA to limit the review on “provisions, which serve the protection of the environment”.

In contrast, for legal remedies outside the scope of Art. 9.2 AC, this restriction may remain unchanged. This differentiation is already justified in the clear wording of Art. 9.3 AC and proves to be viable with regard to an analysis of the decision practice of the ACCC. Finally it is in accordance with a teleological interpretation of Art. 9.3 AC.

However, considerable uncertainties continue to exist with regard to the restriction of e-NGOs to solely exercise third-party protection provisions within the scope of Art. 9.3 AC as it has been developed, inter alia, through the jurisprudence of the Federal High Administrative Court of Germany. According to the results of the study presented here, this restriction does not appear to be necessarily compatible, in particular with the interpretation given by the ACCC to the Convention in the past (see 2.4 of the extended report). In this respect it should be kept in mind, however, that the determination of these third-party protection provisions itself is subjected and influenced by international and European law as well. Therefore this restriction may possibly prevail against the “result orientated provisions” of the Convention to an extent to which a general extension of access to justice – not only for e-NGOs – will occur.

The uniformity of the requirements for legal standing and the statement of grounds as stated in section 42 para. 2 and section 113 para. 1 Administrative Courts Procedure Act (VwGO), is generally compatible with international and European requirements even though other legal systems follow different models in this respect.

The right of action to appeal procedural errors has already undergone considerable modifications and extensions due to international and European law and the German legislator has correctly implemented these requirements, in particular the “Altrip” decision of the ECJ.

Still the question of an independent – not on the enforcement of other substantive law depending – enforcement of procedural errors remains undecided (see 2.5.2.1 of the extended report). It is currently assessed differently in the jurisprudence of the Federal High Administrative Court of Germany and the Higher Administrative Court of Münster. A final decision of the ECJ has not yet been made and the case law of the ECJ has been unclear on this point. In particular, the restrictive link between a material understanding of the protection provisions and the non-possibility of an independent enforcement of procedural errors, which can be observed in some judgements, could prove to be problematic under international and European Law.

The independent enforcement of procedural errors – extended in accordance with general provisions of international and European law – is of importance under Art. 9.3 AC as well. However here it will have less significance in practice since substantial procedural determinations in the law are lacking.

According to the decision-making practice of the ACCC Art. 9.3 AC provides for a sufficiently effective legal protection in preliminary planning phases as well. The draft law of the Federal Government al-

allows for an appropriate extension of access to justice against plans and programs which may be subject to a Strategic Environmental Assessment. With regard to the still unclear ACCC decision-practice in this respect, it is at present not possible to assess with certainty whether the restrictions on access to justice against preliminary planning decisions – which will still remain after the proposed amendment of the EAA – are in compliance with the Convention.

The legal comparison of the national legal orders of France, the United-Kingdom, Italy and Sweden conducted with regard to access to the courts shows that these legal systems have consistently less difficulties with the implementation of the Aarhus-Convention due to their different general legal doctrines and especially due to a pragmatic adaptation of the provisions in the national case law.

The legal comparison concerning the role of the formal structure of e-NGOs for their access to the courts in the national legal orders of France, the United Kingdom, Italy, Sweden and Poland has shown the following: In these countries do exist requirements for the recognition or registration of e-NGOs which either partly or even largely correspond to the German requirements inter alia concerning their formal structure. But unlike in Germany, e-NGOs that are not recognised regularly normally still have access to the courts due to principles established in the national case-law. For this reason, the organizational structure of e-NGOs is either not or only in a limited manner relevant for their access to justice. In particular, in none of the compared countries a democratic organizational structure of e-NGOs is mandatory for their legal standing.

The study revealed significant legal uncertainties concerning the question of the necessity to approximate the rights on **access to the courts of individuals and municipalities** to those of e-NGOs:

The question of an extension of access to the courts of individuals has been discussed intensively and controversially with a focus on the legal consequences of European Law for the last decades in Germany.

The provisions contained in Art. 9.2 and 9.3 AC have further fuelled this discussion. These provisions on the one hand correspond to a reading that emphasizes the respect of differences in national legal orders. On the other hand they urge to a liberalized understanding of the rights on access to the courts of individuals the same way as it was true for the European Law interpreted by the case law of the ECJ before.

As a conclusion an extension of the rights of access to the courts of individuals, and thus an approximation to the rights on access to the court of e-NGOs, was implemented especially for the enforcement of those provisions that are understood to protect the human health in a broad sense. Thus, in particular, provisions which, according to the traditional German concept, were assigned as being a mere precaution against harmful environmental effects and hence were understood to not infringe subjective rights, have to be qualified in the future to be enforceable by individuals as well.

The approximation of the rights of access to the courts for individuals is particularly controversial for nature protection law provisions. Even though the future development on this issue is best described as open, there is evidence that the ACCC and the ECJ will be willing to entitle individuals to enforce nature protection provisions at least when they can show a sufficiently clear personnel reference to the contested provision.

A general and fundamental change of the access to justice model beyond environmental law provisions is however unlikely. In particular the fact that the examined adjustments of the legal protection regime all specifically relate to an environmental international and European context supports this conclusion.

Concerning the approximation of the rights of access to the courts for municipalities the debate is highly controversial as well.

The different and numerous aspects of the influence of the international and European Law on access to justice for municipalities can be best described and explained with a single theoretical approach that is linked – as for individuals – to the term of “the public (concerned)” as defined under the Aarhus Convention. As a result the Convention only provides for access to justice for municipalities if and to the extent that municipalities have to be understood to be thus defined as “public”.

With the exception of the special procedural rights of municipalities for EIAs an infringement of the material self-government rights of municipalities will still be necessary for the merits of a municipalities’ legal action under the current legal development.

Especially under consideration of the special role that particularly the Aarhus Convention provides for e-NGOs it has to be concluded as well that a substantial extension of access to justice for municipalities is not – de lege lata – mandatory.

0.3 Judicial review

In section 4, questions on the scope of judicial review of administrative decisions with an impact on the environment for the German legal system were analysed and compared to the system of legal protection in environmental matters in other EU member states. Judicial review was examined from two different perspectives: Firstly, it was important to clarify how extensively the courts review the legality of administrative decisions which are questioned in legal proceedings; this is a question of the extent of the judicial review (“Kontrollumfang”) which is itself determined by the claims in the application as well as by restrictions of the rights to dispute on certain interventions or legal provisions. Secondly, it was necessary to investigate to which extent the courts have to review the relevant facts and legal questions as well as the technical evaluation of the administrative authorities. This is a question of the intensity of the judicial review (“Kontrolldichte”).

The first question of the report concerning this topic was examining whether in the national legal systems of other member states of the European Union (Italy, United-Kingdom, Poland, Sweden and France) requirements for legal actions by e-NGOs exist, which can be compared to the legal principle of the “material preclusion” (“materielle Präklusion”) of section 2.3 EAA. To answer this question, the current legal situation was analysed which is not in accordance with the European law due to the ECJ decision of 15 October 2015 (C-137/14). Taking into consideration the planned amendment of the EAA, which will be necessary as a result of this case law and to properly implement Art. 9.3 AC, the investigation has been extended to the examination of the proposals for this amendment as well. It is now covering a legal comparison of the provisions which define the **extent of the judicial review** in Germany and other EU member states.

In particular, those proposals for the amendment of the EAA were discussed in detail that may introduce general requirements for the participation of e-NGOs in licensing procedures for projects which require an EIA and the material preclusion for those plans and programmes that may be subject to an SEA. Moreover, the proposed provision for the exclusion of abusive objections in judicial procedures (section 5-draft of the amended EAA) was examined with the result that this provision needs to be interpreted narrowly due to European Law.

The legal comparison concerning the extent of the judicial review has shown that in other EU member states neither provisions exist which can be compared to those of the “material preclusion” clause for objections which have not been made in the administrative procedure. Nor exist provisions which exclude arguments which have first been broad within the legal proceedings because they are determined to have been used in an abusive manner (section 5- draft of the amended EAA). On the contrary, in all the national legal systems which were taken into consideration in the comparative study, it is possible to bring “new” objections within the court proceedings on all legal and factual questions so that administrative decisions in principle are subject to an extensive judicial review. Moreover access to courts predominantly does not depend on prior participation during the administrative procedure.

The discussion of these results in comparison with the German legal system has shown that in Germany an extensive judicial review is only provided for by the Legislature - apart from legal remedies against planning permissions with an expropriating nature - for legal actions of e-NGOs against decisions falling within the scope of Art. 9.2 AC (as named in section 1 para. 1 subsection 1 no. 1 – no. 2b - draft of the amendment of the EAA). For all legal actions of e-NGOs under Art. 9.3 AC, the extent of judicial review can be limited significantly in two ways: According to section 2 para. 1 subsection 1 of the draft amendment of the EAA, only those legal provisions that serve the environment can be invoked and in section 7 para. 3 subsection 1 of the draft amendment of the EAA, a “material preclusion” of objections for legal remedies against plans and programs shall be newly introduced in the EAA.

Moreover, due to section 42 para. 2 of the Administrative Courts Procedure Act (“VwGO”) individual plaintiffs can still only claim an infringement of their subjective rights. On an overall view, the extent of the judicial review is much more limited under German national law provisions than in other national legal orders compared in the study. However, in those legal systems there may also be considerable limitations on the extent of the judicial review due to domestic rights of procedure and their handling in practice.

The limits to the **intensity of the judicial review** of administrative decisions were further investigated:

For this purpose as a first step, the provisions of the German constitution for the judicial review of administrative decisions were taken into special consideration. These provisions show that the courts shall generally conduct a complete review of acts of administrative authorities. Indeed the Legislature can provide administrative authorities with a decision-making scope which can limit the intensity of the judicial review of the courts. But this is only possible within the limits set by the constitutional principle of effective legal remedies and the rule of law under Art. 20 para. 3 of the Grundgesetz (German Constitution).

It has not yet been finally decided under which circumstances these decision-making scopes of administrative authorities are consistent with the Grundgesetz. It is however undisputed that the existence thereof needs to be pointed out clearly in the legal provision itself. On that basis such decision-making powers were upheld as being constitutional for planning decisions and administrative margins of discretion in order to determine the legal consequences of a provision. Moreover the Federal High Administrative Court of Germany has ruled that administrative authorities sometimes have a “margin of assessment” in the application of vague legal terms (“unbestimmte Rechtsbegriffe”), which may lead to a limitation of the judicial review as well. For this, in general, a specific factual justification is obligatory especially when subjective rights are concerned because the review of the application of the law is reserved for the courts under the doctrine of the separation of powers guaranteed under the constitution. Hence the Legislature cannot “lever out” these guarantees of judicial protection by granting too many and too extensive decision-making powers. Therefore a general recognition of administrative decision-making powers for the determination of vague legal terms or for prognostic decisions required by law is not permitted. The possibilities for a restriction of judicial review itself are limited by these constitutional guarantees as well (see 4.3.1.2 of the extended report).

It should also be noted that the exercise of these autonomous administrative decision-making powers is itself subject to a judicial review, which has to meet certain minimum requirements under the constitution. These requirements for judicial review can be generally described as a model of “balanced control” in which the interpretation of the relevant provisions, the correct investigation of the facts as well as the application of generally accepted evaluation standards are fully reviewed by the court.

The subsequent analysis of the restriction of the scope of judicial review under German environmental law has shown that these restrictions are generally accepted for margins of discretion (in planning procedures) for the administration but are predominantly declined for the application of vague legal

terms in individual cases. Exceptions to this rule are only made, firstly, for the term “state of science and technology” under nuclear law and genetic engineering law and for different provisions of the nature protection law for which the jurisprudence accepts a “prerogative on nature conservation requirements” for the administrative authority. And secondly for the particular case of the “margin of assessment” which is specifically laid down in section 3 sentence 1 Environmental Impact Assessment Act for the responsible authority which has to determine an EIA obligation under special circumstances.

Important objections are made against the wide understanding of “margins of assessment” under nature protection law. The Federal High Administrative Court of Germany has stated that these “margins of assessment” are restricted to situations where different assessments of the factual situation are possible from an expert’s point of view, e.g. on the impairment of protected species (see 4.3.2.3 of the extended report). Moreover even in these cases the courts have to review the complete statement of the facts and the methodology of the assessment of the factual situation. Thus an extensive and effective “balanced control” can be guaranteed.

For other environmental legislation – especially the emissions control law – “margins of assessment” of the administrative authority for individual cases are generally denied and the specification of vague law terms is determined by standardized provisions in regulations. Particularly due to section 48 para. 1 Federal Emission Control Act (“BImSchG”), a “norm-concretising scope” to substantiate legal provisions is accepted for the federal government as the highest ranking responsible authority for such standardization. The case law therefore accepts a restricted judicial review for the protection and precaution standards determined in these “norm-concretising regulations”. A closer examination on this issue shows that especially for the implementation of European Law, legislative decrees shall be used in general instead of “norm-concretising regulations” (which are basically used under Emissions control law).

The **legal comparison of the scope of judicial review** in Italy, United Kingdom, Sweden and France has drawn a differentiated picture of the concepts of judicial control concerning both – the legal determination as well as the application in practice. Although a clear differentiation can be made in legal theory between the legal concept of an objective judicial control with a limited intensity of judicial review in the United Kingdom (and to a certain extent in France) and the subjective-rights based concept of judicial control with an extensive judicial review in Germany, these different concepts are not strictly applied in practice. The different legal concepts are relativized – usually for specific legal conditions – so that an approximation of both concepts can – at least partially – be noticed. This is particularly true for the intensification of the judicial control in France on the one hand and its reduction in Germany concerning the nature protection law on the other hand. This development is influenced by the European Law too. Because of the complex and unclear case law it cannot be clearly determined to which extent an approximation of the intensity of the judicial review has already happened. But in general, it can be stated that judicial review in Germany is more extensive than in the United Kingdom and Italy as well as – with some exceptions – in France but less extensive than in Sweden.

In the **final discussion of the results** of this section the following issues were debated:

Overall, the legal comparison has shown that access to justice in Germany has been significantly extended especially – but not only – for e-NGOs because of the European Law and that the planned amendment of the Environmental Appeals Act will point further in this direction. Therefore the European Law has led to a closer approximation towards those legal protection regimes of the other investigated EU member states. Moreover the provisions of the planned amendment determine the extent of the judicial review as well because due to section 2 para 1 sentence 1 no. 1 draft of the amended EAA all infringements of formal and material law can be reviewed under an e-NGO action when projects falling under Art. 9.2 AC are concerned. The alignment of the extent of judicial review to those of other EU Member States however is mostly limited to projects which are subject to EIA. Hence the

overall view shows that the extent of the judicial review in Germany does not generally surpass the legal review concepts of other EU member states.

On the contrary it can be stated that in comparison with the other countries in this study – with the exception of Sweden – in Germany the more extensive control due to the more intensive judicial review is only applied restrictively, as the extent of the judicial review itself is restricted by the limited procedural, legal and factual issues which can be brought before the court. Hence there is reason to estimate that there is no room to reduce the existing scope of legal standing and judicial review in Germany and that rather (another) extension thereof will be necessary in the future.

A restriction of judicial review, which sometimes is demanded due to the extension of the rights of action of e-NGOs, therefore only seems possible with regard to the intensity of the judicial review. This would not in general infringe with Art. 9.2 and 9.3 or the European Law since administrative margins of assessment and a restriction on the intensity of the judicial review are accepted for actions of the European Commission as well as in other EU member states. The ECJ assumes that the enforcement of the European Law is not excessively difficult to exercise only because the judicial review of administrative decisions is restricted. Still it must be ensured that the requirements of the European Law are (effectively) taken into consideration in each specific case. Therefore a restriction of judicial review is only accepted for European provisions that provide for an administrative margin of assessment themselves. Whether and to what extent the European Law provides for administrative margins of assessment and a restricted scope of the judicial review cannot be assessed in a general way but has to be determined for each relevant provision separately.

The constitutional requirements for effective legal protection and the rule of law under Art. 20 para. 3 of the Grundgesetz do not in general deny a restriction of the intensity of the judicial review. The Legislature can empower administrative authorities to take individual decisions to a certain extent with granting administrative margins of discretion and assessment. Still a general recognition of decision-making powers for the execution of vague legal terms or for the forecast of the application of the law – e.g. in the United Kingdom – is not permitted under the constitution (as shown above). Rather for each such provision, the decision-making power and its extent must be clearly pointed out in the provision itself. The analysis of German environmental law under this perspective indicates that the Legislature and jurisprudence have already exercised the existing legal opportunities. Moreover it has to be recognized that the administrative decision-making powers are subject to a judicial review which has to meet minimum requirements under the constitution which are more profound than a legal review on manifest errors as common in other legal systems.

In conclusion the German Legislature generally has permission under European Law as well as under the German Constitution to grant administrative decision-making powers and thus restrict the intensity of judicial review. A general restriction however is neither permitted for the extent nor the intensity of the judicial review due to the obligation to comply with the material law. This is true for factual examination too which generally has been checked for completeness by the courts. Hence only specific amendments of the law are possible in this respect. However the ascertainment of vague legal terms through regulations remains possible in part.

0.4 Legal costs

Section 5 of the report deals with the question of whether the requirement – laid down in Art. 9.4 AC – that access to justice in environmental matters shall not be “prohibitively expensive” was implemented in Germany in accordance with the Aarhus Convention especially with regard to legal aid and the refund of fees for expert opinion.

Therefore a legal comparison with the national legal systems of France, the United Kingdom, Italy and Sweden was conducted. As a result it turned out that only in the United Kingdom specific provisions for legal costs in legal proceedings in environmental matters exist whereas in Germany as well as in

France and Italy, the general procedural provisions on legal costs are applied. However these provisions are only partially in accordance with the requirements developed by the case law of the ECJ concerning Art. 9.4 AC and the provisions of European Law that shall ensure that the legal costs are not “prohibitively” expensive.

In Germany court fees and fees for lawyers can be predicted very precisely in principle because they are based on the definition of “the value of the case” (Streitwert) and pre-determined fee rates. Moreover e-NGOs and individuals as plaintiffs can expect - under certain conditions - to be relieved of fees for expert opinion and at least individual plaintiffs can apply for legal aid. However, uncertainties still remain for the predictability of the risks for legal costs. Moreover, there are no concrete provisions on the limitation of legal costs, which clearly implement the provisions of the European law into the national legal system, as required by the case law of the ECJ. Therefore doubts remain over whether the (general) German provisions on legal costs are sufficient to meet the special requirements of the European law.

1 Questionnaire

In the following section you will find the English translation of the original questions from the German Environment Agency (UBA) and our more detailed sub-questions. Please answer as detailed as possible and provide us with references to and knowledge of your national scientific debate and to the relevant jurisdiction of your national courts. We welcome any additional information which you might find helpful in the context of the UBA-study.

1.1 Access to Justice

Questions in the assignment of the UBA

1. *How exactly can you distinguish the legal requirements of Art. 9.2 AC on one hand and of Art. 9.3 AC on the other? Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and report the professional discourse among legal scholars and the relevant national case law.*
2. *How has Art. 9.3 AC hitherto been implemented in your national legal order?*
3. *Does the Aarhus Convention require uniform or at least similar rules on access to courts, standing and legal protection for individual and for collective (NGO) actions in environmental law?*

Explanations and sub-questions to Questions 1-4:

Consider the text of Art. 9.2 and 9.3 AC:

“2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have 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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, 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.”

Art. 9.2 and 9.3 AC thereby define, inter alia, the standing-requirements in cases concerning environmental law.

German law traditionally does not provide for an extensive access to justice in environmental matters by NGOs but the law and the jurisdiction of the courts is currently developing in this direction.

A priori, German administrative law follows the principle that access to justice is limited to matters wherein the plaintiff can claim an infringement of his subjective rights (Schutznormtheorie). An action based on a violation of environmental law in the public interest only was therefore traditionally not admissible.

The only exception was for actions that may be brought by nature protection associations/NGOs (Verbandsklage), as partially foreseen in the nature protection legislation of the Länder since 1980 and in the Federal Nature Protection Act (Bundesnaturschutzgesetz - BNatSchG) since 2002. Furthermore, since 2006 actions could be started as well by environmental NGOs (e-NGOs) as foreseen in the UmwRG implementing Directive 2003/35/EC and as well access to justice according to Directive 2004/35/EC.

- We provide you with the text of the UmwRG and an English translation.

The UmwRG has been introduced to implement EC-Directive 2003/35 and thereby to implement also the requirements of Art. 9.2 AC. The UmwRG underwent some considerable alterations especially following the decision of the ECJ in C-115/09 (BUND/Trianel). Based on the UmwRG NGO actions are possible against certain administrative decisions enumerated in the law, and subject to certain conditions. Some of these conditions have been called into question in the literature.

Nowadays, there is an intensive debate about the necessity and the necessary content of yet another revision of the UmwRG. This time, the revision shall focus mainly on the implementation of Art. 9.3 AC. Initially, the German legislator and a good part of the legal literature on the subject considered Art. 9.3 AC as already fully implemented by existing EU and national legislation. This conviction has been put into question by the ECJ-judgment in C-240/09 (Slovak bear) and by a follow-up judgement of the German Federal High Administrative Court (Bundesverwaltungsgericht): BVerwG, 7 C 21.12, 5.9.2013 [ECLI:DE:BVerwG:2013: 050913U7C21.12.0].

- We provide the text of this judgement in German and an English translation.

In the meantime on 02.07.2014 the Fifth Meeting of the Parties adopted its decision V/9h on the compliance of Germany with the Convention, and there-in endorsed the findings and recommendations of

the Aarhus Convention Compliance Committee (ACCC) in case ACCC/C/2008/31 (Germany). Its Conclusions and recommendations were the following:

(a) By imposing a requirement that to be able to file an appeal under the Environmental Appeals Act an environmental NGO must assert that the challenged decision contravenes a legal provision “serving the environment”, the Party concerned fails to comply with article 9, paragraph 2, of the Convention;

(b) By not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention;

2. *Recommends* to the Party concerned that it take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:

(a) NGOs promoting environmental protection can challenge both the substantive and procedural legality of any decision, act or omission subject to article 6 of the Convention, without having to assert that the challenged decision contravenes a legal provision “serving the environment”;

(b) Criteria for the standing of NGOs promoting environmental protection, including standing with respect to sectoral environmental laws, to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention are revised, in addition to any existing criteria for NGO standing in the Environmental Appeals Act, the Federal Nature Conservation Act and the Environmental Damage Act;

In addition to this, the EU-Commission brought an infringement procedure before the ECJ (C-137/14), claiming that Germany failed to transform the requirements of EC-Directive 2003/35 properly.

These judgements, recommendations and proceedings seem to suggest a considerably different interpretation of the Administrative Courts Procedure Act (Verwaltungsgerichtsordnung - VwGO) and the UmwRG allowing NGOs (and potentially also individuals and municipalities) to challenge the legality of administrative actions or inactions in the whole field of environmental protection.

Please, in view of the above, answer the following questions:

- *We are interested in how exactly courts and scholars in your national legal order distinguish the legal requirements of Art. 9.2 AC on the one hand and of Art. 9.3 AC on the other. Please give an overview on the scientific debate.*
- *Have there been alterations or amendments in your national legal order in order to transform the standing requirements of Art. 9.2/9.3 AC or EC-Directive 2003/35?*
- *Please provide a text and an English translation of the national provisions on standing in environmental matters.*
- *Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and for individuals and report the professional discourse among legal scholars and the relevant national case law.*
- *Do rights of action allow the courts to control the legality of administrative decisions under all aspects or are they limited to the control of certain areas of the law (especially “environmental law” provisions)? How is the term ‘law relating to the environment’ which is used in Art. 9.3 AC defined or understood in your national legal order? Does it include any law that relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, animal protection, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment?*

- *Please give us information about the discussion in your national legal order – if there is any – concerning the implications of the ECJ's Slovak bear judgment C-240/09. Please give us also a first impression on the reactions on the ECJ judgments in C-401-403/12 P and C-404-405/12 P.*
- *Is Art. 9.3 AC in your national legal order considered to give a right of action mainly or only for NGOs or for individuals as well? Give a general overview on how the standing criteria for individuals from the public concerned are applied in environmental cases in your legal order. Does the individual have to show a specific interest in the decision at stake, or does it suffice that s/he lives in the vicinity of the (proposed) activity?*
- *Does your national legal order differentiate between the standing criteria for individuals and for NGOs? If yes, are there special rules for this differentiation in the field of environmental law? Do the same rules apply to individuals and NGOs of other Member States / Parties to the AC?*

1.2 The recognition of e-NGOs

Question in the assignment of the UBA

How does the formal structure of an e-NGO determine its access to justice in your national legal order?

Explanations and sub-questions

In Germany e-NGO's, in principle, have to be recognized by the authorities in a legally defined procedure to have the right to bring special NGO lawsuits on the basis of the UmwRG or the Nature conservation law. The legal conditions NGOs must fulfill in order to be recognized as an eNGO require, inter alia, that the NGO must have an (democratic) internal organizational structure that allows everyone to become a member and with equal decision-making powers for its members safeguarding to co-determine the e-NGO's objectives and political activities. Therefore in Germany some organizations with no such structure) could not be recognised

Please answer the following questions concerning the legal situation in your country:

- *Are e-NGOs or citizens' initiatives obliged to be recognized by authorities before they have legal standing in environmental procedures? What requirements need to be met? Did any criteria in the recognition procedure change since 2012?*
- *Are there any special requirements on the organization of e-NGOs and, if so, are they comparable with Section 3 para 1 UmwRG*? [Is there any discussion on the compliance of these requirements?]*

* "Upon request, a German or foreign association shall be recognized for the purpose of filing appeals pursuant to this Act. The association shall be recognized if (...)

5. It allows any person who supports the objectives of the association to become a member; members are persons who are given full voting rights in the general meeting of the association upon joining; if at least three quarters of its members are legal persons the association may be exempted from the requirement in the first half of this sentence, provided the majority of such legal persons fulfil this requirement."

1.3 Preclusion of objections

Question in the assignment of the UBA

- *Does your national legal order include restrictions on access to justice for e-NGOs, which are comparable to the "material" preclusion (materielle Präklusion) of section 2 para 3 UmwRG? If so, how is this evaluated in the professional legal discourse (relevant literature/case law) with special regard to its conformity with EU law and the AC?*

Explanations and sub-questions

In the German legal order access to justice in environmental matters for eNGOs, as well as for the general public, is restricted by the legal principle of the “material” preclusion (materielle Präklusion). This principle can be found in Section 2.3 UmwRG as well as in several other legal provisions concerning the public participation procedures for projects with environmental impact (e.g., Section 9.1 UVPG, Section 10.3 BImSchG, Section 73.4 VwVfG). “Material” preclusion means that e-NGOs and the general public have to make all their possible objections in administrative procedures before the competent authority decides on the development consent for a project. All objections which have not been made within the time limits set out for the public participation procedure, but could have been made at this time, will be precluded. The preclusion applies to the decision on the development consent for the project as well as to all possible legal proceedings against this decision. The competent authorities may take objections in a single case into account even if they have been made out of time but the courts always have to respect the preclusion according to Section 2.3 UmwRG (or similar provisions). Consequently, the e-NGOs and the general public can only bring arguments in support of their legal action that were already made during the administrative procedure.

With this provision the legislator intends to achieve that e-NGOs provide their expertise already during the planning and licensing procedure as far as possible at this time. This shall help the competent authorities to make better and well informed decisions by early identification and elimination of deficits concerning environment protection during the administrative procedure. Besides, the provision shall streamline the appeal system and safeguard as well legal interests of the developer: There shall be no complication and prolongation by “surprising” objections against a project in the event of an appeal. The possibility to make new objections in an appeal that could not be made at the time of the consultation phase, is not affected by this system.

The BVerwG has also set up requirements for the content of objections by e-NGOs: At least the legally protected environmental goods that are affected by the project and its environmental impacts have to be mentioned. The more detailed these environmental impacts were analyzed in the planning documents, the more the e-NGO's are under the obligation to analyze these impacts themselves. These requirements are considered necessary to mobilize the expertise of the e-NGOs which shall help the public authorities to better solve conflicts in the area of environmental protection (BVerwG, 14.07.2011 – 9 A 12.10, 19). Consequently, NGOs may be precluded with objections made in their statement in the administration procedure if an impact of a project is not dealt with according these requirements. Objections of citizens do not have to meet these requirements. For citizens it is enough to name how they are legally affected by a project.

Consequently, due to the above described “material” preclusion of objections the Courts may not be entitled to fully review the decision on a development consent for a project. There is an ongoing debate whether this “material” preclusion limits access to justice in environmental matters in accordance with EU-Law. The BVerwG assumes that Section 2.3 UmwRG is in compliance with EU-Law. However, the European Commission launched an infringement proceeding against Germany to the ECJ inter alia on this issue (C-137/14).

To make an objection which avoids preclusion it is necessary to follow the rules for the participation of e-NGOs and the general public in planning and licensing procedures and the legal requirements on the content of the objections. The following procedural characteristics and legal requirements should be considered:

(1) E-NGOs - as well as the general public - are usually informed only by public notices informing about the start of the licensing procedure in the internet or in newspapers.

(2) Once the public participation procedure has started the e-NGOs have access to the information and documents which are relevant for the development consent request of the project. Therefore, and also

for the objections, certain time limits should be observed: Access to information on infrastructure projects or industrial plants is available for a time period of one month. Objections can be made during this time frame plus the two weeks following it. There is no possibility to extend that period. It is questioned if these periods are too short, especially for large-scale projects. Nonetheless, the BVerwG has ruled that these periods are long enough.

Please answer the following questions concerning this subject:

1. *Which requirements do e-NGOs have to meet in your national legal order to be able to participate in planning and licensing procedures?*
2. *Do they have the right to participate only in administrative procedures with a mandatory EIA or can they participate in other procedures as well?*
3. *Do the authorities directly inform the e-NGOs about projects and administrative procedures that may have effects on the environment? If not: How and where can e-NGOs get information about those upcoming procedures? How do they get access to the relevant information and planning documents concerning the projects?*
4. *Are there any time limits to make an objection or give a statement in your national legal order? Will objections passing this time limit be excluded in the administrative procedure and the decision on the development consent of a project? Is an objection that has been made "out of time" also precluded in any legal proceeding against the decision on the development consent ("material" preclusion as described above)? Are there any specific requirements concerning the content of objections by e-NGOs?*
5. *Is there a discourse (relevant literature / case law) on the participation procedure and the possibilities to make objections for e-NGOs with particular regard to the conformity with EU-Law and the AC in your country?*

1.4 Intensity of the Judicial Review (gerichtliche Kontrolldichte)

Question in the assignment of the UBA

- ***What are the requirements and limitations as to the intensity and the scope of judicial review in your national legal order in comparison to German law? Are these limitations in conformity with EU law?***

Explanations and sub-questions

According to Art. 9.4 AC the implementation of access to justice in environmental matters requires effective remedies. In this context the "intensity of the judicial review" (gerichtliche Kontrolldichte) is of special interest in Germany. The German Constitution (GG) generally provides in Art. 19.4 GG that everyone has the right of access to the courts when his or her legal rights have been violated by public authorities. Therefore, the Administrative Courts shall, as a general legal principle, completely review acts of public authorities, especially when fundamental rights might be infringed. Consequently, the Courts are generally obliged to entirely review the public authorities' application of the law. And although eNGOs are not directly protected by the provision of Art 19.4 GG, the principle of the complete review of acts of public authorities generally applies to their appeals as well.

But it is as well recognized that decisions of authorities are not "fully reviewed" by the Courts when the law states that the authorities have discretion (Ermessen) either, when they have to decide upon ordering measurements or, when they have to balance the interests at stake in a decision about a project (which has to be done e.g. for the planning of infrastructure projects and for land use planning).

Besides, the BVerwG ruled that the public authorities have a “margin of assessment” (Beurteilungsspielraum) in the application of specific provisions in environmental law.

In the German legal order there is a distinction between “discretion” (Ermessen) and “margin of assessment” (Beurteilungsspielraum) as follows:

In administrative law the legal provisions generally consist of two parts: First, some requirements are listed which have to be met to give the competent authority the right to make a decision in a specific case (“Tatbestand”). Second, the provisions name specific legal consequences e.g. concerning the permissibility of a project or the conditions that could be stipulated by the competent authorities to ensure compliance with legal requirements (“Rechtsfolge”). As a general rule, the competent authorities may have discretion (Ermessen) only with regard to the specific legal consequences that could result in a single case. Inter alia, for the permit of industrial power plants it is required that the project is in accordance with the best available technologies (BAT) concerning air pollution control. Therefore, in a lawsuit against the development consent the courts have to review whether the competent authority ensured compliance with the BAT-standards (e.g. limit values for air pollution which are laid down in technical regulations). Concerning the decision on a permit the competent authority only has discretion (Ermessen) to decide which obligations should be stipulated to ensure that the project will be realized in accordance with the state of the art (e.g. by ordering monitoring measurements). In cases where different obligations would have been possible to ensure compliance with those requirements the courts do not completely review the administrative choice as long as it is appropriate and does not violate the principle of proportionality. On the other hand some legal provisions may also statue a “margin of assessment” (Beurteilungsspielraum) with regard to the requirements (“Tatbestand”) which have to be met to give the competent authority the right to make an order in a specific case. This means that the competent authority should be responsible to decide if a legal requirement is fulfilled based on its professional and scientific expertise. One example for that is Art. 3c Environmental Impact Assessment Act (UVPG). This provision concerns the case-by-case examination whether a project listed in Annex II of Directive 2011/92/EU shall be subject to an environmental impact assessment according to Art. 5 to 10 of this Directive or not. For such a case-by-case examination Art. 3c Sentence 1 UVPG states that an environmental impact assessment shall be carried out

“if the competent authority, on the basis of an approximate assessment with due regard to the criteria listed in Annex 2 (of the UVPG), *judges* that the project is capable of having significant adverse environmental impacts which would have to be taken into account ... “.

In the wording of this provision “*to judge*” means that the competent authority has a “margin of assessment”. Accordingly Art. 3a sentence 4 UVPG lays down the following:

“If the determination that no environmental impact assessment is to be made is based on a preliminary examination of the individual case pursuant to Article 3c, the competent authority’s assessment may in court proceedings relating to the project approval decision be reviewed only to establish whether the preliminary examination was made in accordance with the requirements of Article 3c and whether the result is plausible.”

Moreover, Section 4a.2 UmwRG* (amendment of 2013) contains general requirements concerning the judicial review of provisions with an accepted “margin of assessment” which could be relevant e.g. in the area of nature protection legislation but the influence of this provision on the judicial practice is still unclear.

*Section 4a para 2 UmwRG:

“To the extent that in applying environmental legislation a public authority is accorded a discretion to determine whether substantive conditions are satisfied, the court’s review of the authority’s decision shall be limited to determining whether

1. the facts were stated correctly and in full,
2. procedural rules and principles of legal assessment were satisfied,
3. errors were made concerning the law to be applied,
4. irrelevant matters were taken into consideration.”

In view of the above the following questions and points should be discussed in detail:

- *Please give an overview on the limitations/restrictions of the “intensity of the judicial review” in your national legal order with special regard on the limitations in environmental and planning law. Do Courts have different approaches on e-NGOs’ lawsuits and citizens lawsuits?*
- *Is there a discourse (relevant literature/case law) on the limitations of the “intensity of the judicial review” with regard to the conformity with the requirements in EU-Law of both effective justice in environmental matters and effective implementation of certain environmental protection standards (e.g. requirements concerning protected animals according to the Habitats-Directive 92/43/EEC)?*

1.5 Legal Costs

Art. 9.4 AC states that access to justice in environmental matters shall not be prohibitively expensive. This requirement is imported into EU-Law in Art. 11.4 EIA-Directive 2011/92/EU and Art. 25 Industrial Emissions Directive 2010/75/EU. As the EU-Study on “Effective Justice?” shows until 2012 there were no specific implementations of these requirements into the national legal order several Member States: The courts’ orders for legal fees and legal aid in environmental matters were based on the general law on legal costs.

Meanwhile the ECJ ruled that in the United Kingdom the plaintiffs are not protected sufficiently against high costs (Case C-260/11 *Edwards v Environment Agency*; Case C-530/11 *Commission v United Kingdom*). The ECJ states that EU-Law imposes a duty for effective protection against high costs in environmental procedures. The public concerned should not be prevented from seeking or pursuing a claim for, a review by the reason of the financial burden in environmental matters. The interest of a person wishing to defend his or her rights and the public interest in the protection of the environment should be taken into account. The Court should control in each particular case whether the overall costs for the plaintiff can be prohibitively expensive. All costs for the judicial proceeding, lawyer fees, witness fees or expert fees on all stages of the proceedings shall be taken into account. The ECJ stated that the British costs’ regime did not meet these requirements since neither the overall costs a claimant could face nor the distribution of these costs were sufficiently predictable. Therefore it held that the UK has failed to transpose EU-Law with all the requisite clarity and precision.

[The VwGO states that all costs shall be borne by the defeated party. Moreover, the court fees and the lawyer fees are determined according to the “value of the case” (Streitwert). The Streitwert is set by the court and is left to the discretion of the judge. The BVerwG recommends that for actions of e-NGOs the Streitwert shall be set from 15.000 – 30.000 Euros. However, in recent times with a view to Art. 9.4 AC the courts are tending to the minimum amount (15.000 Euro). This setting determines the regularized court fees and lawyer fees. Consequently, the resulting costs are usually not very high (about 10.000 Euro based on 15.000 Euro Streitwert if an appeal was heard in two instances). The risk for the plaintiffs to bear all costs of the opposing party is insofar predictable.

However, this cannot be said for the additional costs for expert fees. In Germany expert opinion in environmental matters is ordered in three different situations:

(1) E-NGOs often order expert opinion preparing legal proceedings to identify the non-consideration of environmental impacts in the application documents for a project. The related costs are predictable for the plaintiff because he decides to involve an expert but it might be unclear whether the defeated

party has to reimburse these costs if the appeal is successful. It depends on a decision of the court whether the costs are “necessary expenses” (notwendige Aufwendungen) for an “adequate prosecution” (zweckentsprechende Rechtsverfolgung) according to section 162.1 VwGO.

(2) The Court itself can ask for expert opinion when specific environmental impacts of a development project or the effectivity of protective measures are not sufficiently clear. In such a case the plaintiff can neither predict the court’s decision on ordering expert opinion nor the amount of the expert’s fee and he has to bear these costs when his claim will be dismissed.

(3) When e-NGOs file a lawsuit against private development projects as a rule the developer will participate in the trial (third party intervention – Beiladung) and can defend the project. In those cases developers often commission experts to prove that their project is in compliance with legal requirements. These expert costs have been very high in the past (in some cases up to 300.000 Euro) and it is not predictable whether the developer may request restitution if the claim will be dismissed. Again, the court has to decide in the single case whether those costs are “necessary expenses” (notwendige Aufwendungen) for an “adequate prosecution” (zweckentsprechende Rechtsverfolgung).

In view of the above the following points and questions shall be examined or answered:

- *Please give a general overview on how the distribution of costs for court fees, lawyer fees, expert fees, including fees for expert studies, or witness fees is regulated in your national legal order. Have there been any new regulations since the 2012 EU study to ensure that the access to justice in environmental matters is not prohibitively expensive? Do your national courts put in practice the rulings of the ECJ to ensure that the legal costs are not prohibitively expensive (e.g. with granting legal aid on an individual basis)?*
- *How does your legal system deal with the restitution of experts’ fees? Are these costs predictable and not too expensive? Are e-NGOs entitled to demand the fees for expert opinion that was ordered primarily for the preparation of the lawsuit when their appeal was successful? Is it possible for the developers who intervene in the trial to claim the refunding of the expert opinion fees from the losing party (e-NGO)?*

2 National report France

2.1 Access to Justice

2.1.1 Answer Questionnaire I. 1.

1 The legal requirements of art. 9.2 AC and of art. 9.3 AC are the implementation modalities of access to justice of the two first pillars of the Aarhus Convention: the right to information and the right to participation. The distinction between the two articles is about the provisions being challenged. Art. 9.2 provides for the challenging of decision, act or omission subject to the provisions of art. 6 about “public participation in decision on specific activities”. As art. 9.3 provides for the challenging of acts and omissions not subject to a specific article of the Aarhus Convention but related to any provisions of each national law related to the environment.

2 We notice that there is no specific provision about challenging art. 7 and 8 about public participation concerning plans, programs and policies and during the preparation of executive regulations. But access to justice for these acts or omission could require, according to art. 9.3, national provisions being adopted for such public participation.

3 The rights of action of environmental NGOs applies to both articles 9.2 and 9.3. Each article refers to the public as defined in art. 2-4 “means one or more natural and legal persons and in accordance with national legislation or practice, their associations, organizations and groups”. The only difference between art. 9.2 and 9.3 is about the public involved:

4 Access to justice to challenge decisions on specific activities (art.6) is limited to “the public concerned” defined in art. 2-5 as the public affected or likely to be affected or having an interest. There is then a very important specific mention of the NGOs concerned which makes a difference with the other members of the public. Any environmental NGO meeting any requirement under national law “shall be deemed to have an interest”. That means that they should be considered automatically admissible without any supplementary legal requirement. It is a presumption of legal interest for environmental NGOs challenging a specific activity. As a repetition art. 9.2 last alinea reiterates that NGOs shall be deemed to have an interest and shall also be deemed to have rights capable of being impaired for the purpose of sub-paragraph (b). That makes a difference with the requirements for natural persons such as neighbors who have to show an interest such as likely to be affected.

5 Access to justice to challenge decisions which contravene national environmental law is open to all members of the public without limitation to the public concerned. The only restriction is that national law may establish criteria for access to justice of the public.

6 In both cases it is clear that national legislation may make precise the conditions or criteria of admissibility of NGOs. But there are general requirements about access to justice. They apply both to natural and legal persons and they apply both to art. 9.2 and art. 9.3:

Preamble (8): citizens must have access to justice

Preamble (13): importance of the role of environmental NGOs

Preamble (18): effective judicial mechanisms should be accessible to the public, including organizations

Art. 1: each Party shall guarantee access to justice in environmental matters

Art. 3.1: each Party shall take measures to achieve access to justice

Art. 3.2: each Party shall endeavor to ensure that officials and authorities assist and provide guidance to the public (including NGOs) in seeking access to justice

Art. 3.4: each Party shall provide for appropriate recognition of and support to associations... and ensure that its national legal system is consistent with this obligation

Art. 3.5: The convention shall not affect the right of a Party to maintain or introduce measures for wider access to justice

Art. 3.6: This convention shall not require any derogation from existing rights to access to justice

Art. 3.9: The public shall have access to justice without discrimination, and in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities.

Art. 9.2: the objective is giving the public concerned wide access to justice within the scope of this convention

Art. 9.4: the procedure referred to in paragraph 1, 2, 3 of art. 9 shall provide adequate and effective remedies

2.1.2 Answer Questionnaire I. 2.

7 Art. 9-2 and 9.3 AC have been implemented without problem in French national law. Indeed before the Aarhus Convention, the environmental Code combined with traditional administrative law already allowed access to justice for legal persons and for NGOs based on general principles of law (art. 17 of the 1789 Human Rights Declaration) and on specific environmental law legislation since the

1976 nature protection law. Since 1906 the Council of State (CE) makes admissible the standing for an action in administrative Courts for groups such as trade unions or associations in the name of the collective interest they represent (CE 28 December 1906 Syndicat des patrons coiffeurs de Limoges).

8 Jurisprudence is in fact very limited about the Aarhus Convention. From 2010 to 2014 there were only two judicial courts' decisions with express reference to Aarhus (Cass. Crim. 3 May 2011 n° 10-81529 and Cass. Commercial, 6 May 2014 n°13-11883 about article 6). There were 20 administrative courts' decisions during the same period with the express mention of Aarhus in visas, and 15 with express reference in the decision (about annex 1: 1; art.3-1: 1; art.6 :9; art.7 :1; art.8 :2 ; art.9-2: 1; art. 9-4:1).

2.1.3 Answer Questionnaire I. 3.

9 The Aarhus Convention requires similar rules on access to courts for individuals and NGOs. The standing for Individual and environmental NGOs requires the same necessity to ensure that the public has a sufficient interest. But as art.9.2 mentions the interest of any NGO shall be deemed sufficient, it is considered that environmental NGOs will always have standing, by definition and according to its by-law, to challenge specific activities. This fits with the objective of wide access to justice. The finding and recommendations of the Aarhus compliance committee have agreed in many cases on this interpretation. As art. 9.3 AC is without prejudice to the review procedure referred to in paragraph 2, it can be considered that the standing of environmental NGOs will follow for art. 9.3 the same rules as for art. 9.2. The criteria for NGOs standing set by national law should always be consistent with the objective of the Convention to ensure wide access to justice (Aarhus compliance committee finding and recommendations ACCC/C 2008/31 concerning Germany, para.92).

10 The Aarhus Compliance Committee in a communication concerning the European Union was very clear "It is clear ... that the jurisprudence established by the ECJ is too strict to meet the criteria of the Aarhus Convention" (para. 87). "The Committee is convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedure, the Party concerned [the EU] would fail to comply with article 9-3 of the Convention" (ACCC/C/2008/32 (European Union)).

2.1.4 Answer Questionnaire I sub-questions

Scientific debate

11 There has not been specific academic discussion on how to distinguish art. 9.2 and 9.3 because challenging acts of national law relating to the environment include necessarily the admissibility to challenge acts mentioned in art.6 AC and provisions of national law relating to the environment. Even if in the year 1976 there has been two general environmental laws: one on nature protection (law 10 July 1976) and the other on classified installations for environmental protection ie industrial and agricultural activities (law 19 July 1976), the standing for NGOs remained uniform and available for both issues.

Alterations or amendments

12 There has not been any alteration or amendment to transform the standing requirements of the Aarhus convention, but only limited amendments about the legal procedure of registration of NGOs (see infra II).

National provisions on standing

13 Text in English on standing: see the document in English of the environmental code, but not up to date.

Prerequisite on the right of actions for individuals and NGOs

14 In general admissibility is a preliminary issue but is not submitted to a specific procedure. If the application is declared inadmissible the Court will not decide on the merits of the case. When the application is considered admissible the judge is not required to rule explicitly on the admissibility. He may consider it not necessary to decide on the admissibility of the action. Generally, the admissibility will be accepted implicitly. But if the defendant challenges the admissibility, then the Court will have to answer more or less in detail. The concept of “public concerned” does not exist in French law; all standing is governed by the “intérêt à agir” (interest to act in courts). The article 2 of the environmental Charter in the Constitution recognizing that everyone has the duty to participate in preserving the environment does not give to everyone a standing to challenge any administrative act (CE 3 august 2011 req. n° 330566, B and A).

15 The general constitutional principle of free access to justice for everybody, both individuals and NGOs is based in law on art. 16 of the Declaration of the Rights of Man and the Citizen of 1789 which is part of the Constitution (see CC 31 January 2014, QPC -363, para.4: “the right of standing of interested persons must not be substantially affected”).

16 For individuals

17 There are no specific rules for admissibility on environmental issues. The ordinary rules of law apply. Any natural person with legal capacity may initiate a judicial action. The only requirement is to have an interest to act (intérêt à agir). Generally legal interest is broadly interpreted by the Courts. The Aarhus Convention has not led Courts to interpret more broadly standing issues.

18 As regards illegality proceedings (contentieux de l’excès de pouvoir) in administrative Courts any individual has standing if he has an interest. If the decision of the public authority is individual and relates to that specific person, the interest is automatically recognized and gives legal standing. If the decision of the public authority is a general decision or a generally applicable binding normative instrument (either national or local), standing is granted if the applicant shows a personal interest material or moral (to live near a polluted industry, to live in the municipality for an action against a municipal administrative act). The spatial relation between the plaintiff and the decision involved is crucial and is part of the standing criteria. But action from an individual has been dismissed when challenging a decree on the recognition of environmental NGOs because the plaintiff acting in its personal capacity had not a direct interest for standing (CE 25 September 2013, req. n°352660).

19 As regards full review proceedings (contentieux de pleine juridiction) a subjective right must be argued and proved. There are two situations: liability action to allocate pecuniary compensation needs to prove damages with material and moral impacts; full jurisdiction action to ask the judge to modify a situation. In this last proceeding the powers of the Court are more important than in the illegality proceeding. It applies in environmental issues about litigation concerning the classified installations. Legal standing for litigation about classified installation has specific rules different from ordinary administrative procedure rules. Article 514-6 of environmental Code gives a list of administrative decisions submitted to this specific full review proceeding: authorization or refusal of industrial installations (permit about specific activities, about a list of activities called “la nomenclature des installations classes” similar to the list of activities of annex 1 of Aarhus Convention), specific prescriptions, administrative sanctions. The specific rules are related to:

20 The delay of appeal which is 2 months for the exploiter and one year for third parties as individual neighbors since article R. 515-3-1 of environmental Code (decree of 30 December 2010). Before 2010 the delay of appeal for neighbors was longer: 4 years. But since 2010 there is derogation to this new delay about the appeal regarding wind turbines, the delay being limited to only six months instead of one year. The reduction of such a delay is a limitation to access to justice. This one year delay also applies to NGOs appeals. A special delay exists since 2006 for challenging nuclear activities (2 or 4 years for third parties including NGOs, see article L.596-23 environmental Code)

21 Another limitation of standing concerning only individuals (unless a NGO is the owner of a building) is III of article L. 514-6 of the environmental Code: third parties having rented or bought a real property or a construction in the neighborhood of a classified facility after the publication of the permit of that facility or after the publication of the act reducing the initial prescriptions, cannot bring an action in Courts against that facility. This restriction of standing called issue of the “pre-occupation” could be considered as a limitation of standing for the Aarhus Convention or be considered as national criteria of standing?

22 For NGOs

23 [for a general vision in comparative environmental law, read Claude Lambrechts “Access to justice of environmental NGOs in western Europe” in *Mélanges A.C. Kiss, mankind and the environment*, ed. Frison- Roche, 1998, p. 409].

24 Traditionally French Courts, both administrative and judicial, have a broad and liberal view of NGOs standing. It is the implementation of the liberty of associations mentioned in the preamble of the Constitution and recognized by the Constitutional Council as a fundamental principle recognized by republican law; it is also required by article 16 of the human rights and citizens Declaration of 1789 considered by the Constitutional Council as «a guaranty for interested persons to exercise an effective judicial remedy” (CC, QPC n°2011-138, 17 June 2011, association Vivraviry). In 1919 even an association not declared in the prefecture had standing to go to court (CE, 21 March 1919, dame Polier, rec. p.297; see too CE 31 October 1969 Syndicat de défense des canaux de la Durance, rec. P.462).

25 There are specific rules for standing in environmental matters since 1976. But even before 1976 the jurisprudence recognized standing for NGOs whose social object was the protection of French esthetic heritage (CE, 30 May 1947, de Persan rec. p.228). In 1976, after the specific rules, some legal scholars were afraid of a rush in administrative and criminal Courts by the NGOs. Some judges were afraid of a competition between NGOs and public prosecution bodies for the defense of the general interest linked with the environment. Experience of nearly 40 years of jurisprudence shows that these fears were not justified. There has not been an abuse of access to justice by NGOs because there remain all procedural barriers such as : delays, cost, necessity of a barrister and also because the growing number of participatory procedures give other means to NGOs to put pressure and influence on the decision making process, and which are more effective than going to Court. The more the public participatory process on decision making is fair, open and transparent (which in fact is mainly used by NGOs more than by individuals), the less the access to justice is used.

26 Some scholars contest that NGOs standing come from a specific law, considering that NGOs have their own interest to protect the environment giving them a right to act (L. Neyret, *Atteinte au vivant et responsabilité civile*, LGDJ2006, n°576). This position is confirmed by the more and more liberal position of the Cassation Court, making easier the legal conditions of NGOs standing and even more liberal than art. L 142-2 environmental code. Now the Cassation Court admits that an “action civile” may be used before the civil judge and not necessarily before the criminal judge (Cass. 2° civ. 7 December 2006 n° 05-20- 297). Admissibility of an NGO action has even been recognized without any criminal offence (Cass. 3° civ. 26 September 2007, *Environnement 207*, n° 212, note M. Boutonnet).

27 Read about: “Access to civil justice of environmental NGOs” by Benoit Grimonprez, in *Access to Justice (l'accès au juge)*, Virginie Donier et Beatrice Lapérou-Schneider, ed., Bruylant , 2013, p.292).

28 The existing specific measures for standing of NGOs are in a specific chapter of the environmental Code called “access to justice of associations and local bodies”. (Book one, title IV, chapter II). It divides access to justice in five different ways:

29 1. Any NGO for the protection of the environment and nature may initiate a case in the administrative Court; it needs to have a habilitation to sue the president or of the general assembly of the

NGO, and to show an interest to act related to the environmental objective stated in their by-law. An NGO called CAP 21, whose president was a former minister of the environment, has been declared inadmissible as being an NGO having essentially a political orientation and not justifying an interest to act about the mineral code (CE 7 December 2011, req. n° 346697). It is not necessary to have a specific administrative recognition (article L. 142-1-1° alinéa of the environmental Code). But an NGO action is inadmissible if the plaintiff has not the capacity to act according to the NGO by-law: inadmissible action of an anti shale gas NGO the plaintiff having not the legal quality to act; in that situation only the general assembly of the NGO could give authorization to act in justice (CE 25 September 2013, req. n°352660). The NGO must have an interest to act, including in relation to its geographical scope of intervention. A national NGO is not admissible to act locally against a waste deposit even invoking art. 9-2 AC because art. 9-2 AC applies “within the framework of its national legislation” and Aarhus could not be invoked (CAA Marseille, 11 February 2010, WWF France, req. n°08MA00162). This restriction about the geographical standing of NGOs is classical (CE 27 May 1991 Federation regionale des associations de protection de la nature; CE 31 May 1996 France nature Environment, req.n°116641).

30 2. NGOs having a specific administrative recognition (association agréée) according to article L.141-1 environmental Code have a presumption of legal standing to act against any administrative decision that is directly related to their objective and their activities determined by their by-law and having negative environmental impact on the territory of their specific agreement (article L142-1-2° alinea of the environmental Code). It applies too to the recognized departmental NGO of fishermen (art. L. 433-2 environmental Code). As there have been Court decisions in favor of retroactive effect of the agreement, (CE 25 June 2003 commune de Saillagouse, req. n°233119; CAA Douai 17 march 2005, association vie et paysage, req. n°03DA00544) a law of 2006 confirmed in 2010 decided that the presumption of legal standing applies only for an action concerning an administrative act decided after the date of the recognition. This restriction is a new limitation of access to justice to prevent abuse from NGOs.

31 This presumption of legal standing for recognized associations is considered as progress for a better access to justice of environmental NGOs. It is applied broadly by administrative Courts for actions related to environmental issues including actions in urban law against building permits as they impact the environment.

32 3. NGOs recognized under art. L. 141-1 (environmental Code), have a specific right before criminal Courts. According to article L. 142-2 alinea 1 (environmental Code) recognized associations have the right to oblige the criminal prosecutor to initiate criminal prosecution and penalties (constitution de partie civile) for direct or indirect damages to the environment when there has been a violation of a law or of a regulation. This right to initiate criminal prosecution was established in 1976 only for some specific environmental legislation. Then it has been consistently extended to a growing list of sectors involved such as nature protection, water, air, soil, landscape, urbanism, quality of life, pollution. In 2006 it has been extended to nuclear activities and radioprotection, and in 2010 to the field of misleading environmental advertising. It remains a controversy about the Cassation criminal Court’s decision on the refusal to apply art. L.142-2. Recognized environmental NGOs are inadmissible for actions about the violation of marine fisheries regulations for violation of law and regulations in the marine environment (Cass. Crim. 23 May 2000, droit environnement 2000, n°84, p. 8 note Guihal ; Cass. Crim.7 April 2009, droit environnement, October 2009, p.23 note Léost).

33 The capacity given to recognized NGOs to initiate criminal prosecution in the name of the environment as a collective interest not only facilitates criminal penalties but allows NGOs to receive civil compensation for criminal violation of environmental law.

34 For a detailed examination by the Cassation Court criminal chamber of the admissibility for NGOs to use art. L.142-2 (environmental code) see Cass. Crim. 1 June 2010 n° 09-87159. In this case the judge examines the legal standing of six national and local NGOs in regard to their legal situation

and their interest to act in criminal procedure in relation with their bylaws applying legal conditions of art. L 142-2 and of the procedure criminal code.

35 In the Erika case in the Court of appeal, many NGOs were admissible but two NGOs were inadmissible: “Friends of the Earth” because the president had no specific mandate to sue (only a telephone agreement, a procedure not mentioned in their bylaws), and association “collectif black tide” because it did not exist at the date of the accident (CA Paris, 30 March 2010, n°08/02278, p.131). In Cassation Court about Erika case, the Court confirmed the inadmissibility of the association “office français pour l’éducation à l’environnement en Europe FEEE) because their bylaws and the decision to sue by the president were not signed; The Court declared inadmissible the action of Association “Robin des Bois” because this ONG was not recognized and because as such, their objectives were about resources in water and not in marine waters (Cass. Crim.25 September 2012, n°10/82938).

36 About civil compensation on the basis of art. L 142-2 (environmental Code) after a criminal violation of environmental law, the Cassation Court recognized the legal standing of NGOs for moral reparation for infringement to the collective rights and interests that an ONG has to defend, even if there has not been concrete damage of pollution or a possible damage or an accident, only because of the violation of a rule, and even if the violation has stopped at the date of the legal action by the ONG (see Cass. Crim. 5 October 2010, n°09-88748; Cass. Civ. 9 June 2010, n°09-11738; Cass.civ.8 June 2011, n° 10-15500; Cass. Civ. 20 November 2012, n° 11-19562; Cass. Civ. 20 November 2012, n° 11-21382). In the case of Cass.civ. 9 June 2010 and Cass. Civ. 8 June 2011 the ONG received 1500 euros as compensation for moral prejudice; in the case Court of appeal Nimes, 14 September 2012, n°12-00633 the NGO receives 7000 euros of compensation for moral prejudice.

37 F.G. Trebulle considered that giving money to NGOs for compensation of moral prejudice “has a disciplinary aspect as punitive damages manifestation of failure of criminal law. What would happen if several NGOs stand for compensation for moral prejudice?” (Dalloz, 2011, p.2694).

38 4. Some NGOs, not recognized but only normally registered, have too the right to oblige the criminal prosecutor to initiate criminal prosecution according to art. L. 142-2 alinéa 2 (environmental Code) and article 2 criminal procedure code. The only condition to use this right is to have been registered for at least five years. This specific category consist of NGOs having in their by-law the objective of protection of water as mentioned in article L. 211-1 (environmental Code for NGOs of fishermen) or the protection against pollution related to classified installations (article L.511-1 environmental Code).

39 For an interesting illustration see Appeal Court of Nouméa 25 February 2014 about 5 NGOs not recognized but considered admissible to claim compensation after criminal injury on the environment. In this case the NGOs received not only compensation for prejudice to their collective mission of protecting the environment (50 000 euros to share between 5), but they also received compensation for ecological damage applying the case about Total and Erika of Cass. Crim. 25 September 2012 (83 000 euros to share between 5 NGOs).

40 This Nouméa jurisprudence of 2014 applies a liberal jurisprudence of the Cassation Court criminal chamber of 2006 about environment and urbanism considering that an NGO, even not recognized has a legal standing to claim compensation after a criminal injury only on the legal basis of article 2 of criminal procedure code if the action is directly in relation with the objective of the NGO as stated in their bylaws (Cass. Crim. 12 September 2006, n° 05-86958).

41 For 3) and 4), a law of 2007 has modified procedural criminal Code (new article 85) introducing some new delays for the admissibility of this type of rights.

42 5. Access to Constitutional Court by NGOs: Since the QPC procedure in 2008, legal persons including NGOs have standing indirectly to the Constitutional Council; they cannot go directly to the CC but must have first an action in administrative or judicial Courts through the preliminary ruling on

constitutionality; as being plaintiff they are also plaintiffs in the Constitutional Council. See CC 7 May 2014 QPC 2014-395, Fédération environnement durable and alii, about air planification and regional scheme of wind turbines where several NGOs were plaintiff. In the internal regulation of the CC, NGO can have standing for intervention if they have a direct interest. In the case about shale gas (CC, n°2013-346 QPC, 11 October 2013) some NGOs intervening were declared inadmissible and others admissible.

43 But access to justice of environmental NGOs has been recently reduced in relation with urban law (Read : The fight against NGOs activism in urban litigation , by Carole Chevilly-Hiver, in “L'accès au juge”, op. cit, Bruylant, 2013 p. 303).

44 Since 1994 and in 2006 access to justice in urban law has been limited considering that jurisprudence was too much open to NGOs legal actions. The new article L. 600-1-1 of the Urban Code since a 2006 law on housing, forbids standing of a NGO against a decision on occupation and utilization of soils (ie in urban issues) if the by-law of the NGO has been registered in prefecture after the application of the action was posted . This is to prevent legal action of circumstances by creation of a new NGO just to challenge a specific urban permit. Some scholars' comments have considered that this restriction could be in non-compliance with Aarhus Convention and directive 2003/4 (see comments in the Environmental Code by Chantal Cans, Dalloz, 2015, p.165). The Council of State stated that this reform complied with article 6 of the European Human Right Convention (CE 11 July 2008, req. n° 313386, Association des amis des paysages Bourgniauds). Then the Constitutional Council stated in 2011 that the article L. 600-1-1 of the Urban Code complied with the right to appeal and with the principle of equality (CC, QPC n° 2011-138 of 17 June 2011). For the Constitutional Council the limitation to standing for NGOs by the new article L. 600-1-1 urban Code is limited to individual decisions concerning soil utilization, it is justified by the will to stop actions only motivated to prevent any new building permit; but “this restriction does not affect substantially NGOs standing” and does not affect standing of the NGOs' members and does not affect freedom of association.

45 In the same context of mistrust against NGOs, after lobbying by the builders and developers, the ordonnance of 18 July 2013 introduced an article L. 600-7 in the urban Code allowing the builder to ask for compensation against the NGO using standing against an urban decision in a way exceeding the defense of legitimate interest. Alinea 2 of art. L. 600-7 of urban Code precise that when an NGO has the objective of protecting the environment (even without a specific recognition) the action is presumed to be within the limits of the defense of its legitimate interests i.e. only for environmental protection and not for individual interests. In fact it is said that some people specially set up a so called “environmental NGO” only to get financial compensation from the developers in exchange for withdrawing the legal action against the building permit.

Scope of judicial review of administrative decisions according to rights of action

46 About the term “law related to environment” used in article 9-3 AC, there is no definition in French law. When applying the Rio Declaration principle 4 about integration of environment in others' policies, there is a broad vision of the concept of environment, including the quality of life. It is related to any legislation and activity that may impact on the environment as it is recognized in the environmental impact assessment legislation. Some few cases deal with that issue. In a controversial law case concerning a local anti-nuclear NGO, the judge refused recognition of the NGO because it had not sufficient guaranty of organization in a specific territory, as if nuclear issues were not environmental issues (CAA Bordeaux 7 February 2008, req.n°06BX0814, association Tchernoblaye). We could too refer to the case law about the hunters' association: are they or not protection of the environment NGOs? (See infra II p. 11). An NGO managing community gardens in the suburbs has been considered as not having an environmental objective but rather a social objective (TA Paris, 22 May 2003, France nature environment, droit environment 2003 n°114, p.247).

47 A new field of case law about the definition of the environment is related to the interpretation of art 7 of the environmental Charter about participation to the decision making process. It stated that public participation is necessary for decisions likely to affect the environment. The question is which decision does not affect the environment? In this regard there are four controversial decisions of the Constitutional Council:

48 The CC decision 26 April 2013, QPC n°2013-308, Association ensemble pour la planète stated that permits for research works on mineral resources in New Caledonia regarding prospecting for nickel, are not decisions likely to affect the environment, but permits for exploitation could affect the environment.

49 The CC decision 23 November 2012, QPC n°2012-282 France Nature Environnement, considers that a local permit for advertising banners on private buildings undergoing works is not in the scope of an application of the environmental Charter, as not having such an impact on the environment as some large lighting signs and temporary installations (para.21). But other installations of lighting signs have an impact on the environment (para 22).

50 The CC decision 24 May 2013, QPC n° 2013-316, SCI Pascal stated that the delimitation of the maritime public domain is not a decision likely to affect the environment. Without explanation in the decision, it could be considered that the delimitation being a purely procedural act of recognition has not in itself an impact on the environment.

51 The CC decision of 24 May 2013, QPC n° 2013-317, syndicat français de l'industrie cimentaire, stated that adoption of technical norms concerning the use of wood in construction has no direct impact on the environment and therefore is not a decision requiring public participation

52 Another illustration of the scope of application of the word "environment" is in the decision of CE 28 February 2001 req.n°213776, Association France Nature Environnement (Revue juridique de l'environnement, 4/2001, note Braud, p.563) considering as a commission had to be composed of "representatives of recognized NGOs for the protection of the environment" that a decree providing that this commission is composed of "representatives of associations of protection of nature or of bodies managing fauna and flora" is illegal.

53 Controversy exists between different interpretations by tribunals: an appeal administrative court considered that a decision of approbation of a wind turbine development plan is a decision having an important impact on the environment and as such should have been subject to public participation procedure. But in cassation, the Council of State considered that such a plan just delimited an area and as such has not an impact on the environment, it would have been different for a permit for a wind turbine (CE, 26 June 2013, req n°360466, commune de Roquefère).

The implication of the Slovak bears ECJ case C 240/09

54 Opinion of advocate general Sharpston considered that it is for each national Court to determine if article 9-3 AC has direct effect. So the Court decided that article 9-3 AC has not direct effect.

55 This case considers that art 9-3 AC is not regarded as being directly applicable because national law must establish criteria for members of the public entitled to exercise the rights provided by art.9-3 AC. But by interpreting art.9-3 AC the ECJ decides that national law:

- *is responsible for ensuring that rights of standing are effectively protected (para.46 and 47)*
- *must not make in practice NGOs standing impossible or excessively difficult (principle of effectiveness) (para. 48 and 49)*
- *must be consistent with the objectives laid down in art. 9-3 AC (para.50)*
- *must enable an environmental protection organization to challenge before a Court a decision taken following administrative proceedings liable to be contrary to EU environmental law (para. 51).*

56 As mentioned by a scholar, even if the ECJ considers that art 9-3 has not a direct effect or is not self executing, it needs to guarantee plaintiffs of an effective judicial protection in national law (see Denys Simon, brief comment in “Europe” n°5 May 2011 comm.147). In another comment by Christophe Verdure (in “Europe” n° 5 May 2011 comm.59 “access to justice in environmental issue”) it is stressed that even if art 9-3 is not transposed by the European Union and has not been the subject of EU legislation, as the issue is regulated by a treaty concluded by the European Union and the member states the topic “concerns a field in large measure covered by” European Union law (quoted from the case para. 36). This idea of a subject concerning a field which has already been covered to a large extent has been used in the case Etang de Berre (case C-239/03 Commission / France para 29 to 31). The ECJ imposes to member states two restrictions for, implementing art 9-3 in line with Aarhus Convention:

57 *“those provisions, although drafted in broad terms, are intended to ensure effective environmental protection” (para 46)*

58 *“it is inconceivable that art 9-3 of AC be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law” (para49)*. Christophe Verdure considers that the question has to be stated by national law and that it should be better if the Commission implement clearly art 9-3 by a new proposal of directive like the one of 24 October 2003.

59 Another comment (Laure-Clement Wilz and alii, RFDA, n°06, 2011, p.1225 considers that the application of Aarhus by the Council of State in CE 28 March 2011 n° 330256, should have been more in adequation with the ECJ on Slovak bears because the CE did not take into account the requirement of para 49 about a necessary interpretation of article 9-3 in such a way as to make it impossible to exercise rights.

60 The comment by Laurent Coutron in RTD Eur. N°30 of December 2011 is very interesting. He notices that even if art 9-3 has not a direct effect, the ECJ “regulates drastically procedural autonomy of member states” with a strict conception of the conform interpretation obligation. ECJ “addresses a quasi-obligation of performance guarantee by national authority” (para 49 of the case). The European Court of Justice “succeed in valuing considerably legal position of the NGOs and member states have no other choice but to empower NGOs to get standing”.

61 For F.G. Trebulle (Dalloz 2011, p.2694) this case proves the «irradiation of Aarhus Convention to the extent that absence of direct effect is largely offset by the injunction of conform interpretation”.

62 For Catherine Flaesch-Mougin and Isabelle Bosse- Platière (RTD Eur. 2011, p.662) if art. 9-3 does not have direct effect, however the ECJ mention for an interpretation to the fullest extent possible, that the matter “relates to a field covered in large measure by it [EU law] (para. 40), and that it is necessary “in order to forestall future differences of interpretation, that provision [art. 9-3 AC] should be interpreted uniformly, whatever the circumstances in which it is to apply” (para. 42).

63 As regards the Trianel case about Germany (ECJ C-115/09 of 12 May 2011 we want to mention five opinions of scholars.

64 For Bilun Muller (“Access to the Courts of the member states for NGOs in environmental matters under European Union law” in Journal of Environmental Law vol.23, n°3, 2011, p.505): “in its decision the Court (ECJ) took the side of the majority of German scholars who argue that NGOs are in a privileged position and that their locus standi is to be assumed... The Trianel decision of the Court will lead to radical changes in the German legal conception of standing in front of administrative courts”. “The Trianel decision means that actions brought by NGOs relying on rights protecting the general public will be deemed well founded, if such provisions are infringed. Therefore the restriction in section 2(5) of the umweltrechtsbehelfsgesetz which provides that annulment actions are deemed to be well founded if the decision infringes environmental law provisions which confer individual rights

only (similarly to its provision on admissibility) is no longer applicable". "Finally the [Slovak bears case] clarified that NGOs must not only have access to courts in matters enforcing their right to access to environmental information or to public participation in environmental decision-making but also in other matters governed by EU environmental law".

65 For Eckard Rehbinder in the Trianel case, "the Court relying on the principle of wide access to justice and effectiveness, held that environmental associations are accorded a particular role in verifying compliance with EU environmental law (watchdog function) that militates for an enlarged standing to sue"... Germany will be compelled to amend its Environmental Remedies Act... "Technically, this could be easily done by just omitting the requirement in §2 (1) n° 1 of the Act that the legal violation asserted must "establish rights of individuals" (in " Environmental policy and law" "Judgement on German implementation of the Aarhus Convention" vol.41, number 3, June 2011,p.144. [In general about the transposition of article 9-3 AC see Eckard Rehbinder, "Access to justice for decisions taken by European bodies in environmental matters", in *Mélanges Michel Prieur*, Dalloz, 2007 p. 661].

66 For Eva Julia Lohse "the interpretation of the ECJ is inevitably restricted to the scope of the directive, i.e. to cases where an environmental impact assessment becomes obligatory... this means that, as long as the follow up directive transposing article 9-3 of the Convention has not been issued, access to justice will not be granted in all environmental matters" "... the German implementation only contravenes Union law where provisions originating in EU environmental law are at stake. Although environmental law is an area highly regulated by Union law, there remain many provisions for the protection of the environment that have a purely domestic background and need therefore not to be included in a revised Umw RG. This is especially true, if Germany decides not to change the wording of the UmwRG, but interprets §2(1) UmwRG in a way that facilitates the implementation of EU environmental law and therefore does not introduce the altruistic action but for EU environmental law"... the decision leaves the critical observer with the following question: Does the Convention require the introduction of an "altruistic group action" as a minimum standard and if not, could the EU at least oblige its member states to do so by means of the directive?"..." In the long run a modification of §2(1) UmwRG by the legislator will be necessary" (*ELNI review n°2/ 2011p. 96*).

67 For Michel Aubert (*AJDA 2011, p.1614*) this case "ends a general rule of German procedural administrative law about standing of NGOs against act implementing directive 85/337. This should not be problematical in French administrative law which broadly recognizes in general NGOs interest to act since CE 28 December 1906, *syndicat des patrons coiffeurs de Limoges*."

68 For F.G. Trebulle (*Dalloz, 2011, p. 2694*) this case "does not recognize *stricto sensu actio popularis* but deals with the need, in Aarhus perspective, of ensuring extension of standing to organizations having a sufficient interest to act".

69 *First impression on ECJ case 401/12P and 404/12P of 13 January 2015*

70 In the first instance the judgment of the General Court of the European Union, 14 June 2012, T-396/09 annulled two Commissions' decisions of 2008 rejecting as inadmissible the applications lodged by a Netherlands NGO. This annulment was on the basis of violation by the Commission of article 9-3 AC. In a comment by Laurent Coutron (*RTD Eur. 2012, p. 607*) it has been considered a "revolution" in environmental litigations. Considering that the Regulation n° 1367/2006 had been adopted to implement obligations of Aarhus Convention including article 9-3. (para. 58), the General Court of the EU reinforces the justiciability of international agreement by a finalist interpretation, increasing seriously the legal standing of environmental NGOs." It is a very daring thesis".

71 On appeal the ECJ set aside this judgement. But it is necessary to stress that even if the ruling is classical and dismisses the application for annulment by the Netherlands NGO, this case through the opinion of advocate general Jaaksen in cases C-401- 402-403/12P forecast an important future evolu-

tion and states a strong analysis of art 9-3 AC announcing a coherent interpretation of Aarhus convention by ECJ and Aarhus compliance committee. It is very useful to read and exploit the wording of the advocate general. He mentions that:

“It is important to note the tension which exists between the refusal to recognize the possibility of relying directly on art 9-3 AC, justified by the need implementing measures, and the will to guarantee effective judicial protection as expressed in Lesoochranarske zoskupenie case” (para 69).

“It therefore appears legitimate to ask how to develop the conditions of direct effect for the purposes of the possibility of relying directly on the provisions of conventions” (para75).

“It is usually the intention of the privileged stakeholders to initiate such a review before the courts of the European Union, but in the context of the Aarhus Convention that possibility was also afforded to environmental protection organizations satisfying the criteria laid down in this regard “(para. 77).

Then there is a complete analysis of art 9-3 AC “art 9-3 as a rule which must be referred to for the purpose of the review of legality (see from para 85 to 133.)

72 The main ideas are:

“The obligation to guarantee access to justice is sufficiently clear to preclude a rule which would have the object or the effect of removing certain categories of non legislative decisions taken by public authorities from the scope of the review to be conducted by the national courts “(para 94).

“The contracting parties are therefore obliged to adopt a mechanism which is above all effective, and not simply to make a choice between different types of procedure. Thus, the view should be taken that the signatories to the convention enjoy a degree of discretion as regards the procedures to be introduced, but that the obligation to introduce administrative or judicial remedies must be performed in accordance with the requirements of the convention in order to guarantee the possibility of challenging infringement of environmental law as provided by art 9-3 of the convention. It follows that the implementation of that obligation must be assessed in the light of the requirement of effective access to justice” (para 106).

“It must be held that art 10 of the Aarhus regulation (EU regulation n°1367/2006) does not fully implement the obligation arising under art 9-3 AC (para 131) ” [as stated by the Aarhus compliance committee: C 2008/32 of 2011].

73 There have been two short observations by French scholars. Denys Simon refers to para 94 of the conclusion (see quoted supra) and considers that the Court should have used the idea of obligation of conform interpretation to oblige member states to have a uniform interpretation of art 9-3 (“Europe” n° 3 March 2015 comm.100). Simon Jolivet notices that contrary to the judgment of the general Court of the European Union the ECJ failed to extend a jurisprudence allowing exceptionally referring to an international treaty without a direct effect (see Revue Juridique de l’environnement, n° 2, 2015).

Is art. 9-3 AC in France considered to give a right of action mainly or only for NGOs or for the individual as well?

74 Art.9-3AC gives a right of action both to individual and to NGOs as it refers to “members of the public” as it is defined in art.2-4 AC as “the public” means both individuals (natural persons) and their associations (legal persons as NGOs). There is no difference as the “right to access to justice” is concerned as a fundamental right of “every person” recognized in art. 1 AC.

75 The difference is on the modalities of access to justice which depends of criteria (“if any” as mentioned in art.9-3AC; there could be no criteria and open access for NGOs) laid down by national law. It is critical to distinguish the principle of access to justice of NGO which is binding, and the modalities and procedure of access which allow variation between national law provided that mandatory conditions for access to justice as effectiveness and wide access is ensured.

76 Unfortunately in France, as access to justice is open even before environmental law existence, art.9-3 AC is not very useful and is not an added value especially as the Council of State maintains a traditional jurisprudence very strict on admissibility with direct effect of international conventions. This jurisprudence stated that a plaintiff (individual as NGOs) cannot invoke the breach of an article of an international convention when this article has not a direct effect. The Conseil d'Etat applies this jurisprudence rule to art. 9-3 AC in the decision of CE 5 April 2006, req. n° 275742. art. 9-3 AC "is binding only between state Parties to the Convention and cannot be usefully invoked by the applicants".

77 ***General overview on how standing criteria for individuals are applied?***

78 There are no specific criteria for standing of individuals in the legislation. There is no mention of the principle of access to justice neither in the environmental Code neither in the constitutional charter of the environment. It is a general customary principle of law and based on the constitution through the 1789 Declaration. The criteria are determined by the administrative jurisprudence. For illegality proceeding the plaintiff needs to have a sufficient interest and has not to maintain impairment of a right. For an action regarding an individual decision, the persons to whom the decision is addressed is automatically granted legal standing. But if the action comes from a third party (as an action by a neighbor about a building permit or an industrial authorization) the plaintiff must show a specific interest. If the action concerns administrative regulation a specific interest is necessary. But for liability proceeding the violation of a right has to be proved. Even if the standing is open, the French system is not action popularis because the judge requires always an "interest":

79 The human right to environment established in the constitution in 2005 (environmental Charter) does not provide a general right to standing in environmental matters, it is always necessary for the plaintiff to prove that the decision challenged in justice affects its particular situation (TA Amiens 8 december 2005, Nowacki).

80 Action against an administrative decision needs for the plaintiff to justify a personal interest giving him standing and he cannot argue only violation of human right to environment (CE 3 august 2011, Association Vivre à Meudon, req. n° 330566): action against a national decree drawing up the list of current priority roads in a specific area has been declared non admissible for individual persons who did not live along these roads but only in the area; but a local NGO protecting the quality of life and opposed to the development of roads has been admissible as having a sufficient interest in relation with the objective of its by-law.

81 The individuals have to show a specific interest in the decision at stake, one of the most useful demonstrations of this interest is to show that he lives in the vicinity of the proposed activity or building. Both elements are complementary.

Standing criteria for individuals and NGOs?

82 See the answer in I.d supra

83 Do the same rule apply to individual and NGOs of other member states or parties to AC?

84 According to a classical jurisprudence standing of individuals and NGOs in environmental matters is open to any legal or natural person: French citizens as well as foreigners from the EU or from a third country. But they will have to meet the requirement of being "interested."

85 Concerning the standing of foreign NGOs:

86 The art. 5 of the 1901 law on the associations require for foreign NGOs a prior declaration in the prefecture of the seat or activity in France. This has been considered as a limitation to access to justice and as a violation of the European Human Rights Convention. France has been condemned by the Strasbourg Human Rights Court on 15 January 2009 (para.58, n° 36497/05, Ligue du monde islamique c/ France). That is why the French Court of Cassation consider now that it is admissible for a

civil action in the criminal courts by a foreign legal person even without a prior declaration in France (Cass. Crim. 8 December 2009, req. N°09.81.607). Then the Constitutional Council, taking into consideration the Human Rights Court decision (which is very innovative for constitutional judge), decided that the law cannot prejudice the right to effective access to justice and cannot prevent foreign NGOs having not an installation or seat in France, to have standing in respect of rules of admissibility (CC 7 November 2014, QPC 2014- 424, Association Mouvement Raelin International) [see German translation]. (see comments by Agnes Roblot-Troizier, Standing for foreign associations and the conventionality of the constitutional control, in les nouveaux cahiers du Conseil Constitutionnel n° 47, April 2015, p. 135).

87 In environmental law there have been several cases of standing of foreign NGOs always admissible: about a transfrontier impact assessment action of Netherland province in Strasbourg administrative Court has been admissible (TA Strasbourg, 3 August 1989, province de Hollande septentrionale, *Revue juridique de l'environnement* 1990, p.125); regarding the permit of a nuclear power plant, action from the city of Genève admissible CE 27 May 1991, ville de Genève, Rec. p. 205; about the contamination of the river Rhine, a foreign NGO from Netherland and the city of Amsterdam are also admissible as stated by the CE 18 April 1986 , req. n° 53934, Mines de potasse d'Alsace about water contamination. In the case CE 23 December 1981, req n° 15309, commune de Thionville, German NGOs were admissible regarding a nuclear power plant in France.

88 To conclude the topic “access to justice” we quote interesting comments of judge L. Lavrysen in a global symposium on “access to justice in environmental matters on 24 June 2014 about the Aarhus Compliance Committee decisions on access to justice :

89 “ As article 9-2 is concerned the Committee held that it applies to decisions with respect to permits for specific activities where public participation is required under article 6. For these cases, the Convention obliges the Parties to ensure standing for environmental organizations. “*Environmental organizations meeting the requirements referred to in article 2 paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and impartial body established by law.*” Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided “*with the objective of giving the public concerned wide access to justice within the scope of the Convention*” (C/11 Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para 2). While referring to “the criteria, if any, laid down in national law” in article 9 paragraph 3, the Convention neither defines these criteria nor sets out the criteria to be avoided and allows a great deal of flexibility in this respect. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations, from challenging acts or omissions that contravene national law relating to the environment. The phrase “the criteria, if any, laid down in national law” indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception” (ACCC/C/2005/11 concerning Belgium, paras. 34-36).

2.2 The recognition of e-NGOs

90 How do the formal structures of an NGO determine its access to Justice? Are they obliged to be recognized before they have legal standing? Did any criteria change since 2012? Are there special requirements comparable with UmwRG?

91 As it has been explained supra, standing for NGOs does not always require a specific recognition (see I. d p.4). Legal standing is possible before recognition or without any recognition under the

condition to have a direct interest. But the exception of art. L. 600-1-1 urban Code (supra p. 5 and 6) forbids standing in urban law for any NGO (recognized or not) before its registration in prefecture.

92 When a specific recognition (agrément) is required the legal procedure has been established in 1976 in the law on nature protection and in the law on urbanism. It has been modified in 1995 and then in 2010 with a new regulation by decree of 12 July 2011 (art.R.141-1 to R.141-20 environmental Code). The legal basis is the article L. 141-1 environmental Code. It has been considered that the reform had the objective to be more severe in the recognition which was considered before as liberal. Now more precise criteria is required of representation and good governance and financial transparency. Scholars comments mention that the last reform of 2011 is in a way more restrictive (Chantal Cans, environmental Code, 2015, p.1453) and limits the right to participate giving a monopoly to the big national NGOs because of the requirement of a minimum of 2000 members in 6 regions to be allowed to participate in certain national administrative councils (Philippe Billet, The new restrictions to NGOs participation to the decision making process, in *La semaine juridique, administration et collectivités territoriales*, n° 39-40, September 2011, 2311). This restriction to participation in national administrative councils affects specialized and academic NGOs such as the French Association for Environmental Law (SFDE) as not having enough members (less than 2000), they cannot be allowed to be members of such councils. It is a loss of scientific expertise for the State. However the Council of State did not annul the reform considering its compatibility with the constitution and with general principles (CE, 25 September 2013, req. n°352660). It should be noticed that the 2011 reform is mainly about the recognition procedure and the conditions of the participation to consultative bodies, but does not affect the consequences of the recognition on access to justice. About access to justice the judge in para.19 of the case law of September 2013 mentions that the standing for recognized NGOs does not prevent the standing for non recognized NGOs if they have a sufficient direct interest for standing (the same judicial statement in CE 25 July 2013 req. n° 355745, Association de Defense du Patrimoine Naturel de Plourin).

93 The criteria of the recognition:

- Only after 3 years of existence (as it was since 1976).
- Discretionary appreciation by the administration of the representation based on: effective participation of members of the NGO to the management of the NGO; Public and effective activities or publications and works in environment or urbanism proving principal action for environmental protection; sufficient number of members in relation with the territorial scope of activity of the NGO; unselfish management; guaranty of financial regularity.
- The recognition is available only for 5 years (that is a new requirement) and must be renewed on the initiative of the NGO; a detailed file must be completed by the NGO on the model of arrêté of 12 July 2011 requiring among others the by-law, the last financial and administrative report, the number of members. The effective territorial scope of activity of the NGO must be given in relation with the by-law; it may be departmental, regional or national. Before 2011 there could be recognition for activities of NGOs at the communal level, first level of territorial public bodies with 37000 communes in France. Since 2011 the first level of territorial recognition is the department (95 in France metropole). As there were many small local environmental NGOs they can no longer be recognized as such. That could be considered as a new restriction for NGOs. However article R. 141-3 environmental Code allows recognition could be used in a territorial scope less big than the territorial recognition, in the place where the NGO exercises effectively its activities. This flexibility has been confirmed by art.15 Law 27 December 2012 on participation modifying art. L. 141-1 5° alinéa environmental Code. So there could be a recognition infra regional or infra départemental.
- The decision of recognition: the competent authority to give the recognition depends on the territorial scope of activity of the NGO: for a departmental or regional NGO the competent au-

thority is the prefect of the department where the NGO is registered; for a national NGO the decision is taken by the ministry of environment. The refusal of recognition as the decision of recognition must be motivated. The silence of the administration over a period of six months means a refusal of recognition. The list of recognized NGOs is public (in 2011 there were 110 recognized national NGOs over a total of 2125 recognized NGOs and over a total of environmental NGOs of about 5000). After the 2011 reform, in 2014 there are only 34 recognized national NGOs (including SFDE) and among them 17 may participate as members of national consultative councils. If the NGO no longer fulfils the criteria or if the NGO does not send each year a report of activities, the recognition may be revoked by the administration.

94 The litigation on recognition is a litigation of full jurisdiction in the administrative Court. There has been quite a number of case laws. A controversial issue has been about the very powerful associations of hunters in France. As they were considering themselves as protectors of the environment, they asked for recognition as environmental NGOs. The ecological NGOs disagreed and a tribunal decided to withdraw the recognition given to a hunter association because their principal activity was not the protection of the environment (CAA Nantes 30 December 2003 req. n° 00NT02011, Association Manche Nature). Then the hunters' lobby in the Parliament obtained a new law of 2008 and in 2012 modifying article L. 141-1 environmental Code and giving the possibility for national, regional and departmental associations of hunters to ask for recognition. But they must respect the criteria. In CAA Nantes, 12 October 2012, req. n° 11NT00892, Association Manche Nature, the administrative judge considered the recognition of the hunters association as legal. The major issue of that controversy is not about the consequences of access to justice, but about the right for recognized NGOs to be member of environmental consultative bodies, where the hunters are in competition with the ecologists.

95 The interest for standing must fit with the by law object of the NGO. An NGO having as its objective to help citizens to protect themselves from any damage is inadmissible to challenge a building permit for wind turbines, because they have not sufficient interest for standing (CE 15 April 2005 req. n° 273398, Association des Citoyens et des Contribuables de Sane sur Vienne).

96 The others case law concerns the full jurisdiction power of the judge who may declare illicit a refusal of recognition and decide to grant the recognition (TA Paris 29 April 2010 req.n° 0718905, Association des Familles Victims du Saturnisme; granting recognition to this association because the fight against lead poisoning is also a fight against lead pollution).

97 As regards the standing in relation with the territorial scope of the NGO in CE 25 June 2012, req. 346395, Le collectif anti-nucléaire, standing for annulment of a national decree of 2009 authorizing the closure of a nuclear installation has been considered admissible for an NGO which has not been recognized. Without mention in its by law of its territorial activity, but as having a local seat, has been considered by the Court as a local NGO having interest for standing. In the same decision a national NGO recognized "Friends of the Earth" has been admissible to challenge the same decree as having an interest because its statutory object is in direct relation with the object of the challenged decree.

98 If we compare the French system of recognition (artL.141-1 and R. 141-1 to R141-20 environmental Code) with the German system section 3 para1 UmwRG:

99 Section 3 corresponds to art R. 141-2 "conditions for the recognition"; the French text is less developed than the German. But some elements make the French text more demanding:

100 The common points:

- Objectives of bylaws predominant and not temporarily for environment= Germany
- Objective of bylaw principally for environment = France
- Existence of three years = both

- Guarantee of performance and effectiveness= Germany
- Effective activities = France
- Public benefit purpose = Germany
- Non profit activity and unselfish management = France

101 The differences:

- French requirement must have not only statutory environmental objectives but also effective activities or publications or works.
- The objective of the NGO is not limited to the protection of the “environment”, but is broader with an enumeration in article L.141-1 environmental Code: nature protection, management of wild fauna, improvement of living conditions, protection of water, air, soil, sites and landscape, urbanism fight against pollution and noise pollution.
- Sufficient number of members in relation to the territorial scope of activity
- Recognition on a territorial basis of the recognition
- Guarantee on good finance and accounting management
- Limited time of recognition: formal renewal after 5 years
- Requirement of an annual report to administration

2.3 Preclusion of objections

102 In French law there is not the rule of material preclusion. Because of the separation of powers theory, administrative procedure and judicial procedure are separate. An NGO can have access to justice even if it did not participate to the administrative procedure. The two processes are independent.

103 Only by exception, specific laws require a preliminary administrative complaint or prior administrative appeal before access to justice. But this formal reclamation against an administrative act is not an opinion or consultation. But a prior step of access to justice.

104 There are two ways of challenging an administrative decision before going to Court: the non contentious appeal (*recours gracieux*) and the hierarchical appeal (*recours hiérarchique*).

105 It is only required to introduce a non contentious appeal for reclamation of compensation to administration in full review.

106 There is an increasing number of laws or regulations requiring a preliminary administrative appeal before access to administrative Courts in order to limit the explosive growth of litigation in Courts. It is called obligatory prior administrative appeal (*recours administratif préalable obligatoire* or *RAPO*). There are 140 (Conseil d'Etat, rapport, *Les recours administratifs préalables obligatoires*, la documentation française, 2008). Most specific litigation procedures of that type is in taxation law and civil and military servants' law. Eight exist in environmental law. Access to this preliminary procedure is open like access to justice to individual and NGOs. An important case law on admissibility of legal arguments has decided that new legal means may be raised for the first time in Court even if they were not raised before in the obligatory prior administrative appeal (CE 21 March 2007, req. n°284586, Garnier). A recent example of such an obligatory prior administrative appeal is about impact statement law (decree 29 December 2011, article R. 122-3-V environmental Code): any action against a decision demanding an impact study in the case by case situation, has to be prior submitted to the obligatory administrative appeal. It can be considered that this procedure of access to justice before the final decision applies art. 9-3 AC. Other examples are about the challenge of the refusal of a hunting permit (article L.423-5 environmental Code) or the challenge of greenhouse gas emission allowances (article R.229-27 environmental Code).

107 In general when there is such an obligatory prior administrative appeal, the decision taken by the administrative appeal body necessarily replaces the initial decision (CE 30 May 2007, req.n° 287280, *Société Lesaffre frères*).

108 In general administrative procedural law, it is required before standing to administrative Court about right to information to act prior to the CADA which is the commission for access to administrative documents. It applies regularly to environmental issues. But it is clear that this hypothesis of mandatory prior administrative appeal is totally different from the materielle proklusion, because the prior appeal is the first step of a legal action and is available even if there has not been use of participation right during the administrative procedure. It is a loss of standing if the prior administrative appeal is not used.

109 The material preclusion has been clearly refused by the ECJ (ECJ C-263/08 of 15/10/2009 (*Lila Vartans association for environmental protection*): "participation in the decision-making procedure has no effect on the conditions for access to the review procedure".

2.3.1 Requirements to participate to planning and licensing procedure

110 Participation of NGOs to planning and licensing procedure does not need specific requirements. It is open to all NGOs. Modalities may change according to specific procedures. There are several situations:

111 1) Participation in drafting of national and local regulations having an impact on the environment: applying the notice and comment procedure for implementing art. 8 of AC and art. 7 of the environmental Charter, a recent law of 27 December 2012 (art. L. 120-1 environmental Code) organize such participation open to anybody, individual as NGOs. There is a notice of the draft regulation by electronic mail, the public has a minimum of 21 days to send observations by mail or electronically. The final decision must be motivated and must take into consideration the public observation. A synthesis of the public observations must mention the observations taken into account.

- For Communes of less than 10 000 inhabitants, the same process, but the notice may be posted in the town hall and by internet too if it exists in the town hall
- For Communes of less than 2000 inhabitants participation may be by a public hearing

112 2) Participation in drafting of individual decisions of public authorities having a direct impact on the environment: notice by internet and comment for a minimum of 15 days.

- For communes of less than 10 000 inhabitants, posted in the town hall or internet

113 The public participation of 1) and 2) does not apply in a situation of emergency.

114 3) Participation through the National public debate commission which is an independent public body existing since a law of 1995 (article L. 121-1 environmental Code). The object of the public debate is about “opportunity, objectives, principal characteristic of a project, modalities of information and public participation after the debate”. It includes 25 members. Two of them are members of recognized environmental NGOs. It set up, before the public hearing, a public debate for a list of important projects of works or management mentioned in article R. 121-2 environmental Code. It may organize other public debates at the request of several public bodies and at the request of a national recognized NGO. In all cases the commission has a discretionary power to organize or not the public debate. Its decision (ie refusal of public debate) can be challenged in Courts by NGOs having an interest (CE 17 May 2002, req.n° 236202, Association France Nature environnement, where the CE annul the refusal of public debate asked by an NGO; CE 3 July 2003, req. n° 240850, Association des intérêts des habitants de Toulouges). The public debate takes place during no more than 4 months with a prolongation of 2 months. Two months after the end of the public debate the president of the commission draws up conclusions and put on the internet. Three months after these conclusions the project initiator must decide to continue or not its project and must mention measures taking in account lessons from the public debate. The conclusions of the public debate are part of the public enquiry file.

115 4) Local consultation prior to urban planning: modified by ordonnance of 5 January 2012 (article L.300-2 urban Code): open to anybody including local NGOs., is mandatory or optional, must have a sufficient duration, is organized freely by the local authorities; but standing is limited regarding the procedural illegality (art. L 300-2-IV urban Code).

116 5) Optional consultation prior to the public enquiry: since 2010 a new category of consultation is optional for environmental projects, prior to the public enquiry and during the elaboration of a project, a plan, a program or a decision. (Art. L.121-16 environmental Code). The modalities of the consultation are open, but the public authority may decide to set up a “committee” with all stakeholders including recognized NGOs.

117 6) Participation in public enquiry: it is the most famous, oldest and sophisticated procedure of public participation. It occurs at the end of the elaboration of the project or of the planning document before taking the final decision. Before 2011 there was a list of projects and works subject to public enquiry. Since decree 29 December 2011 it is obligatory for national or local projects submitted to environmental impact assessment (EIA) as mandatory (both works and plans and programs (list for EIA art. R. 122-2 environmental Code) or to case by case EIA. However there is a list of projects which are not subject to public enquiry (see article L. 123-2 and R.123-1 environmental Code).

118 The commissioner of the public enquiry responsible for the management of the public enquiry is designated by the administrative Court. The duration of the public enquiry is a minimum of 30 days, it may be extended for 30 days more. During this period the public may consult the file including the EIA, make written comments and proposals, discuss with the commissioner. This person may organize a public hearing and ask for an expertise. All the costs are supported by the project developer (L. 123-13 environmental Code). At the end of the consultation, the commissioner writes a final report with motivated conclusions including the proposals of modifications and the answer of the developer. These documents are public.

119 There is a large number of case laws about the public enquiry with many standing actions by NGOs. A specific procedure rule (article L123-16 environmental Code) obliges the referral administrative judge to decide the stay of execution of the act involved in case of unfavorable findings by the commissioner. There is also an automatic stay of execution for a decision taken without public enquiry required or in the absence of EIA required. Many law cases are about the question to know if the findings of the commissioner are favorable or unfavorable.

120 7) Participation of NGOs in administrative commissions on environment: Article L.141-2 environmental Code stated that recognized NGOs for the protection of the environment may participate at the action of public bodies concerning the environment. That could be considered that the recognized NGOs have, among NGOs a monopoly for participation. In fact according to laws and regulations concerning each administrative commission, nominations in some of them are reserved to recognized NGOs, and in other regulations without referring expressly to recognized NGOs, ordinary NGOs are often appointed.

121 But there has been a modification by a law of 2000 (L 141-3 environmental Code) and a decree of 12 July 2011 concerning the designation of recognized NGOs in some administrative bodies. It can be considered as a limitation to the existing right to participate. The list of these administrative bodies is in the decree n° 2011-833 of 12 July 2011: there are 20 at national level, 6 at regional level and 6 at departmental level. From now, according to article R. 141-21 environmental Code, it is not sufficient to be recognized. It is necessary to fulfill three supplementary criteria:

- A minimum number of members (2000 members for national NGOs according to arrêté 12 July 2011 and a number determined by each prefect for local NGOs, [generally from 20 to 300 for regional NGOs and from 20 to 100 for departmental NGOs]
- Justify experience and knowledge, by works, research, publications or operational activities
- Financial resources must not come principally from the same private or public source

122 We notice that these criteria are about the same as the criteria for recognition of NGOs, but a little more precise. They have been considered not incompatible with the objective of effective public required by art. 2-2 of the Directive n°2003/35/CE (see CE 25 September 2013, req.n°352660, para 24).

123 From now the recognized NGO must first apply to be allowed to participate in an administrative commission on environment, then it is, or not, appointed to such or such commission. This system is much more complicated than before and needs much bureaucracy because there are three procedural steps: - procedure for the recognition – procedure for being able to participate in a commission – appointment in a commission . We consider that it is not progress and that gives to big NGOs a monopoly to the detriment of small NGOs. It is detrimental to some scientific NGOs, such as the French Society for Environmental Law, SFDE) which, having less than 2000 members, as a national NGO cannot be a member of any national commission.

124 8) Participation in environmental impact assessment procedure:

125 Any decision taken after an EIA must take into consideration the result of the public consultation (article L. 122-1- IV environmental Code). Since 2010, when a project submitted to EIA is not subject to a public enquiry or to any other public consultation, it must be decided by the developer to make available to the public the EIA and the administrative file. The public, including any NGO, even when not registered, may comment during a minimum of 15 days (article L. 122-1-1 and R. 122-11 environmental Code). (idem for EIA of plans and programs article L. 122-8 environmental Code). At the request of the developer a meeting of consultation with the local stakeholders, including NGOs, may be organized about the potential impact of the project (article L. 122-1-2 environmental Code).

2.3.2 Do they only have the right to participate in mandatory EIA or in other procedures as well?

126 As seen supra in III.a. all NGOs may participate in all environmental procedures. The restrictions concern only participation in some administrative commissions.

2.3.3 Information of NGOs about projects

127 There is no individual information about projects, but ordinary information as for individuals: by press, or posted in the Town hall, or by announcement in the official journal. Since 2012 about participation to decision-making process of national environmental regulations, NGOs, as individuals, may be registered by the ministry of environment, to receive automatically by internet all notice of consultation on draft decisions. I myself am registered and I receive all announcements by mail.

2.3.4 Time limit for comments or objections

128 As said supra, each procedure has its own time limit:

- Drafting regulation = 21 days
- Drafting individual decision = 15 days
- Public enquiry = 30 days (+30)
- EIA without public enquiry= 15 days

129 All these delays are a minimum; the administration has a discretionary power to decide more.

- National public debate = 4 months (+ 2), this delay is a maximum

130 For the other procedures without fixed delay, it is up to each authority to fix it.

131 Objections passing this time limit are excluded and not taken into account. But they can be used in any further legal action.

132 The content of objections by NGOs is not regulated. There are no specific requirements.

2.3.5 [Is there a discourse on the participation procedure and the possibilities to make objections for NGOs with particular regard to conformity with EU law and AC in France?]

133 In Courts it is possible to refer to the conformity of the participation procedure with EU law but not with all articles of AC.

134 Participation procedure for NGO must be conformed to EU treaties and EU rules and directives. As AC is now part of EU law, AC being ratified by EU, EU law must implement the obligation arising under the AC under the control of the EU Court. French courts control that French procedure legally implements the EU directive applying AC.

135 But the Council of State always considers that a plaintiff is not admissible to argue the violation of art 9 of AC because this article has not a direct effect and implies only obligations between States' Parties (see CE, 5 April 2006, n° 275242 about art. 9-3 AC which cannot be usefully invoked by the applicants) . idem about article 8 AC (CE 28 December 2005, n° 267287; CE 16 November 2011 n°

344972; CE 20 March 2013 n°354321; CE 16 July 2014 n°365515 and 365 522;). Until now, in reality there has not been any complaint about France in the AC Compliance Committee about a French violation of art 9. It is a sign that probably there is no violation, because the French standing of environmental NGOs is in conformity with art. 9 of AC, as it is with EU directives.

136 However CE sometime refers to AC when it is considered that the article involved has a direct effect. In CE 9 December 2011, req.n°324294, Réseau sortir du nucléaire (NGO), it has been considered that projects of annexe 1 of AC (as with nuclear power plant installation and decommissioning) does not require the organization of a national public debate of French art. L 121-1 environmental Code. In CE 12 April 2013 req.n° 342409 Association stop THT, art. 6-3 AC has a direct effect but is not applicable to the case. It is the same for art. 6-2 and 6-7 in CE 23 March 2013, n° 329642. Article 6 of AC has been excluded about a wind turbine zoning plan, because wind turbines are not mentioned in annexe 1 of the Aarhus Convention (CE 16 April 2010, n° 318067). In a general statement about an action against the creation of a national park the CE referring to Aarhus convention in general considered that the convention has been applied legally through the public enquiry (CE 29 October 2013 n° 360085).

137 There could be divergence of appreciation about “direct effect” between administrative courts. CE in a decision of 28 December 2005, req. n°277128 considered that art. 6-4 AC not having a direct effect; but Paris administrative Tribunal in a decision of 7 February 2013, association pour la defense du site de Notre-Dame, did an extensive review of the application by the administration of article 6-4 AC supposing a direct effect.

138 In many administrative cases, the Aarhus Convention is mentioned systematically by the plaintiff and is referred to in the visas, but there is rarely a strict demonstration of its functioning and it is easy for the court not to take it into consideration. Generally the court considers that the plaintiff did not argue sufficiently and did not give enough precisions for checking on the merits (CAA Douai, 6 March 2014, req n° 12 DA 1087, para. 3; CAA Paris, 31 July 2014, req. n°12PA02598, para. 12; CAA Marseille, 24 September 2013, req. n°12MA03711, para.7.

139 See Julien Betaille’s article, in English, on direct effect and Aarhus Convention in French administrative Courts (ENLI review, 2009(2) p.63). According to case law the following have a direct effect art. 6-2; 6-3; 6-7; 6-1a; Annexe 1; have not a direct effect: the Preamble, art. 1; 2-4; 5-2; 6-4; 6-6; 6-8; 6-9; 7; 8; 9-3; 9-5. In this situation of not having a direct effect, the plaintiffs, including NGOs are not entitled to rely on these articles before a French Court. But they can rely on a similar disposal of French law and of European Union law. [in the same issue of ELNI 2009 (2) p. 74 Pavel Cerny, Practical application of article 9 AC in EU countries]. However in a case of 2011 the Council of State refers to the implementation of all art 6 AC as if all paragraphs were admissible as having a direct effect (CE, 28 March 2011, req. n° 330256, para., in this same case the CE gives a direct effect to art.9-4 of AC).

2.4 Intensity of the Judicial Review (gerichtliche Kontrolldichte)

140 Requirements and limitations as to the intensity and the scope of judicial review?

2.4.1 Intensity of the Judicial Review

141 The control of legality of administrative decisions is under all legal aspects and is not limited. But the administrative judge has a rather broad discretionary power to fully judge merits and to give to procedural aspects legal consequences as annulment of the act. The main distinction is between merits which address the «substantial legality» with annulment of the act when there is direct infringement of the law or of the regulation or in case of misuse of power, and the “procedural legality” when there is lack of competence of the author of the act, or in a situation of formal error. Generally in environmental cases the judge makes a distinction inside formal error between substantial formality and not substantial formality. There will be annulment of the act only in the case of violation of a substantial formality determined discretionary by the judge. It will be proportionate to the importance of the formality and its impact on the final decision. In the case CE 23 December 2011, req. 335033, Danthony, which is not an environmental case, but could apply to an environmental case, the administrative judge stated that the irregularity of a prior consultation does not systematically involve the illegality of the administrative act. An irregularity may involve the illegality of the act if it has impacted the sense of the decision or has deprived the litigants of a legal guarantee. For an environmental case, see CA Marseille, 20 October 2005, req. n°03MA01914 société Durance granulats, insufficiency of the impact assessment is a procedural failure, it will be considered as a substantial formality if it fails to inform completely the public or if it has had an influence on the decision making process as for the consequences of the project on the environment. For the same jurisprudence see CE 14 October 2011, req. n° 323257, Société Ocréal. The absence of the non technical summary of the impact assessment makes illegal the final decision (CE 28 June 1999, req. n°186921, commune de saint martin Bellevue).

142 It can be considered that the margin of assessment or discretion is generally used in environmental litigation rather broadly. It is opposed to what is called an entitlement binding or mandatory duty (competence liée). One can say that in all matters, including environmental law, the administrative judge has a pragmatic and flexible approach in fashioning the substantive law. The breach by the administration of the principle of legality includes the control of the violation of the constitution, including human rights and since 2005 the environmental Charter, the violation of laws and regulations, the violation of general principles of law and unwritten rules of interpretation even customary, the violation of EU directives and the violation of international treaties if they have a direct effect.

143 In all cases the Courts do not make differences between eNGO lawsuits and citizens’ lawsuits.

2.4.2 Limitation of the intensity of the Judicial Review

144 The main distinction relating to the intensity of the review is between the full control and the control minimum or *erreur manifeste d’appréciation* (manifest error of appreciation). It applies to environmental matters and to the conformity with the requirements of EU law. It depends if the administration has an absolute discretion or a limited discretion.

145 We are using here the presentation of the French administrative law by an English law professor, L. Neville Brown (French administrative law, Butterworths,, London 1983) for a better explanation in English.

146 Where the administration has an absolute discretion, the judge will ensure that the administration has committed no mistake of law or fact. Every administrative decision must be motivated. This means that there has to be substantial reasons justifying the decision that could be adduced to, or discovered by, the Court. Traditionally, those reasons do not need to be disclosed to the administré at the time when the decision was made; but the administrative judge could call for the reasons if litigation

ensued and lays down that reasons must be stated, in writing and with sufficient precision, at the time when any administrative decision is made.

147 Where the administration has a limited discretion, it is the most frequent causes of litigation. In this case the administration has a discretion exercisable within statutory limits, and the judge sees that these limits are observed. The administrative Court has, and freely exercises, an effective control over the limits of the opportunity by interpreting the statute and assessing or “qualifying” the facts of the situation in the light of the terms of the statute as so interpreted.

148 About the control of facts, the Conseil d’Etat limits its control in two types of cases. The first is questions of policing, such as measures concerning foreigners. The second concerns scientific or similar technicalities, including technical aspects of environmental issues. The Court would not review the question whether a hair lotion was poisonous (CE 27 April 1951 Société Toni). However the Conseil d’Etat show is willing to quash obvious mistakes called “manifest error” by the administration in its appreciation of the facts (CE 6 November 1963 concerning the disadvantage of adding gum Arabic to ice cream). A famous illustration of this type of control of “legal qualification of facts” in relation with urban environment is the case law Gomel (CE 4 April 1914): there was a prohibition on building in Paris, place Beauvau justifiable under the statute only on the ground of preserving an existing view of architectural value, as a conserved urban landscape. The Conseil d’Etat considered itself competent in such a case to consider whether such a view existed; the question was not the fact of the existence of the place Beauvau, but rather within the category of a place having an exceptional value? Where the Conseil d’Etat was convinced that the administration, although making no mistake in its findings of facts, had nevertheless committed a “manifest error in the appreciation of those facts” the Conseil d’Etat was prepared to quash the decision. In other words, the administrator has the right to err, to decide wrongly, but not to make a manifestly wrong decision. As writes professor Neville Brown, manifest error may be linked with the concept of proportionality familiar as *verhältnismässigkeit* to German administrative law and now imported into European community law.

149 Since 1971 there is a new theory of the judge as a particular application of the broader doctrine of manifest error. This new theory is about the “bilan” or balance sheet. It is a kind of extension of control of opportunity in the area of land use planning. This will allow the judge to extend judicial control in expropriation (or compulsory purchase). The administrative Court may weigh for itself the advantages and the disadvantages of a challenged expropriation. To cite Mr Braibant’s conclusion before the Council of State (CE 28 May 1971 ville nouvelle est de Lille):

“question such as whether the eastern motorway should pass near to Metz or near to Nancy remain matters of opportunity (discretion of the administration). It is only above and beyond a certain point, that is, where the cost, whether socially or financially, appears abnormally high, that you ought to intervene.” Already in 1971 Mr Braibant mentioned among the social costs “environment and quality of life”.

150 As soon as 1972 the Council of State took into consideration to evaluate the legality of an expropriation environmental protection as an element of the balance (CE 12 April 1972, Pelte). In 1973 the Council of State rejected a proposal to build a recreational airport near Poitiers when it was shown that the noise and disturbance to local residents would be greater than the new facilities the project would bring to the area (CE 26 October 1973, Grassin). In 1973 Ecology became an element of the summary (CE 25 July 1975 syndicats CFDT marins pêcheurs de Brest). In 1980 a touristic resort development on the seashore of the island of Oleron has been annulled because of the aggression to the natural environment even in an area without any specific protection (CE 26 March 1980, Beau de Lomenie). In 2006 a high voltage electricity link has been quashed by the judge because it would damage a wonderful natural area, the Gorges du Verdon after an action by NGOs (CE, 10 July 2006, Association Protection Lac de Sainte Croix).

2.5 Legal Costs

2.5.1 General overview

151 In France there is a distinction between court fees or legal costs or regulated fees (“les dépens”) and others fees which are not included in the court fees “called frais irrépétibles”.

152 The rules are different in administrative courts, civil courts, criminal courts and the Constitutional Council.

153 In the civil procedure Code article 695 gives a list of 12 categories of “court fees”; among them: court taxation, fiscal stamp (before 2014, 35 euros in first instance, 150 euros on appeal, this fiscal stamp has been deleted since 1 January 2014; it had been set up in 2010 and the Council of State dismissed an appeal considering that it was not an excessive burden for the litigants, a part being used to support the legal aid, (CE 28 December 2012 , n° 353337) , compensation for witnesses, payment of judicial officers or bailiffs, cost for interpretation, cost for enquiries. The principle is that the loser pays these fees for the two parties (article 696 civil procedure code). But the judge may decide otherwise. He may decide not to ask anyone for court fees and put the costs for the state. In all situations the judge must take into account the equity and the economic situation of the party condemned (article 700 civil procedure code).

154 The “other’s fees” or (frais irrépétibles) are the barristers’ fees, and the expertise cost when decided by the Court. The principle is that these fees are supported by each party for its own personal expenses. But exceptionally, the judge may with discretionary power, decide to charge the loser to pay these fees, which appears in fact a little bit as a kind of penalty (article 700 civil procedure code). According to a Court of cassation decision if the expertise is required on the bases of art 145 of civil procedure code, the defendant is not the loser and must not pay the court fees (Cass. 2° civ. 10 February 2011 n° 10.11.774).

155 In criminal courts the State pays all the court fees of the case; only barristers’ fees remain for each party. But the condemned person pays tax: 31 euros in first instance; 127 euros in correctional court.

156 In civil courts if the loser is a private company they will have to pay fees to the NGO (article 700 civil procedure code) ie In Cassation Court, civ 3, 20 November 2012 n° 11-19562, Esso company had to pay 2500 euros to the ONG; I, Cassation Court , civ.3, 8 June 2011 n° 10-15500, Alvea company had to pay 1200 euros to the ONG.; Vale company had to pay 1676 euros to the ONG (CA Nouméa 25 February 2014).

157 In administrative Courts the rules on fees are in the administrative justice code art. L 761-1 and R. 761-1 to 761- 5. The court fees or legal costs (les dépens) include expertise fees, enquiry fees and all other instruction measure. Except particular provisions, these court fees are paid by the loser, unless particular circumstances of the case justify that they are paid by the other party or shared between them (article R 761-1 administrative justice code). For the others’ fees not included in the court fees, the judge decides who pays, generally the loser. But the judge must take into consideration equity and the economic situation of the plaintiff. For instance on nuclear litigations the NGOs in general the loser had to pay 300 euros to EDF (electric public company) (CE 1 March 2013 n° 340859); or 500 euros to EDF (CE 1 March 2013 n° 353009); or 1000 euros to EDF; or 3000 euros to industry of wind turbines (CE6 June 2014 n° 360437); or 3000 euros to a big commercial space company. The judge may decide that nobody will pay (article L 761-1 administrative justice code). If the administration is the loser the state has to pay fees to the NGO winner: 1500 euros (CE 26 February 2013 n°365640); for a private person with legal aid the state had to pay 2500 euros (CE 26 January 2011 n°310270). But the barrister’s fees will remain the charge for each party. They are generally rather expensive; this can constitute sometimes an obstacle for NGOs not entitled to legal aid. The plaintiff may litigate in first

instance in person without a lawyer for legality action. For damages in a first instance and in appeal and cassation for legality action he will have to employ a barrister..

158 In most of the administrative cases, the judge does not decide on fees and each party pays its own fees. Even when the winner (EDF) asks for payment from the loser NGO the judge may refuse the EDF demand (CE 12 April 2013 n°342409). There are many dismissals of NGOs actions without any obligation to pay any court fees or other fees (CE16 April 2010 n° 318067; CE 28 March 2011 n° 330256; CE 20 March 2013 n° 354321; CE 23 March 2013 n° 329642; CE 25 September 2013 n° 352660; CE 16 July 2014 n°365515).

159 There is a penal sanction of a fine for a vexatious litigant (article R 741-12 administrative justice code).

160 In the Constitutional Council for the QPC action, it is free. There is no provision for court fees. In reality the action of QPC is part of the administrative or judicial litigation as a preliminary ruling. The plaintiff will use the same lawyer or ask a specialist lawyer. But there is no obligation to use the specific bar for action in the Cassation court and the Council of State (avocats aux Conseils ou avocat au Conseil d'Etat et à la Cour de Cassation), they form a close corporation with a monopoly of legal representation before the two high Courts, but not in the Constitutional Council. Art. 10 of the internal rule of the Constitutional Council about QPC of 4 February 2010 provides that oral observations may be presented by ordinary barristers or by the specific bar barristers. For the administration, they generally do not use private professional lawyers but civil servants in charge of legal actions.

161 Legal aid is possible for administrative Courts (article R 441 administrative justice code), judicial Courts and Constitutional Council. The legal status of legal aid for all courts is in law n°91-647 of 10 July 1991. Legal aid is granted on a case by case basis. In article 2 alinea 2 of that law it is also open to NGOs but "exceptionally", only for non profit organizations, if the NGO has its seat in France and has not sufficient resources, which is appreciated by the judge on the basis of all resources from the last year. The European Court of human rights has considered that the distinction in France about legal aid between natural and legal persons, with or without non profit, is not arbitrary (CEDH, 26 Aout 2008, n° 14565/04, VP diffusion SARL c/France decision on admissibility).

162 The principle of effective judicial protection set up by article 47 alinea 3 of the EU fundamental rights Charter in relation with legal aid, may be invoked by a legal person to get the legal aid (ECJ, 2° ch. 22 December 2010, C-279/09, Deb Deutsche Energiehandels).

163 For natural persons it's provided if the person has less than 941 euros of resources to get a 100% of aid paid by the State; and with 1411 euros the aid is up to 15%. For resources over 1411 euros the aid is not given. When legal aid is provided for an action, the same legal aid can be used before the Constitutional Council but the state contribution paid to the barrister may be increased for action of QPC (art. 23-12 ordonnance portant loi organique on Constitutional Council, law of 10 December 2009). It seems that the legal aid for NGOs is a reality because in 2002 there have been 23 426 NGOs receiving legal aid, and 15% of the civil action in criminal courts were exercised by NGOs with legal aid. It was impossible to find examples of caselaw about refusal of legal aid to NGOs which may signify that the refusals are rare. In an administrative appeal Court decision in Nantes, the office of the Court of legal aid refused legal aid to an environmental NGO without giving motivation, but however the NGO went to the Court and won the litigation. The Court decided than the loser (a town and a company) had to pay the NGO 1500 euros as winner of the case applying art. L 761-1 administrative justice court (CAA Nantes, 12 December 2012 req. n° 13NT 03426).

164 There has not been any study or reform on the subject since 2012 and no national courts' decisions on the issue of prohibitive expenses.

165 As mentioned in *V.a.* the cost may be variable according to the case and the necessity or not of expertise. When the NGOs action was successful they generally will get the payment of all the fees by the defendant including expertise fees and advocate fees. But as the discretionary power of the judge is very high in this case, there could be variable solutions as to sharing of fees between the two parties. So it is always very risky for NGOs to go to Court without knowing exactly in advance the real cost. But as NGOs often receive compensation for moral damage they can receive enough money in one case to be able to go to Court for another litigation.

166 The developer who intervenes in the trial may claim the refunding of the expert opinion fee from the NGO as losing party, and the judge will decide. It is difficult to know exactly the tendency of judges in the matter because there are illustrations of all situations: payment by the NGO, payment by the other party, payment shared by both.

167 In criminal courts the victim of an environmental incident may ask the State to pay in advance the cost of the expertise.

168 As regards the notion of “not prohibitively expensive” costs of proceedings (art. 9-3 AC and art. 10 bis 5° of directive 85/337 and 15 bis 5° of directive 96/61) the ECJ case C- 260-11 Edwards and Pallikatopoulos (11 April 2013), found that this certainly would not prevent a court from ordering one party to bear the costs (para 25). The requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in judicial proceedings (para.27). In the absence of criteria for acceptable costs of proceedings the only test is a case by case assessment. Neither is it required that member states have to provide for a functional system of legal aid. But a national court must take into account both the interest of the person wishing to defend his right and the public interest in the protection of the environment (para.39). As it is mentioned in the opinion of Mrs Kokott, it is necessary to take in consideration the objective of environmental protection as a general objective because: “the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or NGOS” (para.42).

169 In French courts this issue has not been decided.

2.6 Conclusion

170 Access to justice for NGOs in environmental issues is not only legally required by the Aarhus Convention and EU law as hard law, but is also required by soft law and universal political will. Germany cannot ignore the Rio 1992 Declaration and its principle 10 and the Bali declaration approved by the governing council of UNEP programme in decision SS.XI/5, part A of 26 February 2010 with the consensus of Germany, called “guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters”.

171 These guidelines are useful for drafting new German legislation:

Guideline 16:

“States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters”.

Guideline 17:

“States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affect the environment or allegedly violate the substantive or procedural legal norms of the State relating to the environment”.

Guideline 18:

“States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice”.

172 Note 2 says that

“the public concerned” may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purpose of this definition, non governmental organizations promoting environmental protection, and meeting any requirements under national law should be deemed to have an interest”

3 National report Great Britain

3.1 Summary

Articles 9(2) and 9(3) and Standing

1 Section 31(3) of the Supreme Court Act 1981 provides: “No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates”.

2 In determining whether a claimant has standing, the High Court considers the merits of the application, the nature of the claimant’s interest and the circumstances of the case. While these rules are rules of court and it is for the courts to interpret them, the question of “standing” is not an act of discretion but an assessment of fact and law.

3 Section 31(3) of the SCA 1981 applies to all applications for Judicial Reviews (JR) in England and Wales. There are no separate provisions in terms of standing for environmental cases or for cases brought by environmental NGOs.

4 The test of “sufficient interest” has gradually evolved over that thirty year period to be liberal with respect to individuals and environmental NGOs. There have been no specific alterations or amendments to s.31(3) of the Supreme Court Act 1981 as a result of either the UK’s ratification of the Aarhus Convention or subsequent EU or domestic jurisprudence.

5 The standing principles in Northern Ireland are the same as in England and Wales, with the “sufficient interest” test appearing in the relevant court rules and the same liberal approach in modern case law.

6 Until 2011, the situation with regard to standing in Scotland was based more upon the protection of rights and was, therefore, significantly more restrictive. However, in 2011 the Supreme Court held in *Axa* that the standing test “title and interest”, which is derived from private law, had no place in JR procedures in the field of public law. The Supreme Court advocated that a preferable test was one of “directly affected”.

7 There is no legislative requirement as to the formal structure or standing of an NGO or community group relevant to the question of standing comparable with section 3 of the UmwRG. Local residents can form a group to challenge a decision and the courts do not require the body to have a distinct legal entity. Such groups may be unincorporated or incorporated.

8 The UK has a great tradition and a well-developed system of consultations with citizens and civil society, which provides that anyone – including environmental NGOs - can respond to a planning consultation. In addition to individuals who may be directly affected by a planning application, community groups and specific interest groups (national as well as local in some cases) can provide representations on planning applications.

Article 9(2) – Substantive and procedural legality

9 Article 9(2) of the Aarhus Convention requires contracting Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of Article 6 of the Convention.

10 While JR is ostensibly a process whereby the procedural *and* substantive legality of a decision can be challenged, in practice the main way in which substantive legality can be contested in JR is by applying the *Wednesbury* unreasonableness test (the usual test for JR of administrative action in English law in the absence of illegality or procedural impropriety, as discussed later) where an authority has made a judgment on substantive issues. The courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker, but the *Wednesbury* unreasonable test is, in practice, very difficult to satisfy. As such, a primary limitation of JR in the UK is its focus on procedural, rather than substantive, impropriety.

11 This issue has been discussed in a number of recent UK cases and grave doubts have been expressed by the Supreme Court about the extent to which JR provides a mechanism for compliance with EU law and the Aarhus Convention.

Article 9(4) - Costs

12 Despite the introduction of bespoke cost rules for environmental cases in 2013, legal costs in the UK remain high and, in some cases, prohibitively expensive for individuals and community groups. This is largely because losing parties have to pay the court fee, their own legal costs (which routinely amount to £25,000 and often rather more) plus a cap of either £5,000 or £10,000. Moreover, successful claimants are often unable to recover their full costs in complex environmental cases due to the imposition of a “cross-cap” on the costs that can be recovered from an unsuccessful defendant of £35,000. As such, claimants in England and Wales and Scotland are routinely facing costs of £31-36k on losing a case (often more in Scotland) and may suffer significant financial losses when winning complex cases.

13 It is argued that the cross cap of £35,000 is unfair and contrary to the letter and spirit of the Aarhus Convention. There is no basis for such a measure in the Aarhus Convention – prohibitive expense applies to the claimant (not the defendant public body) and, as such, it should be removed. There is also UK-wide confusion about which figure applies to community groups – which can often be very small and poorly funded – but which (because they comprise more than one individual) attract the £10,000 in England and Wales and Northern Ireland and are not eligible for automatic costs protection at all under the regime in Scotland.

14 There are also concerns about the efficacy of measures introduced in relation to interim relief and, as of July 2013, the introduction of a six week time limit for lodging an application for JR in cases concerning planning matters. It has been noted that this deadline may have undermined the UK’s ability to comply with the requirement for “fairness” under Article 9(4) of the Aarhus Convention. There is also uncertainty around adverse costs exposure on appeal and the extremely limited availability of public funding for all cases, including environmental claims.

3.2 Access to Justice

How exactly can you distinguish the legal requirements of Art. 9.2 AC on one hand and of Art. 9.3 AC on the other? Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and report the professional discourse among legal scholars and the relevant national case law.

How has Art. 9.3 AC hitherto been implemented in your national legal order?

Does the Aarhus Convention require uniform or at least similar rules on access to courts, standing and legal protection for individual and for collective (NGO) actions in environmental law?

We are interested in how exactly courts and scholars in your national legal order distinguish the legal requirements of Art. 9.2 AC on the one hand and of Art. 9.3 AC on the other. Please give an overview on the scientific debate.

Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and for individuals and report the professional discourse among legal scholars and the relevant national case law.

Introduction

15 Article 9(2) of the Aarhus Convention requires Parties to ensure that: “members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure”. It then states: “What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention”.

16 Article 9(2) of the Convention provides: “the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above”.

17 Article 2(5) of the Convention defines “The public concerned” as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.

18 Article 9(2) therefore gives special protection, in terms of standing to “non-governmental organizations promoting environmental protection”.

19 Article 9(3) of the Convention is much less prescriptive, allowing contracting Parties to set their own criteria for standing: “each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures”.

3.2.1 Standing in England and Wales

20 Section 31(3) of the Supreme Court Act 1981 provides: “No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates”.

21 In determining whether a claimant has standing, the High Court considers the merits of the application, the nature of the claimant’s interest and the circumstances of the case. While these rules are rules of court and it is for the courts to interpret them, the question of “standing” is not an act of discretion but an assessment of fact and law.

22 Section 31(3) of the Supreme Court Act 1981 applies to all Judicial Reviews (JR). There are no separate provisions in terms of standing for environmental cases or for cases brought by environmental NGOs.

23 Over the last thirty years, the courts in England and Wales have adopted a liberal approach to the interpretation of “sufficient interest”, and one that is based on a theory of interests as opposed to rights: “What modern public law focuses upon are wrongs - that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the text for standing for public law claimants, which is interest based rather than rights based²”.

24 There are few modern examples of individuals or environmental groups being refused standing and perhaps because the courts are exhibiting a broad approach to sufficient interest, the Government has not been prompted to amend the SCA 1981 to specifically reflect the requirements of the Aarhus Convention. Concern has been expressed that the courts could return to a narrower interpretation of sufficient interest at any time should they wish to do so and, accordingly, the SCA 1981 should be amended to guarantee appropriate access³. However, as yet there has been no imperative for the Government to do so.

25 However, there are two recent UK cases in which standing has been directly addressed in the context of the Aarhus Convention⁴. First, in *Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd*⁵ the appellant was a local resident whose property was affected by the development. He was a member of the Waterloo Community Development Group (“WCDG”) and did not make any representations to the local planning authority at the planning stage or during the public inquiry on the basis that he had asked WCDG to make representations on his behalf. The Court of Appeal rejected his challenge under section 288 of the Town and Country Planning Act 1990 on the merits, but went on to consider whether he would in any event have been a “person aggrieved” for the purpose of a challenge under s.288 of the Town and Country Planning 1990 Act⁶. In his judgment, Pill LJ considered Article 10a of the EIA Directive, *Miljöskyddsörening v Stockholm*⁷ (in which the ECJ considered the rights of “small, locally established environmental protection associations”) and *Commission v Ireland*⁸. He concluded the following principles could be extracted from the

² Lord Justice Sedley, *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (2007).

³ Castle, P., Day, M., and Hatton, C. (2004). *Environmental Justice – Report by the Environmental Justice Project*. page 32. Available at: <http://www.ukela.org/content/doclib/116.pdf> (abgerufen am 19.10.16).

⁴ Information taken from Banner, C. (2015). *The Aarhus Convention – A Guide for UK Lawyers*. See chapter 8 by James Maurici, Barrister. Hart Publishing.

⁵ [2011] 1 P. & C.R. 5.

⁶ Section 288(1) Town and Country Planning Act 1990 states: “If any person—(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds (i) that the order is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that order; or (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—(i) that the action is not within the powers of this Act, or (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section”. See: <http://www.legislation.gov.uk/ukpga/1990/8/section/288> (abgerufen am 19.10.16).

⁷ Case C-263/08. Paragraph 45 states: “. . . the national rules thus established must, first, ensure, ‘wide access to justice’ and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are entitled to bring actions before the competent courts”.

⁸ Case C-427/07. At paragraph 82, the ECJ held: “. . . Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.”

authorities and applied when considering whether a person is aggrieved within the meaning of s.288 of the 1990 Act:

- Wide access to the courts is required under s.288 of the 1990 Act;
- Participation in the planning process which led to the decision sought to be challenged is normally required. What constitutes sufficient participation will depend on the opportunities available and the steps taken;
- There may be situations in which failure to participate is not a bar to challenging a decision;
- A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced. The sufficiency of the interest must be considered;
- This factor is to be assessed objectively - there is a difference between feeling aggrieved and being aggrieved;
- What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288;
- The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures; and
- While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings.

26 In *Ashton*, the judge did not consider the appellant's participation in the planning process sufficient in the circumstances to acquire standing under s.288. The judge made no finding as to whether the appellant would also fail under the interest limb of the test, though it was considered likely that he would do so.

27 This case would now have to be considered in the light of the wide approach to the "person aggrieved test" taken by the Supreme Court in *Walton v Scottish Ministers*⁹. In *Walton*, the Supreme Court held (*Obiter dictum*) that whether somebody was a "person aggrieved" depended on the particular legislation involved and the nature of the complaint made¹⁰. A wide interpretation was appropriate, particularly in the context of statutory planning appeals as the quality of the natural environment was of legitimate concern to everyone. In particular, a person would ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and if their complaint was that the decision was not properly made. The petitioner was, in this case, a "person aggrieved". He had made representations to the ministers, had taken part in the local inquiry, lived in the vicinity of the peripheral road and was an active member of various local environmental organisations. As a participant in the procedure, he was entitled to be concerned about a perceived failure to follow a fair procedure¹¹. The Supreme Court also observed that he would have had standing, as a party with sufficient interest, to raise common law proceedings for JR¹².

⁹ [2012] UKSC 44; [2013] P.T.S.R. 5.

¹⁰ *Sidebotham, Ex p.* (1880) 14 Ch. D. 458, *Arsenal Football Club Ltd v Smith (Valuation Officer)* [1979] A.C. 1 and *Lardner vs. Renfrewshire DC* 1997 S.C. 104 considered.

¹¹ See paragraphs 83-88, 103 and 151-156 of the judgment.

¹² *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46, [2012] 1 A.C. 868 considered (paras 90-97).

28 The issue of standing was raised again in *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change*¹³. *Coedbach* was a limited company formed by local residents to oppose a proposal to build two biomass power stations in Wales. The group applied for a Protected Costs Order (PCO) to support an application for a JR of consent for the power stations granted by the Secretary of State (for which there were ongoing appeals). In the interim, the Secretary of State granted consent under the Electricity Act 1989 for a biomass power station in England and directed that planning permission be deemed to be granted under s. 90(2) of the Town and Country Planning Act 1990. *Coedbach* did not object to the applications for consent and played no part in the process until it issued an application for permission to apply for a JR of the English decision out of a concern that the decision might influence the decisions in respect of the Welsh proposals. The issue of standing arose in the context of the PCO application, and *Coedbach's* attempt to rely on the Aarhus Convention.

29 The judge noted the claimant was a limited company whose aims and objects were to protect a particular local environment and that it played no part in the decision-making process leading to the grant of the consents to the Interested Party. The judge pointed out that *“But for the coincidence that the planning appeals with which the claimant is concerned were in progress at a time when the defendant's decision was made it is clear, in my judgment, that the claimant would have shown no interest in challenging the lawfulness of the defendant's decision. The claimant readily accepts that its sole purpose in challenging the defendant's decision is to prevent it becoming material to the decisions to be made in the planning appeals in which the claimant is an objector”*. As such, the judge concluded the claimant was not a member of the public concerned for the purposes of the EC Public Participation Directive¹⁴ (PPD).

3.2.1.1 The scope of the “public concerned”

30 In *R (Halebank Parish Council) v Halton Borough Council*¹⁵, the judge held (in considering an application for a PCO application) that the Parish Council fell within the definition of the “public” for the purposes of the Aarhus Convention.

31 Similarly, in a lengthily reasoned costs order following an unsuccessful JR claim by the London Borough of Hillingdon (LBH) alleging that the safeguarding directions issued to protect land required for the HS2 railway were adopted in breach of the Strategic Environmental Directive 2004/42/EC¹⁶, the judge held that the LBH was entitled to an Aarhus Convention costs cap under Civil Procedure Rules 45-41-44 and 5.1-5.2 on the basis that the Aarhus costs cap regime in the Rules: *“relates to claims of a particular nature rather than to any particular type or category of claimant”*, and that *“local authorities and other public bodies are not included. Nor is there any qualification in terms of the claimant's means, or its ability to fund the proceedings, or the likelihood of its being able to meet from its own resources any order for costs which might be made in favour of another party”*. The judge held that because the Civil Procedure Rules were *“entirely unambiguous”* on this point, resort to the Aarhus Convention to achieve a strained interpretation of them was not permissible. Nonetheless, he went on to reject the Secretary of State's submission that *“the concept of access to justice for members of the public under article 9 of the Aarhus Convention must necessarily exclude a local authority bringing a claim in the interests of those living in its area”*. He held that neither the Convention, the Compliance Committee's decision in ACCC/C/2012/68 nor the Guide *“preclude the possibility of [Article 9's scope extending*

¹³ [2010] EWHC 2312 (Admin); [2011] 1 Costs L.R. 70.

¹⁴ 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.

¹⁵ [2012] EWHC 1889 (Admin).

¹⁶ For the determination of the substantive issues in the case, see *R (HS2 Action Alliance Ltd.) vs. Secretary of State for Transport* [2014] EWHC 2759 (Admin).

to] one public authority acting in the public interest when it seeks judicial review of a decision made by another authority, even though its own administrative acts may themselves be subject to scrutiny by the court in proceedings brought by an individual claimant.”

32 On appeal (R (HS2 Action Alliance Ltd & London Borough of Hillingdon) v. Secretary of State for Transport¹⁷), the Secretary of State challenged the Order the LBH an Aarhus PCO under the Civil Procedure Rules¹⁸. The Secretary of State submitted: (i) whether a claimant is entitled to an Aarhus PCO was to be determined by reference to whether they are a “*member of the public concerned*” within the meaning of Articles 2 and 9 of the Aarhus Convention, and (ii) a local authority claimant was not a “*member of the public concerned*” within the meaning of Articles 2 and 9 because it fell within the separate definition of a ‘public authority’ under Article 2.

33 The LBH submitted: (i) the provisions of the Civil Procedure Rules were clear that whether a claimant is entitled to an Aarhus PCO falls to be determined by reference to whether the decision challenged is, or is claimed to be within the scope of the Aarhus Convention, (ii) as the Rules were unambiguous on this point, the Aarhus Convention could not be relied upon to achieve a contrary interpretation that would undermine the clear wording of the Rules, and (iii) in any event, the terms “*public authority*” and “*member of the public concerned*” under Articles 2 and 9 of the Convention were not mutually exclusive for all purposes, and a local authority acting not in its capacity as a decision-maker but instead bringing a JR claim in the interests of its constituents¹⁹ was a “*member of the public concerned*” in that context despite the fact that it would be a “*public authority*” when acting in its capacity as a decision-maker on the receiving end of a JR claim.

34 The Court unanimously agreed with LBH’s first and second submissions, and held that since this was sufficient to determine the cross-appeal, it was neither necessary nor appropriate to resolve the dispute as to the proper interpretation of the Convention, particularly since that issue was likely to be resolved in LBH’s pending communications to the Aarhus Compliance Committee against the UK and EU in relation to HS2.

3.2.1.2 Interested parties and interveners

35 An “interested party” is someone directly affected by the outcome of the case. The claimant is under a duty to identify and notify such parties giving them an opportunity to participate in proceedings.

36 In contrast, “interveners” include anyone who has applied to the court to make oral or written representations²⁰. Before 2000, only third parties who opposed the claim could intervene in this way but now anyone, whether opposing or supporting may do so. The court has the discretion to accept interventions and may impose conditions, such as whether the intervention should be by way or written or oral representations. Essentially, the intervener must persuade the court that they have something extra to offer the case often perhaps by putting it in a wider legal and policy context.

37 In the past third party interventions were fairly rare, but more recently they have become far more common, particularly in the higher courts. For instance, between 2005 and 2009 the House of Lords (as was) permitted interventions in 68 out of 310 decisions²¹.

¹⁷ [2015] EWCA Civ 203.

¹⁸ CIVIL PROCEDURE RULES 45.41-45.44 and Practice Direction 45 paragraph 5.1.

¹⁹ Pursuant to its powers under s.222 of the Local Government Act 1972.

²⁰ Civil Procedure Rules Part 54.

²¹ See Justice (2009) To Assist the Court: Third Party Interventions in the UK.

38 The increase in the number of applications to intervene is presumably the reasoning behind the introduction of unhelpful provisions in Part 4 of the Criminal Justice and Courts Act 2015, which seek to expose interveners to costs orders in certain circumstances (see legal costs below).

3.2.2 Standing in Scotland

39 Until 2011, the situation with regard to standing in Scotland was based more upon the protection of rights and was, therefore, significantly more restrictive. Rather than the broad test of “*sufficient interest*”, the standing test in Scotland was “*title and interest*”²². For example, in *Marco McGinty v The Scottish Ministers*, the Outer Court of Session held that while Mr McGinty (who lived approximately four miles from the site of a development proposal he sought to challenge and used the area for bird-watching and recreation) may have been able to establish a title to sue, he could not establish an interest to sue (i.e. he did not have a “*real and legitimate*” or “*real and practical*” interest to bring the proceedings). Lord Brailsford noted that Mr McGinty’s “*only claim was that as a member of the public who used the area for recreational purposes, he was entitled to be consulted*”.

40 However, in 2011 the Supreme Court (whose decisions bind Scottish courts) held in *Axa General Insurance Limited and others v The Lord Advocate and others*²³ (“*Axa*”), that the standing test “*title and interest*”, which is derived from private law, had no place in JR procedures in the field of public law. The Supreme Court advocated that a preferable test was one of “*directly affected*”. *Axa* case was not an environmental case, although its principles would apply to environmental JRs and it is assumed that the claimant in *McGinty* would now be considered to have standing under the new test. Certainly, had not the Supreme indicated a change, the Scottish approach would be vulnerable as being contrary to the principles underlying recent CJEU decision on access to justice²⁴.

41 However, it has been noted that the Scottish courts appear reluctant to apply the new test of sufficient interest as introduced in *Axa*, nor do they seem keen to apply it as fulsomely as is the practice in England and Wales²⁵. For example, in *Walton v Scottish Ministers*²⁶, the Supreme Court robustly criticised the Inner House of the Court of Session, which questioned not only the Petitioner’s standing as a person aggrieved under statutory provisions in the Roads (Scotland) Act 1984, but expressed the view that he would not have had sufficient interest to take a JR on the same matter.

42 Similarly, in September 2013, the Inner House overturned a ruling from the Outer House in *McGinty vs Scottish Ministers*, which had found against the petitioner on standing. While taking *AXA* into account, the Inner House indicated that it considered that petitioners ought to demonstrate sufficient interest on each individual argument in a case, rather than adopting the more expansive interpretation of the English and Welsh courts where legal standing is granted on grounds of public interest and is looked at more generally.

²² Rule 58.8(2) of the Rules of the Court of Session 1994, as amended by SSI 2000/317, provides: “Any person not specified in the first order made under rule 58.7 as a person on whom service requires to be made, and who is directly affected by any issue raised, may apply by motion for leave to enter the process; and if the motion is granted, the provisions of this Chapter shall apply to that person as they apply to a person specified in the first order.” An annotation to this rule in Greens Annotated Rules of the Court of Session printed in the Parliament House Book, vol 2, C 478/4 states: “The motion to enter the process should state the title and interest of the person.” Although the phrase “title and interest” does not appear in rule 58.8(2), it is used in the form of petition for judicial review which is set out in Form 58.6. That form, which is to be read together with Rule of Court 58.6(1), requires paragraph 1 of the petition to state the “designation, title and interest” of the petitioner.

²³ [2011] CSIH 31.

²⁴ See, e.g. Case C-240/09 (the ‘Slovak brown bear case’, and C-115/09 (“Trianel”).

²⁵ Statement made to 7th Meeting of the Task Force on Access to Justice in Geneva on behalf of the Coalition for Access to Justice for the Environment (CAJE) in June 2014.

²⁶ [2012] UKSC 44.

3.2.3 Standing Northern Ireland

43 The standing principles in Northern Ireland are the same as in England and Wales, with the “sufficient interest” test appearing in the relevant court rules²⁷ and the same liberal approach in modern case law. For example in *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety*²⁸ the court cited with approval the passage in the leading text book on Judicial Review, De Smith: “In summary it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the grounds of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of government action”.

Have there been alterations or amendments in your national legal order in order to transform the standing requirements of Art. 9.2/9.3 AC or EC-Directive 2003/35?

44 There have been no amendments to the standing requirements set out in Section 31(3) of the Supreme Court Act 1981 since the passage of the Act. The test of “sufficient interest” has gradually evolved over that thirty year period to be liberal with respect to individuals and environmental NGOs, but there have been no specific alterations or amendments to the Supreme Court Act as a result of either the UK’s ratification of the Aarhus Convention or relevant EU or domestic jurisprudence. There has, however, been change in the case-law pertaining to Scotland following the judgment of the Supreme Court in *Axa General Insurance Limited and others v The Lord Advocate and others*²⁹ (see above).

Please provide a text and an English translation of the national provisions on standing in environmental matters.

45 Section 31(3) of the Supreme Court Act 1981 provides: “No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates”.

Do rights of action allow the courts to control the legality of administrative decisions under all aspects or are they limited to the control of certain areas of the law (especially “environmental law” provisions)? How is the term ‘law relating to the environment’ which is used in Art. 9.3 AC defined or understood in your national legal order? Does it include any law that relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, animal protection, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment?

46 Section 31(3) of the Supreme Court Act 1981 relates to all JRs; there is no specific provision for environmental cases or type of environmental case.

Please give us information about the discussion in your national legal order – if there is any – concerning the implications of the ECJ’s Slovak bear judgment C-240/09.

47 In *Lesoochránárske Zoskupenie VLK*³⁰, the CJEU concluded that while Article 9(3) of the Convention did not have direct effect, it was for the national court “to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention”. In that case a Slovakian association which had the objective of protection of the

²⁷ Order 53, rule 3(5) Rules of the Court of Judicature (Northern Ireland) 1980.

²⁸ [2005] NI 188 (para 45).

²⁹ [2011] CSH 31.

³⁰ Case C-240/09 [2011] 2 C.M.L.R. 43.

environment, applied to the Slovakian Ministry of the Environment to be a party to administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas. This was rejected and this was challenged in the Courts. In those proceedings the Court made a reference to the CJEU as to the effect of Article 9(3) of the Aarhus Convention.

48 The CJEU held that it had jurisdiction to interpret Article 9(3) of the Convention. In this regard it noted that the Public Participation Directive (PPD) does not cover fully the implementation of the obligations resulting from Article 9(3) of the Aarhus Convention and that, consequently, its Member States are responsible for the performance of these obligations. However, the CJEU found it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it. The CJEU held:

“45. It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46. However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 Impact [2008] ECR I2483, paragraphs 44 and 45).

48. On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (Impact, paragraph 46 and the case-law cited).

49. Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50. It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51. Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 Unibet [2007] ECR I2271, paragraph 44, and Impact, paragraph 54).

52. In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to

bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.”

49 Through this case, the CJEU has sought to ensure Member States do not apply an overly restrictive approach to standing, especially for NGOs. The principle was subsequently applied, *obiter dictum*, in a Scottish JR of a grant of planning permission, where the court upheld an argument that it would run counter to Article 9(3) of maximising citizens’ right of access to the courts in environmental cases, to have a domestic rule to the effect that unless a petitioner challenged a conditional resolution of a planning authority, he was precluded from challenging the substantive grant of planning permission³¹.

Please give us also a first impression on the reactions on the ECJ judgments in C-401-403/12 P32 and C-404-405/12 P33

50 In Joined Cases C-401/12 P to C-403/12 P, the applicants applied to the European Commission for an internal review under Article 10 of Regulation 1367/2006³⁴ (“the Regulation”) of the decision to grant the Netherlands an exemption under Directive 2008/50³⁵ on ambient air quality. The Commission rejected the request as inadmissible on the basis that the decision was not a measure of individual scope and, therefore, not an “administrative act” within the meaning of Article 2(1)(g) of Regulation 1367/2006. The NGOs sought the annulment of that decision.

³¹ *Bova v Highland Council* [2011] SCLR 751 per Lord Pentland at paragraphs 54 and 55: “[54] Counsel for the petitioners drew attention to the judgement of the European Court of Justice in *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* (Case C - 240/09) in which it was confirmed that the provisions of the Aarhus Convention had to be regarded as an integral part of the legal order of the European Union. Article 9(3) of the Aarhus Convention was intended to guarantee to citizens of the European Union an effective right of access to national courts for the purpose of challenging inter alia acts and omissions of public authorities which contravened provisions of national law relating to the environment. In paragraph 46 of its judgement the Court of Justice emphasised that the provisions of Article 9(3), although drafted in broad terms, were intended to ensure effective environmental protection. In paragraph 50 the Court went on to say that it was for national courts to interpret national law in a way which, to the fullest extent possible, was consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. It seems to me that it would run counter to the policy (reflected in Article 9(3)) of maximising citizens’ rights of access to the courts in the sphere of environmental law to have a rule which in effect required a petitioner to challenge a conditional resolution of a planning authority under pain of losing the right to challenge the later substantive grant of planning permission which had a concrete impact on his rights. [55] In the circumstances of the present case, I would have been disposed to hold (had the point been a live one) that the petitioners were not barred from pursuing the petition by reason of mora, taciturnity and acquiescence. They acted promptly to seek legal advice after planning permission had been granted; they kept the respondents and the interested parties informed about the progress of their challenge; they did not delay in taking steps to obtain the evidence necessary to support a legal aid application; and once legal aid had been granted, they raised the proceedings quickly. Looking at the detailed timeline produced for the First Hearing, it discloses a picture of intensive activity on the part of the petitioners and their lawyers in seeking to build up their case and take it forward after planning permission had been granted on 5 March 2010. I would have found it impossible, in these circumstances, to have inferred that the petitioners had acquiesced in the grant of planning permission. In my opinion, they cannot be taken to have become barred from challenging that particular decision because of their failure to challenge the earlier resolution.”

³² Judgment available here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161324&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=560384>.

³³ Judgment available here: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=161323&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=560982>.

³⁴ 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.

³⁵ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

51 In joined cases C-404/12 P and C-405/12 P, the applicants sought to annul Commission Regulation 149/2008³⁶ by establishing Annexes II, III and IV setting maximum (pesticides) residue levels for products covered by Annex I. The Commission rejected the request for the same reason given above. The General Court annulled the Commission's decision in both cases.

52 The Applicants argued that Article 10(1) of the Regulation was incompatible with Article 9(3) of the Aarhus Convention because it restricts the categories of acts that can be challenged within the administrative review procedure to "acts of individual scope".

53 The General Court concluded that as the Regulation had been adopted to meet the EU's obligations under Article 9(3) of the Aarhus Convention, it follows that Article 10(1) of the Regulation (in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope") is incompatible with Article 9(3) of the Aarhus Convention. The Court therefore annulled the Commission's decisions. The Commission, the Council and the Parliament appealed the ruling to the Grand Chamber.

54 The Council (supported by the Parliament and the Commission) sought to rely on case-law maintaining that the provisions of an international treaty must be unconditional and sufficiently precise to be relied upon in support of an action for annulment of an act of secondary EU law³⁷. The Grand Chamber held that Article 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligations capable of directly regulating the legal position of individuals and rejected the application of the *Fediol* and the *Nakajima* cases. Article 10(1) of the Regulation neither made direct reference to specific provisions of the Aarhus Convention, nor conferred rights on individuals to rely on Article 9(3). Moreover, Article 10(1) did not implement specific obligations stemming from Article 9(3) of the Convention since the parties to the Convention had a broad margin of discretion when defining the rules for the implementation of "*the administrative or judicial procedures*". Finally, the Court held that it cannot be considered that, by adopting the Regulation, the EU intended to implement obligations deriving from Article 9(3) of the Aarhus Convention "*with respect to national administrative or judicial procedures, which as EU law now stands, fall primarily within the scope of member State law*", referring in this respect to the Slovak brown bear case³⁸.

55 These rulings are very disappointing. In failing to address the compatibility of Article 10(1) of the Regulation with the Aarhus Convention (with the effect that very few decisions adopted in environmental matters can be challenged), the Court has missed a long overdue opportunity to align retrospective CJEU case-law emanating from the *Plaumann*³⁹ case of 1963 with the requirements of the Aarhus Convention, to which all of the Member States and the EU in its own right are contracting Parties. They are also somewhat surprising in light of international scrutiny on this issue and the CJEU's increasing willingness to reflect the findings of the Aarhus Convention Compliance Committee in its own judgments.

Is Art. 9.3 AC in your national legal order considered to give a right of action mainly or only for NGOs or for individuals as well? Give a general overview on how the standing criteria for individu-

³⁶ Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto.

³⁷ Case 70/87 (*Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities*) and Case C-69/89 (*Nakajima All Precision Co. Ltd v Council of the European Communities*).

³⁸ Case C-240/09 (*Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*), paragraphs 41 and 47.

³⁹ Case 25-62 (*Plaumann & Co. v Commission of the European Economic Community*).

als from the public concerned are applied in environmental cases in your legal order. Does the individual have to show a specific interest in the decision at stake, or does it suffice that s/he lives in the vicinity of the (proposed) activity?

56 As discussed above, section 31(3) of the Supreme Court Act 1981 does not distinguish between individuals and NGOs. The more restrictive approach to standing in Scotland, in which the petitioner had to demonstrate “title and interest” to sue, has been modified following the Supreme Court ruling in *Axa General Insurance Limited and others v The Lord Advocate and others*⁴⁰.

Does your national legal order differentiate between the standing criteria for individuals and for NGOs? If yes, are there special rules for this differentiation in the field of environmental law? Do the same rules apply to individuals and NGOs of other Member States / Parties to the AC?

57 There is no differentiation between the standing criteria for individuals and NGOs. Similarly, there are no restrictions in the Civil Procedure Rules (England and Wales) regarding geographical scope. Thus, in theory, foreign environmental individuals and NGOs are not prohibited from applying for JR, providing they can demonstrate sufficient interest in the matter to which the application relates. Thus, there was no bar to an Irish NGO (An Taisce) applying for a JR of the decision of the Secretary of State to make an order granting development consent for the construction of a European pressurised reactor (EPR) nuclear power station at Hinkley Point in Somerset⁴¹. However, in such cases, a court is more likely to exercise its discretion to require greater provision for security of costs before the action takes place⁴².

⁴⁰ [2011] CSIH 31.

⁴¹ R (on the application of An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change & NNB Generation Co Ltd (Interested Party) [2014] EWCA Civ 1111.

⁴² CIVIL PROCEDURE RULES 25.12.

3.3 The recognition of e-NGOs

How does the formal structure of an e-NGO determine its access to justice in your national legal order?

Are e-NGOs or citizens' initiatives obliged to be recognized by authorities before they have legal standing in environmental procedures? What requirements need to be met? Did any criteria in the recognition procedure change since 2012?

Are there any special requirements on the organization of e-NGOs and, if so, are they comparable with Section 3 para 1 UmwRG*? [Is there any discussion on the compliance of these requirements?]

58 The Supreme Court Act 1981 merely states that an applicant must have “*a sufficient interest in the matter to which the application relates*”. As such, there is no legislative requirement as to the formal structure or standing of an NGO or community group relevant to the question of standing comparable with section 3 of the UmwRG. There have been no changes to the legislative position since 1981.

59 Local residents can form a group to challenge a decision and the courts do not require the body to have a distinct legal entity. Such groups may be unincorporated or incorporated. The unincorporated association form is usually chosen when a number of individuals agree or 'contract' to come together for a common purpose. They are relatively straightforward to run, cost nothing to set up and do not need to register with, or be regulated by, either Companies House or the Financial Services Authority. However, they have no separate legal identity so their members carry the risk of personal liability. The limited company is an organisational structure which gives limited liability to its members, and the courts have accepted that a limited company may be formed to bring a case in order to limit exposure to costs.

60 An association, whether incorporated or not, may therefore be able to bring an action on behalf of its members but amalgamation as such does not provide enhanced interest – “*an aggregate of individuals each of whom has no interest cannot of itself have an interest*”⁴³, provided that that association represents interests which are relevant to its claim for JR.

⁴³ Lord Wilberforce in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617.

3.4 Preclusion of objections

Does your national legal order include restrictions on access to justice for e-NGOs, which are comparable to the “material” preclusion (materielle Präklusion) of section 2 para 3 UmwRG? If so, how is this evaluated in the professional legal discourse (relevant literature/case law) with special regard to its conformity with EU law and the AC?

Which requirements do e-NGOs have to meet in your national legal order to be able to participate in planning and licensing procedures?

61 The UK has a great tradition and a well-developed system of consultations with citizens and civil society, which provides that anyone can respond to a planning consultation. In addition to individuals who might be directly affected by a planning application, community groups and specific interest groups (national as well as local in some cases) can provide representations on planning applications.

62 The importance of improving the partnership between government and civil society organisations was first recognised in the “*Compact on Relations between Government and the Voluntary and Community Sector*”. The Compact was adopted in 1998 and an annual report is issued every year on its implementation in addition to an annual meeting between the Government and representatives of the community sector. The Renewed Compact⁴⁴ is an agreement between the Government, and their associated Non-Departmental Public Bodies, Arms-Length Bodies and Executive Agencies, and civil society organisations⁴⁵ (CSOs) in England. The agreement aims to ensure that the Government and CSOs work effectively in partnership to achieve common goals and outcomes for the benefit of communities and citizens in England.

63 When determining planning applications, a Local Planning Authorities (LPA) must have regard to the provisions of the development plan (so far as material to the application) and to any other material considerations^{46 47}.

64 Section 78 of the Town and Country Planning Act 1990 provides the applicant with a right to appeal a refusal of planning permission (or the imposition of conditions) to the Secretary of State within 12 weeks of the Decision Notice⁴⁸. Anyone else, including those who objected to a planning application (so-called interested or third parties), have no equivalent right of appeal. Their only recourse is to apply to the High Court for a Judicial Review of the LPA’s decision, subject to the usual rules on standing under s. 31(3) of the Supreme Court Act 1981.

65 The Secretary of State determines the format of an appeal and takes account of the following information:

- the material submitted to the local planning authority – including the views of interested parties;

⁴⁴ Available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214617/the_compact.pdf (abgerufen am 19.10.16).

⁴⁵ Charities, social enterprises and voluntary and community groups.

⁴⁶ Section 70(2) Town and Country Planning Act 1990 and section 38(6) Planning and Compulsory Purchase Act 2004

⁴⁷ A material planning consideration is one which is relevant to making the planning decision in question. The scope of what can constitute a material consideration is very wide. In general the courts have held that planning is concerned with land use in the public interest, so that the protection of purely private interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations. Examples of material planning considerations can be found here: <http://www.rtpi.org.uk/media/686895/Material-Planning-Considerations.pdf> (abgerufen am 19.10.16).

⁴⁸ See: <http://www.legislation.gov.uk/ukpga/1990/8/section/78> (abgerufen am 19.10.16).

- any relevant legislation and policies, including changes to legislation, any new Government policy and any new or emerging development plan policies since the local planning authority's decision was issued; and
- any other matters that are material to the appeal.

66 Any third party wishing to take a very active part in an inquiry must write to the Planning Inspectorate requesting "Rule 6" status⁴⁹. Where an interested party would like their views to be taken into account they must send representations to the Planning Inspectorate within 6 weeks of the start date of the appeal⁵⁰. Representations submitted after this date will not normally be accepted. An interested party can submit views irrespective of whether they commented at the application stage (equally, submissions can be made if the third party did submit views at the application stage but has additional points to make).

67 Section 288 of the Town and Country Planning Act 1990 provides a right for an "aggrieved person" to appeal the Decision of a Planning Inspector to the High Court.

"s.288 Proceedings for questioning the validity of other orders, decisions and directions.

(1) If any person

- a. is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—*
 - i. that the order is not within the powers of this Act, or*
 - ii. that any of the relevant requirements have not been complied with in relation to that order; or.*
- b. is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—*
 - i. that the action is not within the powers of this Act, or*
 - ii. that any of the relevant requirements have not been complied with in relation to that action,*

he may make an application to the High Court under this section".

68 The TCPA 1990 does not define an "aggrieved person", but for the relevant case-law on this point, please see the discussion on *Ashton v Secretary of State for Communities and Local Government and Coin Street Community Builders Ltd*⁵¹, above.

Do they have the right to participate only in administrative procedures with a mandatory EIA or can they participate in other procedures as well?

69 Environmental NGOs are not precluded from participating in any planning (administrative) procedure.

Do the authorities directly inform the e-NGOs about projects and administrative procedures that may have effects on the environment? If not: How and where can e-NGOs get information about those upcoming procedures? How do they get access to the relevant information and planning documents concerning the projects?

⁴⁹ Further information about Rule 6 status can be found here: http://www.planningportal.gov.uk/uploads/pins/guide_rule_6.pdf (abgerufen am 19.10.16).

⁵⁰ Further information about planning appeals can be found here: http://www.planningportal.gov.uk/uploads/pins/procedural_guide_planning_appeals.pdf (abgerufen am 19.10.16) and <http://www.planningportal.gov.uk/uploads/pins/taking-part-planning-written.pdf> (abgerufen am 19.10.2016).

⁵¹ [2011] 1 P. & C.R. 5.

70 The first an environmental NGO may hear about a proposal for a new development is often through the developer's own public consultation process.

71 However, following receipt of a formal planning application, the Local Planning Authority (LPA) will display public notices and/or write to homes and businesses near the proposed site inviting comments. Most LPAs also publish details online, with larger developments also advertised in local newspapers. The public can view the details of a proposal – including architectural drawings – at the LPA offices.

72 LPAs often consult a large number of organisations before reaching a decision. Planning law requires some bodies to be consulted on certain planning applications. Such bodies (referred to as 'statutory consultees') are under a duty to provide advice on the proposal in question. They include organisations such as the Environment Agency, Forestry Commission and Natural England⁵². In addition to statutory consultees, LPAs must also consider whether there are planning policy reasons to engage other consultees who – whilst not designated in law – are likely to have an interest in a proposed development ('non-statutory consultees⁵³'). To help applicants develop their proposals, LPAs are encouraged to produce and publish a locally specific list of non-statutory consultees.

73 LPAs have discretion about how they inform communities and other interested parties about planning applications⁵⁴ but they often set out in detail how they will consult the community in a Statement of Community Involvement prepared under Section 18 of the Planning and Compulsory Purchase Act 2004⁵⁵. Consultation would normally include parish councils (who may have their own informal parish plans which are not included in the statutory scheme) and established environmental NGOs, such as the local County Wildlife Trust⁵⁶ and regional groups of the Campaign to Protect Rural England⁵⁷, the RSPB⁵⁸ and/or Friends of the Earth, with expert knowledge and data about the local area.

Are there any time limits to make an objection or give a statement in your national legal order? Will objections passing this time limit be excluded in the administrative procedure and the decision on the development consent of a project? Is an objection that has been made "out of time" also precluded in any legal proceeding against the decision on the development consent ("material" preclusion as described above)? Are there any specific requirements concerning the content of objections by e-NGOs?

74 Local planning authorities are required to undertake a formal period of public consultation, prior to deciding a planning application (see Article 13 of the Development Management Procedure Order⁵⁹ (as amended)). There are separate arrangements for listed building and conservation area consent set out in Regulation 5 of the Listed Building and Conservation Area Regulations⁶⁰ (as amended).

⁵² A full list of statutory consultees can be found here: <http://planningguidance.planningportal.gov.uk/blog/guidance/consultation-and-pre-decision-matters/table-2-statutory-consultees-on-applications-for-planning-permission-and-heritage-applications/> (abgerufen am 19.10.16).

⁵³ Organisations identified in national policy and guidance can be found here: <http://planningguidance.planningportal.gov.uk/blog/guidance/consultation-and-pre-decision-matters/table-3-non-statutory-consultees-identified-in-national-planning-policy-or-guidance/> (abgerufen am 19.10.16).

⁵⁴ See Table 1 of the Article 13 of the Development Management Procedure Order (as amended) for minimum requirements: <http://www.legislation.gov.uk/ukxi/2010/2184/article/13/made> (abgerufen am 19.10.16).

⁵⁵ See: <http://www.legislation.gov.uk/ukpga/2004/5/section/18> (abgerufen am 19.10.16).

⁵⁶ See <http://www.wildlifetrusts.org/> (abgerufen am 19.10.16).

⁵⁷ See <http://www.CivilProcedureRulese.org.uk/> (abgerufen am 19.10.16).

⁵⁸ See <http://www.rspb.org.uk/> (abgerufen am 19.10.16).

⁵⁹ See <http://www.legislation.gov.uk/ukxi/2010/2184/article/13/made> (abgerufen am 19.10.16).

⁶⁰ See <http://www.legislation.gov.uk/ukxi/1990/1519/regulation/5/made> (abgerufen am 19.10.16).

75 Local Authorities have discretion about how they inform communities and other interested parties about planning applications. Article 13 of the Development Management Procedure Order (as amended) sets out the minimum statutory requirements⁶¹. The time period for commenting on a planning application are set out in the publicity accompanying a planning application. This will be not less than 21 days, or 14 days where a notice is published in a newspaper.

76 Anyone can respond to a planning consultation. In addition to individuals who might be directly affected by a planning application, community groups and specific interest groups (national as well as local in some cases) may wish to make representations. Once the consultation period has concluded a local planning authority can proceed to determine the planning application. Thus, to *ensure* comments are taken into account comments must be made before the expiry of the statutory deadline.

77 The public can still submit comments on planning applications after the expiry of the consultation period. However, as the decision can be made any time after the consultation period has expired it is important to do so as quickly as possible and it is not always certain that late comments will be taken into account. The public cannot comment on decided applications.

78 Most planning applications are decided within eight weeks, unless they are unusually large or complex - in which case the time limit is extended to 13 weeks.

Is there a discourse (relevant literature / case law) on the participation procedure and the possibilities to make objections for e-NGOs with particular regard to the conformity with EU-Law and the AC in your country?

79 Concerns have been raised about the absence of a third party right of appeal in the town and country planning system⁶², the impact of new Cabinet Office Consultation Principles⁶³ and recent approaches to public participation on transport (such as the High Speed railway 2) and energy infrastructure planning⁶⁴. However, as a general rule the UK's approach to public participation in administrative decision-making (including environmental NGOs) is broadly satisfactory.

⁶¹ Supra, n. 58, see Table 1.

⁶² See: <http://www.CivilProcedureRulese.org.uk/resources/housing-and-planning/planning/item/1908-third-party-rights-of-appeal-in-planning>. (abgerufen am 19.10.16).

⁶³ See Banner, C. (2015) The Aarhus Convention. A Guide for UK Lawyers. Chapter 9, page 196 onwards. Hart publishing

⁶⁴ For a discussion on the latter see Heffron, R.J. and Haynes, P. (2014). 'Challenges to the Aarhus Convention: Public Participation in the Energy Planning Process in the United Kingdom', Journal of Contemporary European Research. 10(2), pp. 236-247. Available at: <http://www.jcer.net/index.php/jcer/article/viewFile/561/462> (abgerufen am 19.10.16).

3.5 Intensity of the Judicial Review (gerichtliche Kontrolldichte)

What are the requirements and limitations as to the intensity and the scope of judicial review in your national legal order in comparison to German law? Are these limitations in conformity with EU law?

Please give an overview on the limitations/restrictions of the “intensity of the judicial review” in your national legal order with special regard on the limitations in environmental and planning law. Do Courts have different approaches on e-NGOs’ lawsuits and citizens lawsuits?

Is there a discourse (relevant literature/case law) on the limitations of the “intensity of the judicial review” with regard to the conformity with the requirements in EU-Law of both effective justice in environmental matters and effective implementation of certain environmental protection standards (e.g. requirements concerning protected animals according to the Habitats-Directive 92/43/EEC)?

Introduction

80 Article 9(2) of the Aarhus Convention requires contracting Parties to ensure that members of the public concerned have access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of Article 6 of the Convention.

81 The Aarhus wording is imported into Article 10a of the EC Directive on Environmental Impact Assessment (EIA) via Article 7 of the EC Public Participation Directive (PPD). Article 9(3) of the Convention does not refer specifically to either substantive or procedural legality, instead referring to “acts or omissions [...] which contravene its national law relating to the environment”. As such, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision – be it procedural or substantive – in national law relating to the environment.

3.5.1 The scope of the review in the UK

82 While Judicial Review is ostensibly a process whereby the procedural *and* substantive legality of a decision can be challenged, in practice the main way in which substantive legality can be contested in JR is by applying the *Wednesbury* unreasonableness test where an authority has made a judgment on substantive issues. *Wednesbury* unreasonableness is the usual test for judicial review of administrative action in English law in the absence of illegality or procedural impropriety. In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*⁶⁵, the English court set out the standard of unreasonableness of public-body decisions that would make them liable to be quashed on JR. This came to be known as *Wednesbury* unreasonableness and was later articulated in *Council of Civil Service Unions v Minister for the Civil Service*⁶⁶ by Lord Diplock as a decision: “So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”. It essentially means the court does not intervene and set aside an administrative decision unless it is perverse⁶⁷.

83 The courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker, but the *Wednesbury* unreasonable test is, in practice, very difficult to satisfy. The test has, in fact, been under sustained attack for several decades. Lord Lester and Jeffrey Jowell argued in a seminal article⁶⁸ that *Wednesbury* unreasonableness has three serious flaws. First, to label a decision

⁶⁵ [1948] 1 KB 223[1].

⁶⁶ A.C. 374, 410 per Lord Diplock.

⁶⁷ Arden, Lady Justice. (2013). Proportionality: the way ahead? Public Law P.L. (2013) July Pages 498-518.

⁶⁸ Lester, Lord Lester and Jowell, Jeffrey. Beyond *Wednesbury*: Substantive Principles of Administrative Law. [1987] P.L. 368.

“unreasonable” is conclusory and does not give an intellectually honest reason for reaching the conclusion of unreasonableness. This “*naturally encourages suspicion that prejudice or policy may be hiding beneath Wednesbury’s ample cloak*”⁶⁹. Secondly, *Wednesbury* is unrealistic, because reviewing courts actually sometimes quash decisions that are “*coldly rational*”⁷⁰. Building on Lester and Jowell’s second criticism, it has been argued that continued invocation of *Wednesbury* borders on dishonesty: “*If the courts really were to restrict rationality review to such manifest absurdity then we would all be out of business, in this area at least. There would be almost no successful challenges of this kind*”⁷¹. Thirdly, *Wednesbury* is: “*confusing and tautologous ... It allows the courts to interfere with decisions that are unreasonable, and then defines an unreasonable decision as one which no reasonable authority would take*”⁷².

84 Ultimately, Lester and Jowell concluded: “*the Wednesbury test, because of its vagueness, allows judges to obscure their social and economic preferences more easily than would be possible were they to be guided by established legal principle*”⁷³.

85 There is no “special provision” in the common law for environmental cases – the threshold for *Wednesbury* unreasonableness is applied uniformly throughout.

86 It has been noted that the primary limitation of JR in England and Wales is its focus on procedural, rather than substantive, impropriety⁷⁴. This issue was also discussed by the Aarhus Compliance Committee in Communication ACCC/C/2008/C33⁷⁵. The Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) of the Convention including, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. Particular reference was made to criticisms by the House of Lords⁷⁶ and the ECHR⁷⁷, concerning the very high threshold for review imposed by the *Wednesbury* test. While the Committee, on the basis of the information before it in C33, did not go as far as to find the UK in non-compliance with Article 9(2) or (3), it did suggest (perhaps picking up on submissions made by the UK Government during the hearing) that the application of the “proportionality principle” by the courts in England and Wales could provide a more appropriate standard of review in cases within the scope of the Aarhus Convention.

87 However, the domestic authorities do not appear to share the concerns of the Aarhus Compliance Committee and others. In *Evans*⁷⁸, the Court of Appeal confirmed that *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning EIA screening decisions.

⁶⁹ Ibid, 368, 372.

⁷⁰ Ibid.

⁷¹ Ellis, Evelyn (ed.) (1999). *Unreasonableness and Proportionality in UK Law. The Principle of Proportionality in the Laws of Europe* (Oxford: Hart) p.95.

⁷² Lester, Lord and Jowell, Jeffrey. [1987] *Beyond Wednesbury: Substantive Principles of Administrative Law*. P.L. 368, 372.

⁷³ Ibid, 368, 381.

⁷⁴ Donson, F. and Lee, R. (1996). *Environmental Protection: Public or Private Law*. 1 *Judicial Review* 56.

⁷⁵ See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> (abgerufen am 19.10.16), paragraphs 121-125.

⁷⁶ See, for example, Lord Cooke in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 paragraph 32.

⁷⁷ *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, paragraph 138.

⁷⁸ *Evans -v- Secretary of State for Communities and Local Government* [2013] EWCA Civ 115.

88 In another case called *Evans*⁷⁹ (“*Evans II*”), the English Courts addressed whether JR offered an intensity of review consistent with Article 9(4) of the Aarhus Convention⁸⁰. The claimant at first instance drew attention to the Compliance Committee’s concerns that the *Wednesbury* test provides an inadequate standard of review. The judge held:

130 I do not think the provisions of article 9 of the Aarhus Convention really tell against that conclusion. On the contrary, article 9(1) in general terms, so far as concerns requests under article 4 (access to environmental information), requires “access to a review procedure” by an independent and impartial body established by law. That generality of approach is reflected in article 6(2) of the Directive itself.

131 It is true that article 9(2) of the Aarhus Convention requires access to such a body “to challenge the substantive and procedural legality of any decision”: albeit that is dealing specifically with requests under article 6 (public participation in decisions on specific activities) and such language is not in fact deployed in article 9(1) of the Aarhus Convention. It is also true that the Implementation Guide to the Aarhus Convention 2nd ed (2013), p 199 asserts that the entitlement to challenge the “substantive and procedural legality” is “implicit” in article 9(1) also; and the 2011 recommendations of the Implementation Committee had indicated concern as to whether a judicial review procedure, of the model adopted under the law of England and Wales, meet the standards of review said to be required by the Aarhus Convention with regard to substantive legality. But the point was tentatively put by the Implementation Committee: and there was, at all events, no finding that the United Kingdom was in non-compliance with article 9 of the Aarhus Convention: see para 127. Moreover, while the Implementation Guide itself may properly be taken into account, it is not binding: any more than are the views of the Implementation Committee.

*132 Mr Swift cited R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114, a case on the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293). Among other things, in that case, article 9 of the Aarhus Convention fell to be considered, including the suggested need for assessment by a court of the substantive and procedural legality of an environmental decision, at para 33. It was observed by Beatson LJ, at para 37 of his judgment (with which Sir Stanley Burnton and Patten LJ agreed), that the expressed concerns of the Aarhus Convention Compliance Committee did not bind the English courts and in any event did not “identify the variations in the intensity of *Wednesbury* review that reflect the nature of the interests affected”.*

133 As may be gathered from what I have previously said, I attach considerable importance to the principle reaffirmed by Beatson LJ in this last sentence. Judicial review is a procedure consistent with the requirements of article 9(4) of the Aarhus Convention. It is a flexible procedure, enabling an appropriate intensity of review where such intensity of review is called for: see also the analogous reasoning of the Court of Appeal in T-Mobile (UK) Ltd v Office of Communications [2009] 1 WLR 1565—a competition case dealing with Parliament and Council Directive 2002/21/EC. In the present kind of case, close scrutiny by the court is called for: and such close scrutiny of the reasons given for the accountable person’s opinion must require—and has here required—a close scrutiny by the court of the initial decision to withhold. Indeed, if there were substantive or procedural illegality or irregularity in the original decision such a review by the court, under section 5381, should reveal it. In my view, that amply complies with the requirements of article 6(2) of Directive 2003/4.”

⁷⁹ R (on the application of Rob Evans) v (1) Attorney General (2) Information Commissioner [2013] EWHC 1960 (Admin).

⁸⁰ *Ibid*, paragraphs 130-138.

⁸¹ Section 53 of the Freedom of Information Act 2000 (the Act) available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/53> (abgerufen am 19.10.16).

89 Thus, the judge at first instance held JR to be a sufficiently flexible procedure to enable an appropriate intensity of review where such intensity of review is called for. On Appeal in *Evans II*⁸², the Court of Appeal addressed the slightly different question of the intensity of review required under the EC Directive on Access to Information⁸³ (which requires a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law):

*"Nature of the review required by article 6(2)*⁸⁴

68 We heard a good deal of argument on the question whether article 6(2) requires a full reconsideration of the merits by the court de novo or whether some form of judicial review is sufficient. I have reached a decision on the third issue without addressing this question. In deference to the submissions of counsel, however, it is right that I should say something about it. Miss Rose relies on the statement of Sullivan LJ in the Department for the Environment case [2012] PTSR 1299 (see para 42 above) and submits that article 6(2) requires the court to consider de novo for itself the propriety of releasing the information ...

69 Mr Swift says that we should prefer the approach of Beatson LJ in R (Evans) v Secretary of State for Communities and Local Government [2013] JPL 1027. This case involved a different Directive (the "Environmental Impact Assessment Directive": Council Directive 85/337/EEC as subsequently amended) which concerned environmental impact assessments and which contained provisions derived from the Aarhus Convention. Beatson LJ (with whom the other members of the court agreed) decided that orthodox Wednesbury review is compatible with the requirements of the "access to justice" provisions in the Directive. But since (i) the case involves a different Directive and (ii) the statement of Sullivan LJ is binding on us, I shall not lengthen this judgment by elaborating on the differences between the two Directives to which Miss Rose drew our attention.

73 If I had considered that it was necessary to decide what kind of review is required by article 6(2), I would have been inclined to hold that it was not acte clair and to make a reference to the Court of Justice. It seems to me that it is not clear that in relation to article 6(2) the approach of Sullivan LJ in the Department for the Environment case [2012] PTSR 1299 is to be preferred to that of Beatson LJ in the Evans case [2013] JPL 1027. The policy imperatives of the Aarhus Convention and the Directive are clear enough in broad terms. The difficult question is whether a Wednesbury review is sufficiently flexible to meet the requirements of article 6(2)".

90 The Supreme Court handed down its judgment in *Evans II* on 26th March 2015⁸⁵. While the noble Lords did not express a definitive view on the "difficult question" of "whether a Wednesbury review

⁸² R (on the application of Evans) (Appellant) v Attorney General (Respondent) & Information Commissioner (Interested Party) [2014] EWCA Civ 254.

⁸³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

⁸⁴ Article 6(1) of EC Directive 2003/4/EC states: "Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive". Article 6(2) states: "In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse".

⁸⁵ See: https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_judgment.pdf (abgerufen am 19.10.16).

is sufficiently flexible to meet the requirements of Article 6(2)⁸⁶ [of EC Directive 2003/4/EC⁸⁷], grave doubts were expressed about the extent to which JR represents a suitable standard of review. In particular, Lord Wilson noted that it “remains difficult to shoe-horn the facility for judicial review into the requisite review procedure⁸⁸”.

91 Additionally, Lord Neuberger held:

“105 ... In that connection, Mr Eadie contends that the fact that a section 53 certificate can be challenged by a domestic judicial review satisfies the requirements of articles 6.2 and 6.3, as the court’s decision on a judicial review is “final” and “binding on the public authority concerned”. A domestic judicial review does not normally involve reconsideration of the competing arguments or “merits”. However, it seems to me clear that article 6.2, with its stipulation that the court should be able to “review” the “acts and omissions of the public authority concerned”, requires a full “merits” review. Even assuming in the Attorney General’s favour that, on a domestic judicial review, the court could, unusually, consider the merits, it gets him nowhere at least in a case such as this, where a tribunal has ruled that the information should be disclosed and the certificate is merely based on the fact that he disagrees with the final decision of the Upper Tribunal...

92 And Lord Wilson:

185. The fifth recital to the Directive explains that its purpose was to make EU law consistent with the Aarhus Convention dated 25 June 1998 (“the Convention”), the subjects of which, in the words of its title, were “access to information, public participation in decision-making and access to justice in environmental matters”. So access to justice was the third pillar of the Convention and was the subject of detailed provision in its article 9, paragraph 1 of which was the subject of efficient transposition into article 6 of the Directive. But article 6 should not be subject to the intricate analysis apt to a domestic statute. It required the provision to Mr Evans of a right to invoke two robust, independent inquiries into whether the refusal to give him the environmental information was in accordance with the Directive. But, while they are obliged to achieve the result envisaged by a directive, and in particular to provide effective judicial protection for an individual’s exercise of such rights as it confers, member states have “the freedom to choose the ways and means of ensuring that a directive is implemented”: paras 40 to 47 of the judgment of the Grand Chamber of the ECJ in the Impact case, cited at para 106 above.

187. The Attorney General seeks a ruling that the facility for judicial review of a section 53 certificate satisfies the paragraph 2 requirement for a review procedure before a court of law. He may in part be motivated to do so by his wish to preserve the facility for a certificate to be given following a decision notice served by the Commissioner and prior to any appeal. If in such circumstances the paragraph 2 requirement is to be satisfied, it can be satisfied only by the facility for the applicant to seek judicial review of the section 53 certificate. At all events the Attorney General cites the decision of the Court of Appeal in T-Mobile (UK) Ltd v Office of Communications [2008] EWCA Civ 1373, [2009] 1 WLR 1565, in which an article of an EU directive required provision of an “effective appeal mechanism” in which “the merits of the case are duly taken into account”. Although ultimately there was no argument to the contrary, Jacob LJ concluded, at para 19, that the jurisdiction to conduct a judicial review was flexible enough to accommodate whatever standard the article required; and in paras 20 to 29 he convincingly set out the grounds of his conclusion. Nevertheless it remains difficult to shoe-horn the facility for judicial review into the requisite

⁸⁶ See R (on the application of Evans) (Appellant) v Attorney General (Respondent) & Information Commissioner (Interested Party) [2014] EWCA Civ 254, paragraph 73.

⁸⁷ Article 6(2) of the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC implementing Article 9(1) Aarhus Convention.

⁸⁸ See Supreme Court judgment paragraph 187.

review procedure. However intense the judicial scrutiny, the focus of the judicial review can only be upon whether the accountable person had formed his opinion on reasonable grounds; but I agree with the Court of Appeal that paragraph 2 requires that the focus of the review procedure should be upon whether refusal of the information was in accordance with the Directive. Grave doubts about whether, in the case of environmental information, judicial review can satisfy the paragraph 2 requirement should lead an accountable person to be even more cautious before deciding to give a certificate under section 53 in relation to a decision notice served by the Commissioner rather than to appeal against it to the First-tier Tribunal (own emphasis added).

93 Thus, significant doubts have been expressed by the Supreme Court as to the extent to which JR may be able to satisfy the intensity of review required by both Article 9(2) of the Aarhus Convention and Article 6(2) of EC Directive 2003/4/EC on Public Access to information.

94 In Scotland, the Inner House set out its view on the scope of JR in fairly bleak terms in the case of *Viking*⁸⁹. The case concerned a grant of permission by the Scottish Ministers for the Viking Wind Farm on central Shetland in 2012. The Petitioner (Sustainable Shetland) applied for a JR, seeking reduction of the Scottish Ministers' decision on the grounds, *inter alia*, that they had failed to take into account their duties under the EC Wild Birds Directive⁹⁰ in respect of a species of bird called the whimbrel. In October 2013, Lady Clark of the Outer House held the Scottish Ministers had failed to comply with their obligations under the Birds Directive. In 2014, the Inner House overturned Lady Clark's Opinion on the basis that her jurisdiction should be confined to an examination as to whether the grant of consent had been a lawful decision as opposed to whether the Scottish Ministers had demonstrated a proper understanding of, and compliance with, the Directive. The Inner House held that the obligation to comply with the Birds Directive is an entirely factual question for the Scottish Ministers to determine and that "*once that conclusion was arrived at, the Wild Birds Directive, and any associated problems of interpretation and application, fell out of the picture as far as this proposal was concerned*"⁹¹.

95 This judgment raises a number of concerns. As the Scottish Minister's decision letter confirmed a divergence in view as to the potential effect of the wind farm on the UK whimbrel population (SNH as statutory advisers (and RSPB) believing the impact to be nationally significant and the Scottish Ministers holding it to be less so), it is arguable that it was appropriate, if not necessary, for Lady Clark to examine whether the Ministers had properly understood or interpreted their duties under the Birds Directive.

96 The case went to the Supreme Court⁹², which considered the respective approach of the courts below - the Lord Ordinary on the one hand requiring the Scottish Ministers to, in effect, conduct a full review of their functions under the Birds Directive and that of the Inner House - that the Directive was but one of a number of material considerations to be taken into account in reaching a lawful decision whether to grant consent under the Electricity Act 1989.

97 Lord Carnwath held that, in principle, the Inner House was "*clearly right*" in that the ministers' functions in this case derived, not from the Birds Directive, but from their statutory duty to consider a proposal for development under the Electricity Act 1989. However, the noble Lord also held that it did

⁸⁹ *Sustainable Scotland v The Scottish Ministers* [2014] CSIH 60 – see: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=cdc395a6-8980-69d2-b500-ff0000d74aa7> (abgerufen am 19.10.16).

⁹⁰ Directive 2009/147/EC.

⁹¹ *Supra*, n.43, paragraphs 23-27.

⁹² *Sustainable Shetland (Appellant) v The Scottish Ministers and another (Respondents) (Scotland)* [2015] UKSC 4. See https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0216_judgment.pdf (abgerufen am 19.10.16).

not follow that, once it had been decided that the impact on whimbrel population was not of significance, the Directive (in the words of the Inner House) “*fell out of the picture*”. If there had been evidence that the proposal, while having no significant effect in itself on the whimbrel population, might prejudice the fulfilment of the ministers’ duties under the Directive, this would have been a potential objection which required consideration. As such, while the Supreme Court considered the approach of the Inner House too extreme, it refrained from providing an explicit view on whether JR fulfils the requirements of Article 9(2) of the Convention.

98 Most recently, in *RSPB v Defra*⁹³, Lord Justice Sullivan neatly summarised the limitations of JR as a review mechanism in environmental cases. When examining which population of Black-Headed gulls on the Ribble Estuary Special Protection Area (SPA) gave the most representative figure, the Secretary of State had discounted a 1999 figure of 14,300 individuals. Sullivan, LJ commented that ascertaining the baseline figure for the assemblage was not simply a mathematical exercise, it required the Secretary of State to exercise his planning judgment as to which counts would give the most representative figure. The Secretary of State had given reasons for excluding the 1999 figure. While those reasons were “*intelligible*”, the judge observed that: “*If this was an appeal on the merits I would have said that they are unconvincing, but I am unable to conclude that they are irrational*”.

3.5.2 Conclusion

99 While the Supreme Court has been invited to confirm its view on the extent to which JR satisfies the requirement for a review of “substantive legality” under Article 9(4) the Aarhus Convention, it has unfortunately failed to do so. The Compliance Committee has left the door ajar for a subsequent Communication on this point, suggesting also that proportionality may provide a suitable standard of review for such cases. It is understood that NGOs in the UK are investigating this possibility with a view to making further submissions to the Compliance Committee.

⁹³ Court of Appeal Judgment 18.3.15 [2015] EWCA Civ 227.

3.6 Legal Costs

Please give a general overview on how the distribution of costs for court fees, lawyer fees, expert fees, including fees for expert studies, or witness fees is regulated in your national legal order. Have there been any new regulations since the 2012 EU study to ensure that the access to justice in environmental matters is not prohibitively expensive? Do your national courts put in practice the rulings of the ECJ to ensure that the legal costs are not prohibitively expensive (e.g. with granting legal aid on an individual basis)?

Introduction

100 The extraordinarily high cost of pursuing Judicial Review in the UK has generated significant debate in recent years. The ensuing national and international concern forced the devolved administrations to introduce separate costs regimes for environmental cases in 2013. These regimes now cap the liability of unsuccessful claimants for the costs of the defendant public body in Judicial Review (“adverse costs”) to pre-determined, quantifiable amounts and make special provision for interim relief. There is no doubt the new regimes are encouraging claimants to contemplate legal action, although a variety of new challenges, and the primary limitation of JR as a procedural review, serve to constrain advancements in this context. The efficacy of the new schemes, and relevant developments impacting on legal costs, are outlined below.

3.6.1 Costs in England and Wales

3.6.1.1 What do “legal costs” cover?

101 Costs can typically include lawyers’ fees, witness and expert fees, court fees, travel, copying and VAT.

102 The court fees do not vary according to the value of the case (i.e. the German civil law system incorporating ‘Streitwert’ does not apply). However, the court fees for Judicial Review in England and Wales have doubled since 2014. A fee of £140 (previously £60) is payable when a claimant lodges an application for permission to apply for JR at the High Court. A further £700 (previously £215) is payable if permission is granted and the claimant wishes to pursue the claim⁹⁴. If permission is refused on the papers, there is a £350 fee on request to reconsider at a hearing a decision on permission and a further £350 payable if permission is granted (making a similar total of £840 payable).

103 The cost of applying for permission to appeal to the Supreme Court was increased in 2011 from £800 to £1000⁹⁵ and the current cost of filing a notice of appeal is £1600. If permission is granted, there is a charge of £800 to proceed and £4280 to file a statement of facts and issues, making the court fees alone for the Supreme Court total in excess of £6,000.

3.6.1.2 Costs – the general rule

104 The general principle in the UK is that “costs follow the event” (i.e. the unsuccessful party pays the costs of the successful party). However, following judgments of the CJEU in *Commission v United Kingdom*⁹⁶ and *Edwards v Environment Agency*⁹⁷, the Ministry of Justice introduced special costs rules

⁹⁴ See the Schedule to The Civil Proceedings Fees (Amendment) Order 2014 available at: <http://www.legislation.gov.uk/ukxi/2014/874/schedule/made> (abgerufen am 19.10.16).

⁹⁵ Supreme Court Fees (Amendment) Order 2011 (SI 1737 (L16) /2011).

⁹⁶ Case C-530/11 – infraction proceedings brought against the UK as a result of a complaint lodged by a coalition of NGOs in 2005.

⁹⁷ *Edwards v Environment Agency* (Case C-260/11) and *R (Edwards) v Environment Agency* (No. 2) [2013] UKSC 78).

for JRs concerning environmental matters (“Aarhus Convention claims”), which took effect in England and Wales⁹⁸ on 1st April 2013.

105 Civil Procedure Rule 45.41 (2) defines an Aarhus Convention claim as: “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the ... [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject”. The regime in England and Wales currently excludes cases brought by way of statutory review (unlike Northern Ireland, discussed below).

106 Practice Direction 45⁹⁹ sets limits on the costs recoverable from a party in an Aarhus Convention claim in England and Wales. The cap on the costs recoverable from an unsuccessful claimant is £5,000 in respect of an individual and £10,000 in all other cases. However, PD45 also limits the costs that can be recoverable by a successful claimant to £35,000 (the so-called “cross-cap”).

107 Where the claimant asserts the claim is an Aarhus Convention claim, these figures apply unless the defendant challenges that fact and the court upholds the challenge. Where the court does not uphold the challenge, it will normally order the defendant to pay the claimant’s costs of defending the claim on an indemnity basis. This has the effect of generally dissuading defendants from challenging the status of the claim.

108 The UK’s First Progress Report to the Aarhus Convention Compliance Committee in respect of Decision V/9n¹⁰⁰ confirms that the Government undertook a cross-departmental exercise to review the costs regime for cases under the Aarhus Convention in late 2013. It is understood that consideration was given to amending the current costs caps of £5,000 for individuals and £10,000 for organisations, although no announcement has subsequently been made.

109 There is widespread concern amongst environmental NGOs that the adverse caps of £5,000 and £10,000 are too high, particularly for individual claimants. The CJEU judgments in *Commission v UK*¹⁰¹ and *Edwards*¹⁰² confirm that the figures of £5,000 and £10,000 must be “not prohibitively expensive” for claimants on both an objective *and* subjective basis, i.e. they must not be prohibitively expensive on an objective view and they must not be prohibitively expensive for *that particular claimant*. There are, therefore, calls on the Government to amend the CIVIL PROCEDURE RULES to make provision for the figures to be reduced on cause shown, as is currently the case in Scotland.

110 Similarly, there is criticism that the cross cap of £35,000 is unfair and contrary to the letter and spirit of the Aarhus Convention. It is argued that there is no basis for such a measure in the Aarhus Convention – prohibitive expense applies to the claimant (not the defendant public body) and, as such, provision for a cross-cap should be removed from the CIVIL PROCEDURE RULES.

3.6.1.3 Appeal costs

111 There are no special provisions covering the costs of appeals in Aarhus Convention claims. Civil Procedure Rule 52.9A makes general provision in relation to the costs of an appeal:

(1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

⁹⁸ Similar schemes were introduced in Scotland and Northern Ireland shortly afterwards.

⁹⁹ See Practice Direction 45 (Fixed Costs) available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs#5.1> (abgerufen am 19.10.16).

¹⁰⁰ Concerning Communication C33. See: <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> (abgerufen am 19.10.16).

¹⁰¹ See paragraphs 47-51 of the judgment.

¹⁰² See paragraphs 40-48 of the judgment.

(2) In making such an order the court will have regard to –

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

112 Thus, while a claimant at first instance can ascertain their precise adverse costs liability should they be unsuccessful in advance of lodging an application for JR, an appellant has no such certainty. It is currently up to the judge to decide, on the circumstances of each case, whether the original cap covers the appeal, whether the same cap is imposed again (i.e. making a total adverse costs liability of £10,000 for individuals and £20,000 for all other cases) or whether an entirely new figure is appropriate. The uncertainty surrounding the extent of liability for adverse costs on appeal(s) remains an issue of concern to NGOs working in this field.

3.6.1.4 Injunctive relief and cross-undertakings in damages

113 The lodging of an application, or the granting of permission, does not have an automatic suspensive effect in the UK. However, in accordance with CIVIL PROCEDURE RULES Part 25, the court may grant an interim injunction at any time in the course of JR proceedings. This order could be granted conditionally or unconditionally until 2010, at which point the CIVIL PROCEDURE RULES was amended to *require* claimants to provide a cross-undertaking in order to secure interim relief¹⁰³. Such an undertaking requires the claimant to agree to reimburse the defendant for any loss suffered by reason of the injunction if it subsequently transpires that it ought not to have been granted. The cross-undertaking has been described as the “price” of an injunction – if the applicant is unwilling to pay the price he does not get the injunction.

114 In April 2011, the Aarhus Compliance Committee found that the high costs involved in pursuing injunctive relief effectively amount to prohibitively expensive procedures that are in non-compliance with Article 9(4) of the Aarhus Convention¹⁰⁴. Similarly, in *Commission v UK*, the CJEU held that the requirement that proceedings not be prohibitively expensive applies also to the financial costs resulting from measures which the national court might impose as a condition for the grant of interim measures in cases falling within Articles 3(7) and 4(4) of the EC Public Participation Directive¹⁰⁵ and that “*the system of cross-undertakings in respect of the grant of interim relief constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive*”.

115 In light of the CJEU judgment, in 2013 Practice Direction 25A (Interim Injunctions) was duly amended as follows:

“5.1B

¹⁰³ See Practice Direction 25A – Interim Injunctions, paragraph 5.1 available at: [www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice directions/pd part25a.html](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice%20directions/pd%20part25a.html) (abgerufen am 19.10.16).

¹⁰⁴ See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> (abgerufen am 19.10.16).

¹⁰⁵ See *Commission v UK* (Case C-530/11) paragraphs 64-70 and *Edwards and Pallikaropoulos* (Case C-260/11) paragraphs 27 and 28.

(1) *If in an Aarhus Convention claim the court is satisfied that an injunction is necessary to prevent significant environmental damage and to preserve the factual basis of the proceedings, the court will, in considering whether to require an undertaking by the applicant to pay any damages which the respondent or any other person may sustain as a result and the terms of any such undertaking –*

(a) have particular regard to the need for the terms of the order overall not to be such as would make continuing with the claim prohibitively expensive for the applicant; and

(b) make such directions as are necessary to ensure that the case is heard promptly.

(2) ‘Aarhus Convention claim’ has the same meaning as in rule 45.41(2).”

116 Whilst seemingly a step forward, the fact that a claimant may still have to provide the court with a cross-undertaking in damages remains a dissuasive factor. To the author’s knowledge, there have been no applications for interim relief following the introduction of this new provision in the CIVIL PROCEDURE RULES in 2013.

3.6.1.5 Exclusion of statutory appeals

117 The costs regimes for Aarhus Convention claims introduced in 2013 only apply to applications for JR. Civil Procedure Rule 45.41 (2) defines an Aarhus Convention claim as: “*a claim for **judicial review** of a decision, act or omission all or part of which is subject to the provisions of the ... [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject*” (own emphasis added).

118 Thus, appeals against statutory bodies (such as appeals under sections 288 of the Town and Country Planning Act 1990) are not covered. This shortfall (which contrasts with the position in Northern Ireland) was highlighted in the recent case of *Venn*¹⁰⁶, in which Lord Justice Sullivan noted that the availability of Protective Costs Orders for environmental cases falling within the Aarhus Convention had been deliberately limited to JRs and did not extend to statutory appeals or applications. The judge held that it was not appropriate for the court to exercise its discretion to grant costs protection in respect of an application to quash planning permission under s.288 of the Town and Country Planning Act 1990 as that would side-step a limitation deliberately enacted in the CIVIL PROCEDURE RULES to give effect to a Convention which had not been directly incorporated into domestic law, but noted that legislative action was necessary to remedy Rule 45.41’s non-compliance with the Aarhus Convention.

3.6.1.6 Protected Costs Orders (PCOs)

119 In private law cases (e.g. nuisance proceedings), claimants must apply to the court for a Protected Costs Order (PCO). A PCO is an order of the court that the claimant is not liable to pay the costs of a successful defendant or that his liability to pay will be limited to a particular amount.

120 The decision to grant a PCO is one of the discretion of the courts, and until recently they were fairly rare. In the context of JR proceedings, they were given a significant boost by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*¹⁰⁷ (“*Corner House*”). In *Corner House*, the Court of Appeal held that a PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(a) The issues are of general public importance;

(b) The public interest requires that those issues should be resolved;

¹⁰⁶ Secretary of State for Communities & Local Government v Sarah Louise Venn [2014] EWCA Civ 1539.

¹⁰⁷ [2005] 1 WLR 2600.

(c) The claimant has no private interest in the outcome of the case;

(d) Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and

(e) If the order is not made, the claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

121 The court also made it clear that if the lawyers acting for the claimant were acting *pro bono* this would be likely to enhance the merits of the application for a PCO. Shortly afterwards, in *McArthur v Lord Advocate*¹⁰⁸, the Scottish Court of Session recognised its competency to grant Protective Expenses Orders (PEOs), with similar guidelines to those set out in *Corner House*, above.

122 However, *Corner House* was not an environmental case and was not driven by Aarhus conditions concerning the principle of “not prohibitively expensive”. Some of the limitations imposed by the Court of Appeal were problematic in practice – for example, in *Berkeley*¹⁰⁹, Mr Justice Underhill refused an application for a PCO on the basis that the issues raised, despite involving a large development in a prominent local site, was not one of general public importance. Moreover it was clear that the text of “no private interest” is not one that appears in the Aarhus access to justice provision, nor the EU Directives replicating them.

123 In 2010, the Court of Appeal in *Garner* recognized that the *Corner House* limitations could not apply where EU access to justice provisions applied and that they must be modified, “*insofar as it is necessary to secure compliance with the directive*”. Essentially the tests of general public importance and no private interest no longer applied, at least in cases where the EU Directive was involved¹¹⁰.

124 The principles established in *Garner* have now, at least as far as JR is concerned, been superseded by the introduction of the new costs rules for Aarhus Convention claims in 2013 discussed above.

125 However, the position with regard to private law cases remains uncertain and unsatisfactory. In *Morgan v Baker*¹¹¹, the Court of Appeal held that the requirement of the Aarhus Convention that costs in environmental proceedings should not be “prohibitively expensive” was, at most, a matter to which the court might have regard in exercising its discretion with regard to costs. Similarly, in *Miller Argent*¹¹², the Court of Appeal held that while private nuisance actions were, in principle, capable of constituting procedures which fell within the scope of the Aarhus Convention, the requirement in Article 9(4) of the Convention that proceedings should not be prohibitively expensive was no more than a factor to be taken into account when considering a claimant’s application for a PCO. In *Miller Argent*, the Court of Appeal held that the judge at first instance had correctly exercised his discretion when refusing to make a group litigation order under CIVIL PROCEDURE RULES r.19.11 for prospective claimants to bring an action in private nuisance and, as no submissions on the Aarhus Convention had been made during the course of the application, he was right to order that the applicants pay the costs of the application.

¹⁰⁸ 2006 SLT 170.

¹⁰⁹ *River Thames Society v First Secretary of State & 3 ORS sub nom Lady Berkeley v First Secretary of State* [2006] EWHC 2829, see paragraph 10.

¹¹⁰ It was accepted that the access to justice provisions in the EIA directive as amended had direct effect and therefore could be invoked by the claimant. In other cases, it would be far less certain that a court would feel obliged to modify the *Corner House* principles. UK law has adopted a dualist approach to international public law, and provisions of Aarhus, though influential, cannot be directly relied upon in the UK Courts.

¹¹¹ (1) *Francis Roy Morgan* (2) *Catherine Margaret Baker* (Appellants) v *Hinton Organics (Wessex) Ltd* (Respondent) & CAJE (Intervenor) [2009] EWCA Civ 107.

¹¹² *Alyson Austin & Ors v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928.

3.6.1.7 Criminal Justice and Courts Act 2015

Implications for environmental cases

126 While it is assumed that the introduction of new costs regimes for environmental cases has enabled claimants to bring cases to the High Court more readily¹¹³, the incoming 2010 coalition Government sustained a systematic attack on Judicial Review as a mechanism to hold public bodies to account. While new legislative provisions and dramatic drops in public funding have not targeted environmental claims in particular, such cases have been a casualty of these generalised measures. As such, advances resulting from European infraction proceedings and the findings of the Aarhus Compliance Committee have undoubtedly been mitigated.

127 Part 4 of the Criminal Justice and Courts Act 2015¹¹⁴ inserts a number of provisions into the Senior Courts Act 1981 concerning applications for JR¹¹⁵. It is unclear what effect some of these new provisions will have on Aarhus Convention claims. However, it would appear that provisions relating to the provision of financial information and interveners (discussed below) will apply to environmental cases.

Definition of environmental cases

128 Section 90 of the CJC Act 2015 gives the Lord Chancellor the power to make Regulations providing that provisions relating to the capping of costs in sections 88 and 89 of the Act (see below) do *not* apply to environmental cases. However, there is presently no statutory definition of an environmental case or Aarhus Convention claim. The general position is that the broad definition of “environmental information” in Article 2(3) of the Aarhus Convention is taken as the basis for determining whether a case is an Aarhus Convention claim under Civil Procedure Rule 45.53. The leading authority on this point is *Venn v Secretary of State for Communities and Local Government*¹¹⁶, in which the Court of Appeal held that since administrative matters likely to affect “*the state of the land*” are classed as “*environmental*” under Aarhus, the definition of “environmental” in the Convention is arguably broad enough to catch many planning matters. The definition of environmental cases is, therefore, currently broad (at least in England and Wales).

129 Section 90 of the CJCA 2015 gives the Secretary of State the power to define, by way of Statutory Instrument, Aarhus Convention claims. The “worst case scenario” would be for the Secretary of State to define environmental cases as only those falling within the ambit of the EC Public Participation Directive (i.e. cases concerning Integrated Pollution Prevention and Control (IPPC) and Environmental Impact Assessment (EIA)) for the purpose of costs protection under the Civil Procedure Rules. This is currently the case in Scotland and is believed to be a major limitation (see below).

Information about financing of JR applications

¹¹³ It should be noted that while this is assumed to be the case by practitioners and NGOs, there is no statistical data on which to base this assertion. The author has attempted to obtain data on the number of applications for environmental JRs lodged since 2013. However, the Ministry of Justice has refused to disclose data on the basis that it is not environmental information for the purposes of the Environmental Information Regulations 2004 and that the request is “manifestly unreasonable” under the Freedom of Information Act 2000. The author is currently challenged the refusal to disclose information through the Information Rights Tribunal (hearing scheduled for June 2015).

¹¹⁴ See http://www.legislation.gov.uk/ukpga/2015/2/pdfs/ukpga_20150002_en.pdf (abgerufen am 19.10.16).

¹¹⁵ Part 4 also inserts provisions into and the Tribunals, Courts and Enforcement Act 2007 in respect of the jurisdiction of the Upper Tribunal to hear JR applications.

¹¹⁶ [2014] EWCA Civ 1539, at §11.

130 Section 85 of the CJCA 2015 inserts new provisions into section 31(3) of the Senior Courts Act 1981, which concerns applications for leave (permission) to apply for JR¹¹⁷.

131 When applying for leave to apply for JR, applicants must show that they have a sufficient interest in the matter to which the application relates¹¹⁸. Section 85(1) and (2) of the CJCA 2015 amends 31(3) of the SCA 1981 so that applicants will also have to provide the court with any information about the financing of the application that is specified in rules of court for the purposes of this application. The information that may be specified includes:

- information about the source nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application, and
- if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

132 The level of financial support (whether direct or indirect) above which information must be provided for a body corporate will be set out in Rules of court.

133 Section 86 of the CJCA 2015 applies when the High Court, the Upper Tribunal or the Court of Appeal is determining costs in JR proceedings. When making an order for costs, the court or tribunal will be required to have regard to the information about the financing of the proceedings provided under section 31(3)(b) of the SCA 1981. In particular, the court must consider whether any other person (other than a party to the proceedings) who is identified in that information as someone who is providing financial support for the purposes of the proceedings or likely or able to do so, should be liable for costs.

134 These new provisions means that all individuals and bodies providing funds towards a JR (above an as yet undefined threshold, but thought to be in the order of £1,500¹¹⁹) will have to be declared and information about the extent of their financial resources supplied to the court. The declaration has to include those who are “likely” to support the action. The court “*must*” then consider awarding court costs against those individuals/bodies identified by charities. The general view amongst NGOs is that these measures were introduced to dissuade individuals and groups from providing funding for JRs, thus reducing the number of claims being brought against public bodies¹²⁰.

Interveners

135 Section 87 CJCA 2015 applies where a person (or organisation) who is not a relevant party to the proceedings¹²¹ is granted permission to file evidence or make representations in JR proceedings (“interveners”¹²²).

¹¹⁷ See <http://www.legislation.gov.uk/ukpga/1981/54/section/31> 8abgerufen am 19.10.16).

¹¹⁸ Section 31(3) SCA 1981.

¹¹⁹ During the passage of the Criminal Courts and Justice Bill, the Government tabled an amendment requiring that the court and tribunal procedure rules that implement the clause include a minimum threshold for contributions, so that those who contribute an amount below that threshold need not be identified in the information provided to the court. The figure suggested by the Government to be included in a subsequent public consultation was £1,500.

¹²⁰ See, for example, briefings produced by Wildlife and Countryside Link here: http://www.wcl.org.uk/docs/Criminal_Justice_Courts_Bill_Wildlife_Countryside_Link_briefing_July_2014.pdf (abgerufen am 19.10.16).

¹²¹ A relevant party includes any of the following: (a) a person who is or has been an applicant or defendant in the proceedings; (b) a person who is or has been an appellant or respondent in the proceedings; (c) any other person who is or has been directly affected by the proceedings and on whom the application for judicial review, or for leave to apply for JR has been served.

¹²² According to the Explanatory Notes to the Bill, the new presumption only applies where an intervener applies to the court for permission either to provide evidence or make submissions to the court. It does not apply where a person or

136 Section 87(3) of the Act provides that a relevant party to the proceedings may not be ordered by the High Court or the Court of Appeal to pay the intervener's costs in connection with the proceedings, unless exceptional circumstances apply. However, where a relevant party to the proceedings applies to the court and the court is satisfied that one of the conditions below is satisfied, the court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings¹²³. The conditions are:

- the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
- the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
- a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
- the intervener has behaved unreasonably.

137 The court is not required to make an order for costs against an intervener if it considers that there are exceptional circumstances that make it inappropriate to do so (these exceptional circumstances will be specified in rules of court).

138 Prior to the CJC Act 2015, the position on costs in legal proceedings was entrusted largely to the courts' general discretion to be exercised in light of all the circumstances of the case¹²⁴. Statutory provisions directing courts as to when they can, and cannot, order costs to be paid in relation to proceedings before them are unusual. In practice, individuals and NGOs seeking to intervene in proceedings were asked to provide assurances to the court that they will not seek to make an application for an order for costs against any of the relevant parties, i.e. that they will simply cover their own costs.

139 As a result of the CJCA 2015, interveners will be at risk of an order for costs where costs have been incurred by a relevant party as a result of the intervener's involvement and the court is satisfied that one of the four listed circumstances are satisfied. As such, the Act introduces a new and unwelcome element of uncertainty with regard to adverse costs.

140 Most of the conditions in section 87 are uncontroversial - the court can already make an order for costs against any party that has behaved unreasonably. The most worrying condition is that the intervener's evidence and representations, taken as a whole, are not considered to have been of significant assistance to the court. This will place a relatively high burden on the intervener to contribute something that none of the relevant parties have raised themselves. In reality, this provision is likely to be an unhelpful step and will defer individuals and NGOs from intervening in cases.

body is invited by the court to intervene, because in such cases the intervener does not require the intervener to be granted permission.

¹²³ Section 87(4) CJCA 2015.

¹²⁴ With the exception of environmental claims following the introduction of the Aarhus costs rules in CIVIL PROCEDURE RULES 45.53 in April 2013.

3.6.1.8 Public funding

141 Despite dramatic cuts in public funding since 2010, legal aid is still available for Judicial Review cases¹²⁵. Whether an individual qualifies for public funding will depend upon the merits of the case (including the likelihood of success and benefit to the client¹²⁶) and the completion of a financial eligibility check¹²⁷. In reality, public funding is very difficult to obtain in environmental cases unless the case is of wider public interest. It should also be noted that NGOs are not eligible for public funding in any event.

142 These difficulties were examined by the Aarhus Compliance Committee in the context of Communication ACCC/C/2008/C33 concerning costs, in which the Committee concluded that *“the system as a whole is not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider¹²⁸”*.

143 Despite these findings, the UK has markedly reduced the availability of public funding generally and has given no consideration to the merits of making environmental NGOs eligible for legal aid in order to improve the UK’s compliance with Article 9(4) and 9(5) of the Aarhus Convention.

3.6.2 Costs in Scotland

144 The Scottish Government is in the process of modernising and enhancing the efficiency of the civil justice system through a number of reforms, including the Courts Reform (Scotland) Act 2014 and the Government’s response to the Taylor Review in June 2014¹²⁹.

145 Protected Expenses Orders (PEOs) are theoretically available at common law in both Judicial Review cases and statutory appeals, as well as being codified in Chapter 58A of the Rules of the Court of Session¹³⁰. The PEO regime in Scotland caps adverse costs liability for certain parties to £5,000. The UK’s First Progress Report to the Aarhus Convention Compliance Committee in respect of Decision V/9n¹³¹ maintains: *“case law demonstrates that groups are taking advantage of the availability of PEOs both at common law and under statute”* and provides a number of cases by way of illustration¹³².

146 However, it should be noted that Chapter 58A of the Rules of Court only apply to individuals and NGOs promoting environmental protection¹³³. Thus, representatives of unincorporated bodies or individuals acting in a special capacity (such as trustees) are not eligible. The Court may also refuse to

¹²⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 (Civil Legal Services), Part 1 (Services), s.19(1). Available at: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted> (abgerufen am 19.10.16).

¹²⁶ See the Civil Legal Aid (Merits Criteria) Regulations 2013 available at: <http://www.legislation.gov.uk/uksi/2013/104/regulation/6/made> (abgerufen am 19.10.16).

¹²⁷ See Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 available at: <http://www.legislation.gov.uk/uksi/2013/480/contents/made> (abgerufen am 19.10.16).

¹²⁸ See Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, paragraphs 136 and 142 available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp_pp_c.1_2010_6_add.3_eng.pdf (abgerufen am 19.10.16).

¹²⁹ See <http://www.scotland.gov.uk/Resource/0045/00451822.pdf> (abgerufen am 19.10.16).

¹³⁰ See: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chapter58a-1.pdf?sfvrsn=6> (abgerufen am 19.10.16).

¹³¹ Concerning Communication C33. See <http://www.unece.org/env/pp/compliance/Compliancecommittee/33TableUK.html> (abgerufen am 19.10.16).

¹³² Newton Mearns Residents Flood Prevention Group v East Renfrewshire Council [2013] CSIH 70; Carroll v Scottish Borders Council [2014] CSOH 30; Sustainable Shetland v Scottish Ministers [2014] CSIH 60; Friends of Loch Etive, petitioner [2014] CSOH 116; John Muir Trust, petitioner [2014] CSOH 172A.

¹³³ SSI 2013 No. 81 58A.3. (4)(e) <http://www.legislation.gov.uk/ssi/2013/81/made> (abgerufen am 19.10.16).

make a PEO if it considers that the applicant has failed to demonstrate a sufficient interest in the subject matter of the proceedings or the proceedings have no real prospect of success¹³⁴.

147 Rule 58A.5 provides that in determining the terms of a PEO the court must take into account the circumstances including the need to ensure that it is not prohibitively expensive to continue with the proceedings, the extent to which the applicant would benefit (whether financially or otherwise) if successful in the proceedings to which the order would apply, the terms on which the applicant is represented, whether and to what extent the applicant is acting on behalf of another person who may have been able to bring the proceedings and whether and to what extent the applicant is willing to limit the expenses which he or she would be able to recover from another party if successful. There was a full discussion on the considerations to be given to applications under the new rules by Lord Drummond Young in *Carroll v Scottish Borders Council*¹³⁵.

148 Moreover, it should be noted that whilst all five petitioners cited in the UK Progress Report applied for a PEO - three of the applications were refused¹³⁶. For example, in *Newton Mearns Residents Flood Prevention Group for Cheviot Drive*¹³⁷, a group of local residents sought to challenge the grant of planning permission for the construction of houses without ensuring adequate flood prevention measures. The Lord Ordinary held that the circumstances of the case did not satisfy the requirement for general public importance. No important point of law or principle was raised where the petitioners' primary objective was the safeguarding of their respective private interests and there was a strong indication that they were seeking to challenge the merits of the decisions rather than raise any issue for JR and the Court could not be satisfied that the petition had any real prospects of success¹³⁸.

149 The availability of PEOs under the new rules is also limited to JR and statutory review cases falling within the scope of the EC Public Participation Directive¹³⁹ (PPD). Petitioners in broader "Aarhus cases" must apply for a PEO under common law. Thus, it is not certain that a PEO will be granted, and only a handful of such PEOs have been granted in Scotland at common law. The difficulty is that the *Corner House* principles set an extremely high test to obtain such an order. Furthermore, those that have been granted have had very high limits. In *McGinty v Scottish Ministers*¹⁴⁰ a cap on adverse costs of £30,000 was set. Whilst this was an environmental case, it was dealt with at common law. In *Walton v Scottish Ministers*¹⁴¹, again dealt with at common law but with reference to the particular issues arising in environmental cases, the adverse costs cap was set at £40,000.

150 The remit of the Taylor Review did not extend to examining the obligations of the Scottish Government regarding expenses and funding of environmental litigation under the PPD or the Aarhus Convention¹⁴². However, the Review strongly implied that EU law consider Aarhus cases to be defined

¹³⁴ RCS 58A.2(4) and (5).

¹³⁵ 2014 SLT 659. For further discussion of this case see Banner, C. (2015). *The Aarhus Convention – A Guide for UK Lawyers*. Chapter three (The Aarhus Convention in Scotland by Lorna Drummond QC, pages 69-70).

¹³⁶ PEO applications made by Newton Mearns Residents Flood Prevention Group, Friends of Loch Etive and the John Muir Trust were all refused. Note also that while Sustainable Scotland was granted a PEO, this was before the new rules came into effect – they may no longer be eligible.

¹³⁷ [2013] CSIH 70.

¹³⁸ The Extra Division upheld the Lord Ordinary's Opinion that the case did not satisfy the requirement of general public importance.

¹³⁹ 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.

¹⁴⁰ [2010] CSOH 5.

¹⁴¹ [2011] CSOH 10.

¹⁴² Confirmed in email correspondence with Kay McCorquodale, Secretary to the Taylor Review, 15 March 2013.

by the PPD¹⁴³. While the Review recommended that PEOs be available in all public interest cases (therefore covering many Aarhus cases outside the scope of the PPD) it held that the decision to grant a PEO (and at what level) were matters for judicial discretion - not specific rules of court¹⁴⁴.

151 A submission to the Aarhus Compliance Committee from members of the Coalition for Access to Justice for the Environment (CAJE) in respect of the UK's First Progress Report on Decision V/9n concluded that legal action in Scotland remains, as a whole, prohibitively expensive for most individuals, community groups and environmental NGOs. Litigants still have to raise their own legal costs which for a complex JR, accounting for lawyers and court fees, can add up to tens of thousands of pounds. In particular, barriers to legal aid in Scotland mean that very few awards are granted in environmental cases¹⁴⁵, and the system effectively prohibits aid for public interest cases (which most Aarhus challenges are). When deciding whether to grant legal aid under Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002¹⁴⁶, the Scottish Legal Aid Board (SLAB) looks at whether "other persons" might have a joint interest with the applicant. If so, SLAB is prohibited from granting legal aid if it would be reasonable for those other persons to help fund the case. Moreover, the test states that the applicant must be "*seriously prejudiced in his or her own right*" without legal aid in order to qualify¹⁴⁷. Furthermore, as in England and Wales, community groups are unable to apply for legal aid under the Scottish regime.

152 These criteria strongly imply that a private interest is not only necessary to qualify for legal aid, but that a wider public interest will effectively disqualify the applicant. A recent Freedom of Information request confirmed that in the last 5 years the Scottish Government had not had any discussions with SLAB on the impact of Regulation 15 in environmental cases. Environmental NGOs in Scotland consider the removal of Regulation 15 essential for compliance with Article 9(4) of the Aarhus Convention and the PPD.

153 These long-term difficulties were exacerbated in 2013 by the introduction of a cap on the expenses of a JR to be covered by legal aid (including Counsel's fees, solicitors' fees and outlays) of £7,000. This is an entirely unrealistic figure to run a complex environmental JR. While applications can be made to increase the figure, the cap is likely to reduce the number of solicitors willing to act in this area as they run the risk of incurring liability for counsel's fees and outlays which are not covered by the cap. Due to the low levels of payment for legal aid compared with market rates, and the complexities of JR cases, individuals can struggle to find a lawyer willing to represent them on this basis.

¹⁴³ See http://www.scotland.gov.uk/About/Review/taylor-review/Report_Taylor_Review_of_Expenses_and_Funding_of_Civil_Litigation_in_Scotland_Chapter_5_Paragraph_29 (abgerufen am 19.10.16).

¹⁴⁴ See http://www.scotland.gov.uk/About/Review/taylor-review/Report_Taylor_Review_of_Expenses_and_Funding_of_Civil_Litigation_in_Scotland_Chapter_5_Paragraph_33 (abgerufen am 19.10.16).

¹⁴⁵ In correspondence with the Scottish Parliament's Public Petitions Committee (regarding FoES petition on Aarhus compliance), SLAB indicated that in a three-year period (2008-2011) only two environmental cases where Regulation 15 was considered had been granted legal aid. (<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/40063.aspx>) (abgerufen am 19.10.16). In the same period, three cases had been refused Legal Aid citing Regulation 15, and all were environmental cases. Correspondence with SLAB in April 2012 confirmed that two of the three cases refused were later granted on appeal, and by that point a further award of Legal Aid had been granted in a case where Regulation 15 was relevant, amounting to a total of 5 cases granted over a 4 year period. We consider that it is likely most of these cases had a strong private interest. To the best of our knowledge, only one of these grants was in a public interest matter, and this was when the case was on appeal, at which point SLAB somewhat arbitrarily decided that Regulation 15 did not apply to the appeal proceedings. It is not clear on what basis this decision was made, but it may be cited as an example of legal aid being available for public interest cases.

¹⁴⁶ See <http://www.legislation.gov.uk/ssi/2002/494/regulation/15/made> (abgerufen am 19.10.16).

¹⁴⁷ For a more detailed dissection see Frances McCartney, 'Public interest and legal aid' Scots Law Times, Issue 32: 15-10-2010.

3.6.3 Costs in Northern Ireland

154 The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 became operative in Northern Ireland on 15th April 2013¹⁴⁸. They contain similar provisions to those pertaining to England and Wales, limiting adverse costs liability to £5,000 for individuals and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association. The cross-cap in Northern Ireland is £35,000. All these figures are exclusive of VAT. The caps apply to all environmental cases (a hugely controversial and last-minute amendment to the recent Planning Bill to restrict the availability of planning judicial reviews to European grounds only was thwarted by the Environment Minister¹⁴⁹).

155 However, experience suggests that the caps remain prohibitively expensive in Northern Ireland. One practitioner¹⁵⁰ reports that a PCO of £10,000 was too high for one of his clients who could not afford to pay his own legal costs and potentially suffer adverse costs of £10,000 (plus VAT). The claimant then tried to continue the case as a litigant in person but was unable to do so and the case could not continue. The same practitioner also highlighted the detrimental effect of the cross-cap of £35,000¹⁵¹. In straightforward JRs the cross cap may not be problematic - but this is not the case in complex environmental cases involving issues of public importance cases. This issue is illustrated by the following two cases.

156 The first case concerned a proposed 50 mile dual carriageway scheme at a cost of £800m¹⁵². The road affected 250 farmers, over 100 of whom supported the case. A PCO was obtained, but only after a difficult and fully contested hearing, under the pre-regulation law. The Order granted by the High Court was that the objectors would have to pay £20,000 if they lost but there was no cross cap in the event that they won. In the event, the claimants were successful and therefore their full costs were recovered. The case ran for 6 days in the High Court, was highly technical and very challenging. Their costs came out at between £100k + £150k for the costs of a solicitor, senior and junior counsel, a roads consultant, an environmental consultant and an agricultural consultant. Some of the consultants, counsel and the solicitor proceeded on the basis of concessionary fees (the “true” costs would have been nearer £250,000). The claimants’ position would have deteriorated under the 2013 Regulations because, whilst their liability to adverse costs would have been reduced to £10,000, had they lost (they were an unincorporated association) they would have recovered only £35,000 leaving them with a shortfall of close to £100k (or over £200k against the “true costs.”). There is little doubt this case would not have been brought had the claimants faced this kind of shortfall, win or lose.

157 The second case was conducted after the Regulations came into force. It concerned the construction of a sports stadium at a value of approximately £81m. The grouping opposing the development consisted of roughly 200 nearby households. The case was again taken on the basis of concessionary fees by both the solicitor and senior counsel (managing without junior counsel reduced costs). Unpredictably, the case ran for 13 days making it, probably, the longest judicial review in Northern Ireland legal history. The residents were successful. They will recover £35,000 plus VAT leaving them approximately £18,000 out of pocket. Had the stadium case been charged at commercial rates the

¹⁴⁸ See: <http://www.legislation.gov.uk/nisr/2013/81/regulation/1/made> (abgerufen am 19.10.16).

¹⁴⁹ For further information see Banner, C. (2015). *The Aarhus Convention – A Guide for UK Lawyers*, Chapter 4 (The Aarhus Convention in Northern Ireland – A Tale of Two Politics) by William Orbinson QC, pages 76-77.

¹⁵⁰ Information for Northern Ireland provided by Roger Watts, C & J Black Solicitors, 13 Linenhall Street, Belfast, BT2 8AA as part of a submission made by CAJE to the UK’s first progress report on Decision V/9n.

¹⁵¹ Provided under Regulation 3(3) of The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013.

¹⁵² [2012] NIQB 97. This case occurred before the 2013 Regulations came into force.

“true” costs would have exceeded £100,000 and the shortfall would have been, beyond argument, prohibitively expensive.

158 While these cases might be seen as atypical (as they were at the top end in terms of scale and complexity), it is difficult to see how, under current administrative review procedures, the costs for many environmental JRs can be kept below £35,000 by the time solicitor, counsel and all necessary consultants are paid. Environmental challenges are often complex, multifaceted and accompanied by voluminous documentation.

159 Additionally, it is reported that:

- Legal aid is invariably denied in Northern Ireland when a group of objectors have a similar interest in objecting to a scheme in development. Accordingly, financial assistance from public funds is rarely available for potential applicants in environmental legal challenges;
- The indemnity costs rule applies with full force in Northern Ireland. If successful, objectors can only recover the costs they agreed to pay their own legal team. If these were reduced or are concessionary then that is all that can be recovered from the unsuccessful public authority¹⁵³; and
- Contingent and no-win no fee arrangements are unlawful in Northern Ireland.

3.6.4 The failure to incorporate access to justice provisions into UK law

160 The Aarhus Convention entered into force in the UK on 24th May 2005¹⁵⁴. However, one decade on, it has still not been fully incorporated into UK law. While the first two pillars were incorporated into EU law (and therefore transposed into domestic legislation¹⁵⁵ as a result of EC Directives on Access to Information and Public Participation¹⁵⁶), a Directive on access to justice stalled in the European Parliament, thus preventing the vital third pillar being unincorporated into EU or UK law.

161 In a case brought by Greenpeace¹⁵⁷, the English High Court held: “*the Aarhus Convention is itself irrelevant; it has only been incorporated into UK law to the extent that an EC Directive is involved; the Directives were not involved, other than as an element of background*”. Greenpeace took this case to the Aarhus Convention Compliance Committee (ACCC), which pointed out that the UK: “*being a Party to the Convention, is bound by the Convention under international law and that the nature of its national legal system or lack of incorporation of the Convention in national law are not arguments that it can successfully avail itself of as justification for improper implementation of the Convention.*”

¹⁵³ The 2013 Regulations do provide that where lawyers are providing representation free of charge in whole or part then the Court shall order that such part of the recoverable costs shall be paid to the Northern Ireland Lawyers Pro Bono Unit as it thinks just. The reference to ‘recoverable costs’ may be a reference to the £35,000 in regulation 3(2). This provision may assist the Pro Bono Unit but will not assist in cases where legal representation is not provided pro-bono.

¹⁵⁴ The UK ratified the Aarhus Convention on 23rd February 2005.

¹⁵⁵ By 14th February and 25th June 2005 respectively.

¹⁵⁶ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and 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.

¹⁵⁷ In 2012, Greenpeace challenged the Secretary of State for Energy and Climate Change’s designation of the National Policy Statement (NPS) for Nuclear Power Generation in the UK. The High Court refused Greenpeace permission to bring the case and ordered it to pay £8,000 legal costs. The Aarhus Convention Compliance Committee found the UK in breach of the Convention on the basis that the order for costs of £8,000 was “prohibitively expensive” and thus the UK was not in compliance with Article 9(4) of the Convention.

3.6.5 Conclusion

162 Despite the introduction of bespoke cost rules for environmental cases, legal costs in the UK remain very high and, in many cases, prohibitively expensive for individuals and community groups. This is largely because losing parties have to pay the court fee, their own legal costs (which routinely amount to £25,000 and often rather more) plus a cap of either £5,000 or £10,000 – and winning parties are often unable to recover their full costs in more complex environmental cases because of the cross-cap of £35,000. As such, claimants in England and Wales and Scotland are routinely facing costs of £31-36k on losing a case (often more in Scotland) and may even suffer significant financial losses when winning complex cases.

163 Many believe that the cross cap of £35,000 is unfair and contrary to the letter and spirit of the Aarhus Convention. It is argued that there is no basis for such a measure in the Aarhus Convention – prohibitive expense applies to the claimant (not the defendant public body) and, as such, it should be removed. There is also UK-wide confusion about which figure applies to community groups – which can often be very small and poorly funded – but which (because they comprise more than one individual) attract the £10,000 cap in England and Wales and Northern Ireland and are not eligible for automatic costs protection at all under the regime in Scotland.

164 There are also concerns about the efficacy of measures introduced in relation to interim relief and, as of July 2013, the introduction of a six week time limit for lodging an application for JR in cases concerning planning matters. It has been noted that this deadline may have undermined the UK's ability to comply with the requirement for "fairness" under Article 9(4) of the Aarhus Convention. There is also uncertainty around adverse costs exposure on appeal and the extremely limited availability of public funding for all cases, including environmental claims.

How does your legal system deal with the restitution of experts' fees? Are these costs predictable and not too expensive? Are e-NGOs entitled to demand the fees for expert opinion that was ordered primarily for the preparation of the lawsuit when their appeal was successful? Is it possible for the developers who intervene in the trial to claim the refunding of the expert opinion fees from the losing party (e-NGO)?

3.6.6 Expert fees

165 As discussed in the section on Northern Ireland (see above), expert costs can be significant. In theory, a successful claimant could seek to recover expert costs from the unsuccessful public body. However, the imposition of a cross-cap of £35,000 on recoverable costs from the defendant (which claimants will invariably be subject to in order to benefit from capped adverse costs protection) means that in practice, expert costs would rarely be recoverable. Thus, complex cases involving technical expert evidence are now described as "too expensive to win" as successful claimants could inevitably end up significantly out of pocket.

3.6.7 Interveners and costs

166 Before 2000, only third parties opposing a claim could apply to intervene in JR proceedings. Since that date, however, anyone (whether opposing or supporting) can apply. The court has the discretion to grant interventions and impose conditions on the form of the intervention (i.e. in writing only or by way of oral intervention).

167 Until 2013, the leading authority on the issue of third party costs in JR was *Bolton MDC v Secretary of State for the Environment*¹⁵⁸. In *Bolton*, the House of Lords (as was) held that a third party

¹⁵⁸ [1995] 1 W.L.R. 1176.

would normally only be entitled to its costs where there was likely to be a separate issue on which it was entitled to be heard or if it has an interest which requires separate representation.

168 However, the case of *R (Peel Investments) v Health and Safety Executive*¹⁵⁹ gives comfort to commercial bodies in regulated industries in respect of intervening in JR proceedings. Such entities can be reassured by the weight the judge in *Peel* attached to the nature of the relationship between Regulator and Regulated Entity in order to find that Regulated Entities can have a separate interest, and so may be awarded their costs of intervening, when decisions of their Regulator are challenged. So, where such a relationship exists, the usual position taken by courts (that points of relief and discretion can be properly argued by the decision-maker) may be more readily displaced. It is important to note that in *Peel*, it was found to be highly pertinent that the regulator (here, the Health and Safety Executive) directly regulated the intervener's relevant activities. The intervener successfully argued that it would be wholly inappropriate to ask a regulator to run arguments as to relief and discretion on behalf of an entity it regulates. The intervener also highlighted that, as in *Bolton*, the case was of considerable commercial and financial importance to it as an interested third party.

169 However, there is one final nuance. Section 87(5) of the Criminal Justice and Courts Act 2015 provides that: "*On an application to the High Court or the Court of Appeal by a relevant party to the proceedings, if the court is satisfied that a condition described in subsection (6) is met in a stage of the proceedings that the court deals with, the court must order the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings*". The conditions in sub-section (6) being:

- the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
- the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
- a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
- the intervener has behaved unreasonably.

170 Thus, interveners will in future be at risk of an order for costs where costs have been incurred by a relevant party as a result of their involvement and the court is satisfied that one of the circumstances listed above apply. This means that while interveners may – in certain circumstances be able to recover their costs from an unsuccessful environmental NGO - they are also at risk of an order for costs where costs have been incurred by a relevant party as a result of their involvement and the court is satisfied that one of the circumstances listed above are satisfied.

¹⁵⁹ [2013] EWHC 1012 (Admin), [2013] Env. L.R. D6.

4 National report Italy

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4.1 Access to Justice

How exactly can you distinguish the legal requirements of Art. 9.2 AC on one hand and of Art. 9.3 AC on the other? Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and report the professional discourse among legal scholars and the relevant national case law.

How has Art. 9.3 AC hitherto been implemented in your national legal order?

Does the Aarhus Convention require uniform or at least similar rules on access to courts, standing and legal protection for individual and for collective (NGO) actions in environmental law?

We are interested in how exactly courts and scholars in your national legal order distinguish the legal requirements of Art. 9.2 AC on the one hand and of Art. 9.3 AC on the other. Please give an overview on the scientific debate.

Have there been alterations or amendments in your national legal order in order to transform the standing requirements of Art. 9.2/9.3 AC or EC-Directive 2003/35?

4.1.1 Introductory remarks

- 1 The main difference between Art. 9.2 and 9.3 AC in Italy¹⁶⁰ may be drawn differentiating:
- access to a review procedure (before an administrative court) on the one hand: Art. 9.2
 - access to an administrative procedure (before an administrative authority) and access to a judicial procedure (before a court other than administrative, i.e. criminal and civil) on the other hand: Art. 9.3.

4.1.2 Art. 9.2 Access to review procedure before an administrative court

2 Art. 9.2 has been implemented applying the general rules of access to administrative judicial review for members of the public affected, or potentially affected, by an administrative decision. The national rule that has implemented this provision is L. Decree n.152/2006, known as “Environmental Code”, EC (Titolo III, Parte VI, Art. 311-318 EC; specifically on this topic see Art. 318 EC), which refers to the general rules on administrative judicial review for any kind of claim related to environmental protection. The L. Decree has abrogated the previous legal provisions, in place before the implementation of the Aarhus Convention.

3 According to the general rules: (a) any member of the public with (b) a sufficient interest (meaning: members of the public potentially affected by the decision) or (c) claiming the violation of a right have access to (d) the judicial review before an administrative court.

¹⁶⁰ http://www.minambiente.it/sites/default/files/archivio/notizie/national_report_italy2013_aarhus.pdf (abgerufen am 19.10.16).

(a) Members of the public are both individuals and e-NGOs.

(b) Sufficient interest: 1) Members of the public that have participated to the administrative proceeding; 2) Members of the public that had the right to participate but their participation was not allowed.

(c) Violation of a right: Members of the public that might not have participated to the administrative proceeding and that have suffered a damage from the final administrative decision.

(d) The administrative review can be initiated before the administrative court of first instance (Ricorso giurisdizionale al Tribunale Amministrativo Regionale) or alternatively before the President of Republic (Ricorso straordinario al Capo dello Stato).

4.1.3 Art. 9.3 Access to judicial procedure – other than administrative court – and access to administrative procedure

4 Art. 9.3 has been implemented in the Italian legal system with a differentiation from Art. 9.2 in two main domains: members of the public and actions. In this case, a difference between legal provisions anterior to EC-Directive 2003/35 and legal provision/case-law interpretation will be drawn. The implementation of Art. 9.3 covers the following spectrum of procedures:

- A) *Set of actions in place before the implementation of Aarhus: an overview of the legal provisions still applicable and on the abrogated ones*
- *In general, each person/group of persons whose right or legitimate interest was breached by a public authority has legal standing to act in court against that decision (Art. 2043 Civil Code).*
 - *According to the Law 349/1986 (Art. 18), all the e-NGOs recognized by the MoE could challenge public decisions or omissions, both at a national and at a local level through a review procedure. This provision is now replaced by L. decree n. 152/2006 (Environmental Code, EC, see below) that abrogates it (Art. 318, EC) and provides that only the MoE has legal standing in case of environmental damages (Art. 311 EC). Today, the legal standing for the e-NGOs is acknowledged by case-law, which comprises it under the general rule on tort liability (Art. 2043 C.c.).*
 - *Recognized e-NGOs can also challenge decisions of the local authorities (regional, provincial, municipal) that cause environmental damages (Law 127/1997). This provision is still applicable after the EC-Directive 2003/35 implementation.*
 - *Private individuals do not have direct legal standing for public decisions; in case of criminal behavior (the private or public act is punishable by criminal law) any individual or group of individuals is entitled to commence an investigation, by addressing either the police or the judiciary. In case the request is sound, these authorities are obliged to act.*
 - *Any private person whose right was breached by another private person can challenge that act or omission directly before a court or request both tort compensation for damages and criminal sanctions.*
- B) *Set of actions specifically concerning an environmental damage after the implementation of Aarhus*
- *Actions of the MoE*
 - 1) *The L. Decree 152/2006 charges the State (MoE) to initiate an administrative procedure in any case of potential damage to the environment, by issuing an order which is immediately executive (Art. 312-313 EC).*
 - 2) *The MoE has access to a judicial procedure, also by bringing a civil action before a criminal court, to request for specific redress or compensation of environmental damages (Art. 311 EC; Art. 2043 c.c.).*

- *Actions of individuals, e-NGOs and territorial entities potentially affected by environmental damages, or with an interested to participate to an administrative proceeding.*

1) *As for the notion of access to administrative procedure, these categories of subjects have two orders of actions: 1. They cannot initiate an administrative procedure but they can challenge acts or omissions of the MoE before the Ministry itself (Ricorso in opposizione); 2. They can request the MoE to seize the court in matters related to environmental damages and its compensation.*

2) *As for the notion of access to judicial procedure, it is necessary to distinguish between (a) individual and territorial entities on one side, and (b) e-NGOs on the other side.*

(a) Individual and territorial entities cannot act for environmental damages against the direct responsible.

(b) E-NGOs can always intervene in procedures on environmental damages. In case of local damages, e-NGOs can address their requests for compensation directly to the court on behalf of the public administration. As said above, after the abrogation of Art. 18 L. 349/1986, case-law comprises this hypothesis of legal standing under the general rule on tort (Art. 2043 Civil Code)¹⁶¹. As a rule, e-NGOs can bring civil actions before a criminal court, when in their statutes they are representative of environmental interests –territorial delimited- that have been damaged by the criminal activity¹⁶². According to a large jurisprudence, now also e-NGOs not recognized (see below) are admitted to participate to those procedures.

- *Actions of the Ombudsman (Difensore civico)*

The majority of local administration, such as Regions, Provinces, Municipalities can nominate an Ombudsman to assist the public. The Ombudsman collects citizens' complaints and provides remedies against the denial to access to administrative acts.

Actions of the Istituto Superiore per la Protezione dell'Ambiente (National Institute for Environmental Protection ISPRA), regional agencies for environmental protection, local police, forest guards, customs officials.

They all insure -through inspections in polluting companies and installations- that environmental law is properly implemented.

- *Actions of the Municipality's Major, magistrates, MoE.*

They can all initiate an administrative procedure issuing orders (closure of productive site, confiscation), as safeguard and preventive measures.

Please provide a text and an English translation of the national provisions on standing in environmental matters.

4.1.4 Legal standing of the MoE

L. Decree 152/2006 (EC) Risarcimento del danno ambientale Art. 311, comma 1

(Azione risarcitoria in forma specifica e per equivalente patrimoniale)

¹⁶¹ Cass. pen., Sez. III, 3 October 2006, n. 36514, Censi, Ced Cassazione n. 235059; Cass. pen., Sez. III, 28 October 2009, n. 755, Ciaroni, ivi, n. 246015; Cass. pen., Sez. III, 11 February 2010, n. 14828, De Flammis, ivi, 246812).

¹⁶² Cass. Pen. Sez. III n. 36514/2006; Cass. Pen. Sez. III n. 554/2007.

1. Il Ministro dell'ambiente e della tutela del territorio agisce, anche esercitando l'azione civile in sede penale, per il risarcimento del danno ambientale in forma specifica e, se necessario, per equivalente patrimoniale, oppure procede ai sensi delle disposizioni di cui alla parte sesta del presente decreto.

English Translation Art. 311, paragraph 1

(Specific redress or request for compensation of environmental damages)

1. The Minister of Environment has standing in actions for specific redress, also bringing civil actions before a criminal court and, if necessary, for compensation of environmental damages or decides according to the provisions of Part VI.¹⁶³

4.1.5 Legal standing of the e-NGOs

Italian version: Art. 2043 Codice Civile

Qualunque fatto doloso o colposo che cagioni ad altri un danno ingiusto obbliga colui che ha commesso il fatto a risarcire il danno

English translation: Art. 2043 Civil Code

Any negligent or fraudulent fact causing an unjust damage obliges the author of the fact to compensate the damage.

Sub-question:

Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and for individuals and report the professional discourse among legal scholars and the relevant national case law.

4.1.6 Scale and scope of legal remedies for e-NGOs and for individuals

4.1.6.1 Legal remedies: the review procedure

5 The Italian legal system is based on the protection of the legitimate interests (*interessi legittimi*), according to Art. 24 Constitution and Art. 1 Legislative Decree 2 July 2010 n. 104. "Legitimate interest" is the public interest of the party to obtain an administrative decision. The administrative courts hear cases involving legitimate interests, though there are also some other areas, -such as public procurement, public services, housing and urban planning- where they have exclusive jurisdiction (deciding on the infringement both of a right and of an interest).

6 The constitutional provision sets the basis for the participation of the public (i.e. any party that may get injured by the administrative decision, as well as the organizations representatives of potentially injured interests) that has an interest to an administrative decision

- to participate into the decision-making process and
- to have access to a *review procedure* of any *illegitimate* administrative decision of the public authority.

7 Participation into the decision-making process implies that all the mentioned parties can examine the acts of the proceeding and submit written pleadings and documents, that the public administration shall take into account if relevant for the proceeding itself (Art. 10 Law 241/1990). This general provision -valid for all the administrative proceedings (see below § 14)- is applicable to the environmental decision-making process.

¹⁶³ Part VI comprises all the actions of the MoE in case of environmental damages, such as the competence to initiate an administrative procedure, and to issue orders.

8 An administrative decision is *illegitimate* when it infringes the rule of law (any legal provision ruling the discretionary power of the public administration), including the provisions concerning the right of the interested parties to be heard in an environmental decision (i.e. environmental impact assessment).

9 The *review procedure* can be either an administrative review (before the President of the Republic) or a judicial review (before the administrative courts of first instance, *Tribunali Amministrativi Regionali*, T.A.R.)¹⁶⁴.

10 The parties can challenge an environmental impact statement, EIA, (a decree, in Italy) of a project subject to environmental impact assessment.

11 The review before the President of the Republic is possible against any illegitimate administrative decision and has no court or legal fees. It is open to any party that has a legitimate interest.

4.1.6.2 Interim measures in the review procedure

12 Neither administrative appeals nor applications for judicial review have automatic suspensive effects.

13 Traditionally interim measures are taken when two conditions are met, namely *periculum in mora* (urgency) and *fumus boni juris* (a *prima facie* positive assessment on the case).

14 *Interim* measures adopted in first instance may be appealed to the Consiglio di Stato (or the special second-instance Court for the Sicily Region: Consiglio di giustizia amministrativa per la Regione Sicilia) without the need to wait for the first instance judgment on the merits.

15 It is difficult to go into more details focusing on environmental cases, since *interim* measures are normally not reported. They are however often given in environmental cases.¹⁶⁵

16 The doctrine underlines that a problem linked to the limits for *interim* relief is the effectiveness of remedies provided by administrative courts. These courts are quite apt at annulling illegal decisions and are getting used to award pecuniary damages. Judicial protection in case of omissions instead is less developed; according to the prevailing view, Art. 117 Legislative Decree 2 July 2010 n. 104 (Administrative Procedure Code) only allows administrative courts to declare the duty of the defendant public administration to act; they cannot give the defendant public administration indications on the actual content of the measures to be taken. Moreover, even in the case of annulment, it is still up to the competent authority to decide again the issue¹⁶⁶.

4.1.7 Prerequisites of the right of action

17 With regard to the provisions mentioned in Art. 9, para 3 AC, any person or group of persons have recourse to the judicial review procedure against the acts or omissions that infringe their rights or interests.

4.1.7.1 Ex lege standing

18 Under the Law n. 349/1986 on the Establishment of the Ministry of the Environment (1986 Law) the environmental organizations can be officially recognized by the Ministry of the Environment

¹⁶⁴ This provision was specifically applied to the environmental organizations by Art. 310, Legislative Decree n. 152/2006, see below §15. The Legislative Decree states that against the decisions, acts and omissions related to the Environmental Impact Assessment participation, it is always possible to recourse before the administrative courts.

¹⁶⁵ T.A.R. Sicilia, Palermo, Sez. I, 14 March 2012, n. 552, and T.A.R. Sicilia, Palermo, Sez. I, 23 March 2011, n. 546.

¹⁶⁶ See article by Roberto Caranta, Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Italy, in http://ec.europa.eu/environment/aarhus/access_studies.html.

(MoE) and be granted access to justice in order to challenge unlawful administrative decisions “in general” – i.e. not necessarily subject to a public participation procedure¹⁶⁷ – if they pursue (not occasionally) objectives of environmental protection described in their By-laws¹⁶⁸. It is not required that the appealed decisions fall into the specific field of activity of the associations.

19 According to Art. 13, 1986 Law, any environmental organization can apply for the *recognition* by the decree of the MoE if it meets the following legal requirements:

- 1) *It shall have an environmental objective*
- 2) *It shall be nationally representative (representing national interests) or representative in at least 5 Regions of Italy*
- 3) *It shall have a democratic internal order*
- 4) *It shall grant a continuity of action and an external relevance of the activity*

1) Environmental objective. The statutory objectives of the organisation shall be specifically dedicated to the protection of the environment¹⁶⁹.

2) National representativeness. The environmental protection objectives shall serve a national purpose.

3) Democratic internal order. The act of the MoE 24 October 1996, Prot. 2157/SCOC/96¹⁷⁰ has clarified that democratic internal order implies that:

a) The power to alter, amend or repeal the By-laws in whole or in part, or to adopt new By-Laws shall be vested in the organization’s members (Assembly). The Assembly shall name the Board of Directors. Any limitation to the members of the organization violates the Assembly sovereignty.

b) Every member of the organization has the right to join the Assembly and the right to vote.

c) Any statutory body which derives its authority or is controlled by another governing body (with different objectives) limits the Assembly sovereignty.

4) Continuity of action and external relevance of the activity

The MoE shall recognize the organization in 90 days from the application.

4.1.7.2 In concreto standing

20 Besides the decree of the MoE, the administrative courts have stated that an environmental organization can have the right of *locus standi* on a case-by-case basis¹⁷¹.

¹⁶⁷ In line with Art.9 para 3 AC, which refers to acts and decisions “in general” (namely, non-necessarily subject to a participation procedure by the “public concerned”).

¹⁶⁸ The system introduced by the 1986 Law has remained unchanged after the entry into force of the Environmental Code (Legislative Decree 152/2006, as amended).

¹⁶⁹ See, e.g., CdS, Sez. IV, 19 June 2014, n. 3111, where the association was not granted access to justice in so far as its statutory objectives were not specifically dedicated to the protection of the environment, as they were mainly objectives of political nature.

¹⁷⁰ L DOC 3.

¹⁷¹ Elena Fasoli observed that “this strict legislative criterion is mitigated by judicial practice. In fact, the majority of the more recent Italian case-law tends to confer legal standing not only to the national (and “officially” recognized) associations, but also, on a case-by-case basis, to the representatives of the local associations, not acting on behalf of the national organization. The environmental associations are thus granted standing when they protect interests that could be prejudiced by the decisions once a concrete and stable connection with the territory is established. It is difficult to predict whether the existence of a conspicuous number of recent case-law, which effectively allow the representatives of local associations (not acting on behalf of the national ones) to go before the courts, could be considered sufficient to meet the requirements of clarity and precision necessary in order to be regarded as a valid implementation of the obligations arising e.g. from art. 10 (2) Directive 85/337/EEC”, in E. Lohse, M. Poto, Participatory rights in the Environmental Decision-

Consiglio di Stato

21 In this regard, three main complementary consolidated opinions of the Consiglio di Stato (administrative court of second instance, hereinafter also CdS) have formed an integrated approach, where the emerging ideas are the following:

A. The administrative court can acknowledge, case by case, the standing to local organizations that

a) in their By-Laws have the environmental protection as a main purpose and this protection shall not be occasional nor episodic¹⁷² and

b) have a sufficient degree of representativeness and stability on a territory connected to the affected area¹⁷³.

B. The standing of the environmental organization can be considered as legitimate only if

a) the organization is not established for the only purpose to have an automatic standing before the administrative court

b) is proven a consolidate “territorial connectivity” that has to persist in a significant period of time (in the case, 18 days were considered a “non significant period of time”)¹⁷⁴;

c) the organization has a consistent number of members, which shows the causal connection between the interest and the claimed prejudice¹⁷⁵.

C. According to the leading case-law, the standing of national and ultra-regional environmental groups does not rule out the standing of local associations which represent a well-defined geographical area (local branches)¹⁷⁶. This is particularly true for spontaneous committees which are set up in order to protect the environment, the health and/or the quality of life of residents within a specific area. The areas and the populations threatened by activities possibly affecting the environment or public health would otherwise have no way to defend themselves in case of inertia of national environmental groups authorized to recourse.¹⁷⁷

Tribunali Amministrativi Regionali (T.A.R.)

22 The administrative court of first instance (T.A.R.) has also specified that there is a “substantial criterion”, based on an assessment “in concreto” on the degree of the representativeness of the entity, related to its by-law and organizational structure, as well as its local branch and its previous activities

Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective”, Duncker&Humblot, Berlin, 2015.

¹⁷² CdS, Sez. IV, 24 May 2011 n. 3107.

¹⁷³ The so-called “vicinitas”, the Latin word to express the degree of proximity between neighbours (§ 10): CdS; Sez. IV, 9 January 2014, n. 36; CL DOC 3 CdS, Sez. IV, 8 November 2010 n. 7907.

¹⁷⁴ Part of legal doctrine does not agree with the strict interpretation of the requirement. R. Caranta observes that: “Under Art. 9 l. 7 agosto 1990, n. 241, having legal personality is a condition sufficient for participation in the administrative proceedings. However, according to the prevailing opinion, this is not enough to give standing. Therefore ad hoc groups are often denied standing, because of their occasional nature and – even more often – because they are not representative. Other times even groups operating on a very specific local level are given standing. The more relaxed approach is probably preferable considering that, as shown above, individuals as such often have standing; logically speaking groups can hardly be subject to stricter requirements than individuals.”

¹⁷⁵ CdS, Sez. V, 17 September 2012 n. 4909.

¹⁷⁶ A stricter reading of the Administrative Court of Appeal in Sicily (special only for this Region) and of Consiglio di Stato – dating 2006 and 2004- allowed standing only to the national representative of the organisation: Cons. giust. amm. Sicilia, 22 November 2011, n. 897; Cons. Stato, Sez. IV, 14 aprile 2006, n. 2151, in Resp. civ. prev., 2006, 1098, note M. Poto, Il giudice e il legislatore di fronte alla questione ambientale, ovvero sulla sfida all’Idra di Lerna.

¹⁷⁷ CdS, Sez. VI, 24 May, 2011, n. 3107, confirmed by T.A.R. Sardegna Cagliari, Sez. I, 11 July 2014, n. 599.

to protect the environmental interest¹⁷⁸. The concrete and stable connection to the territory has also been considered an element of legitimation¹⁷⁹.

Sub-question:

Do rights of action allow the courts to control the legality of administrative decisions under all aspects or are they limited to the control of certain areas of the law (especially “environmental law” provisions)? How is the term ‘law relating to the environment’ which is used in Art. 9.3 AC defined or understood in your national legal order? Does it include any law that relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, animal protection, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment?

4.1.8 Implementation of Art. 9.2 and Art. 9.3 AC

23 As said, it is necessary to distinguish between actions under 9.2 AC and under 9.3.AC.

4.1.8.1 Administrative Court

24 As said, the implementation of Art. 9.2 AC provides that the interested parties can ask for a review of any decision of the public administration (i.e. order of the MoE) before the administrative court.

1. As for the intensity of judicial review, the administrative courts have unlimited jurisdiction in respect of the exhaustive cases set up by the law. This means that there are limited matters of administrative jurisdiction on the merits, where the court is responsible for deciding whether the act is correct on its merits (Art. 134 Administrative Procedure Code¹⁸⁰). Environmental decisions and consequential damages are not included in the list. In case of environmental-related acts, the court’s control will be limited on the legality of the act under all aspects interested by breach of administrative law (including the review on the damages), depending on the claim raised by the party (i.e. violation of the general rules on administrative proceedings; violation of environmental rules set up by the environmental laws).
2. Both the Consiglio di Stato and the Corte di Cassazione have clarified that, though the control on the legality can be supported by technical expertise, it is always an external control, meaning that the administrative court cannot substitute its own decision for that of the authority.¹⁸¹
3. As for the control on certain areas of the environmental law, before the administrative courts the principle is applied that judicial decisions must be commensurate with the forms of order

¹⁷⁸ T.A.R. Sardegna, Cagliari, Sez. II, 24 March 2009, n. 324, recalling CdS, Sez.VI, 7 February 1996, n. 182; T.A.R. Liguria, Sez. I, 22 June 2004, n. 1020 and 18 marzo 2004 n. 267; T.A.R. Marche, 22 February 2002, n. 184.

¹⁷⁹ T.A.R. Umbria, Perugia, Sez. I, 14 January 2014, s.n.d.; T.A.R. Lazio Roma, Sez. II, 6 February 2013, n. 1282.

¹⁸⁰ The exhaustive list of cases is justified by the principle of separation of powers: in the Italian legal systems the courts cannot overrule the administrative activity but in specific cases. According to Art. 134 the unlimited jurisdiction of the administrative court covers: 1. Cases of judgments’ execution; 2. Electoral decisions; 3. Administrative sanctions; 4. Territorial delimitations and borders; 5. The denials of film authorization. (Italian: Art. 134 Materie di giurisdizione estesa al merito: 1. Il giudice amministrativo esercita giurisdizione con cognizione estesa al merito nelle controversie aventi ad oggetto: a) l’attuazione delle pronunce giurisdizionali esecutive o del giudicato nell’ambito del giudizio di cui al Titolo I del Libro IV; b) gli atti e le operazioni in materia elettorale, attribuiti alla giurisdizione amministrativa; c) le sanzioni pecuniarie la cui contestazione è devoluta alla giurisdizione del giudice amministrativo, comprese quelle applicate dalle Autorità amministrative indipendenti e quelle previste dall’articolo 123; d) le contestazioni sui confini degli enti territoriali; e) il diniego di rilascio di nulla osta cinematografico di cui all’articolo 8 della legge 21 novembre 1962, n. 161).

¹⁸¹ Cass. civ., Sez. Un., 17 February 2012, numbers 2312 and 2313; Corte cost., 3 March 2011, n. 175; Cons. St., Sez. VI, 9 February 2011, n. 871.

sought by the parties. This principle has two consequences: a) A court cannot of its own motion adjudicate on requests which have not been pleaded before it. The judicial review on the legality of the acts is therefore limited on the claims raised by the parties (Art. 112 Code civil procedure)¹⁸²; b) the court cannot rule beyond the limits of the requests. This means that only the requests raised by the party shall receive an answer from the court. Therefore, “law relating to environment” is intended in a broad sense, including all the activities related to the environment, as far as the parties have requested a judicial decision on them.

4.1.8.2 Civil or criminal court

25 In case of action brought before the civil or criminal courts (Implementation of Art. 9.3), the powers of the judges will be limited to an indirect control on the act, primarily focusing on the environmental damages as a consequence of the act: the court will assess on the damages, disapplying the illegitimate act. The illegitimate act is considered as *tamquam non esset* (=as if it did not exist) for the period of the judicial decision. The main difference between this judicial review and the judicial review before an administrative court is that the criminal and civil courts can disapply the act, while the administrative court can annul it. Also before the civil and criminal court is applied the rule that judicial decisions must be commensurate with the forms of order sought by the parties: any violation of environmental laws, broadly intended, might have caused damages to the parties.

Please give us information about the discussion in your national legal order – if there is any – concerning the implications of the ECJ’s Slovak bear judgment C-240/09. Please give us also a first impression on the reactions on the ECJ judgments in C-401-403/12 P and C-404-405/12 P.

4.1.9 ECJ judgments in C-401-403/12 P and C-404-405/12 P

4.1.9.1 Case C-240/09

26 The case was discussed by the scholars, but never quoted by the Courts. The doctrine in Italy has ranked it as one of the most important cases where the national judge shall interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9 (3)¹⁸³. An author has underlined that the Italian translation of the expression “to the fullest extent possible” does not mirror the meaning in English, for it is much more restrictive. On the contrary, the author underlines that the purpose of the ECJ is to interpret the procedural rules in order to allow the most comprehensive involvement of the e-NGOs in environmental cases before the Courts: the expression does not provide a conditional statement, but rather an imperative one¹⁸⁴.

4.1.9.2 Cases C-401-403/12 P and C-404-405/12 P

27 The judgments of the Court of Justice are published in Italian in one the most important websites for environmental news (<http://www.reteambiente.it/normativa/21624/>) but have neither been commented nor published with comments in legal journals yet.

Is Art. 9.3 AC in your national legal order considered to give a right of action mainly or only for NGOs or for individuals as well? Give a general overview on how the standing criteria for individu-

¹⁸² Cons. Stato, Sez. IV, 9 January 2014, n. 36.

¹⁸³ Urbano Barelli, I limiti alle energie rinnovabili con particolare riferimento alla tutela della biodiversità, in Rivista giuridica dell’ambiente, fasc. 1, 2014, pag. 1.

¹⁸⁴ Marco Onida, Accesso alla giustizia ambientale nell’Unione Europea: un percorso ancora incompiuto?, in Rivista giuridica dell’ambiente, fasc. 3-4, 2014, pag. 441. Roberto Caranta underlines this scarce attention of the Courts toward the Slovak Brown Bear, only reported in Ambiente e sviluppo, 2011, 5, 466.

als from the public concerned are applied in environmental cases in your legal order. Does the individual have to show a specific interest in the decision at stake, or does it suffice that s/he lives in the vicinity of the (proposed) activity?

4.1.10 Individual and collective rights

28 In general, under Art. 24 of the Italian Constitution, everyone has the right of access to courts for vindicating her/his own rights or legitimate interests. In practice, rules on standing in front of the courts (especially the administrative ones) have been elaborated by the case-law. It is noteworthy that in Italy the Consiglio di Stato's decisions (court of appeal in administrative judicial review) can be challenged before the Corte di Cassazione, that has jurisdiction on mere legitimacy questions (where fundamental rights are involved). Therefore, we find sometimes two different trends, in case-law, one set up by the Consiglio di Stato, one by the Corte di Cassazione.

29 Apart from damages actions, where the standing is restricted to the damaged parties, standing does not change according to the type of remedy requested. The first case dates back to the early '70s, with the Italia Nostra Case. The Tovel lake in Trentino had endemic algae, which at times gave red colour. The provincial government decided to build a road, in order to facilitate the visits to the lake. A leading environmental association, Italia Nostra, challenged the decision. The Consiglio di Stato stated that the standing of the Italia Nostra was legitimate, based on its by-laws provisions. The Corte di Cassazione, on the contrary, affirmed that standing could be given only to individuals with a specific interest, this way excluding any fundamental right to environment.

30 Progressively, the protection of the environmental rights connected to health has become so rooted as to be ranked as fundamental right. The first case was raised by an action of some citizens who asked an environmental assessment where a nuclear plant was planned to be built¹⁸⁵. The case was followed by an individual action of a person worrying about the environmental effects of a water treatment plant¹⁸⁶. In line with this trend, the administrative courts allow now individuals' standing in all cases where the concept of *vicinitas* is involved. *Vicinitas* is a word borrowed from Latin, which connects to the idea of neighborhood and has been interpreted by the courts as a satisfactory degree of proximity between neighbours. The doctrine has underlined that the concept is flexible enough: for instance, being an owner of some land affected, or bordering a land affected, by activities potentially harmful for the environment, is a sufficient title to qualify the standing¹⁸⁷. A similar decision was taken in the case of living close to an actual or potential source of pollution¹⁸⁸. A case was brought before the administrative court by the owner of a flat two km distant to a beach, where building works were to be allowed by the municipality. The Consiglio di Stato held that the owner of the flat had sufficient standing, even if the flat was two kilometers distant to the building site. The Consiglio di Stato, though rejecting the admission of an *actio popularis*, held that is to be avoided a situation where no one can challenge a decision affecting the environment. The building, whose permission was in discussion, rested on a beach which was flanked by a large pine grove beach, without any immediate neighbors: consequently, the Consiglio di Stato held that the title of flat owner, though at some distance, was enough to have standing based on the proportionality principle¹⁸⁹.

¹⁸⁵ Cass. Civ., Sez. un., 9 March 1979, n. 1463.

¹⁸⁶ Cass Civ., Sez. un., 6 October 1979, n. 5172.

¹⁸⁷ Roberto Caranta, op.cit.; T.A.R. Sicilia, Palermo, Sez. II, 7 August 2008, n. 1097, concerning the authorization for geothermal research activities.

¹⁸⁸ CdS, Sez. III, 15 February 2012, n. 784.

¹⁸⁹ CdS, Sez. VI, 13 September 2010, n. 6554; see Roberto Caranta op.cit.

31 This broad approach does not dispense the claimants from providing evidence about the circumstances grounding the legal standing, which means: actual or potential damages of the activity affecting the territory¹⁹⁰.

Does your national legal order differentiate between the standing criteria for individuals and for NGOs? If yes, are there special rules for this differentiation in the field of environmental law? Do the same rules apply to individuals and NGOs of other Member States / Parties to the AC?

4.1.11 Standing criteria for individuals and e-NGOs

32 The law (Art. 13, L. 349/1986 for the e-NGOs; Art. 2043 Civil Code for both e-NGOs and individuals) and the interpretation of the courts have set up a series of pre-requisites of the right of action for the e-NGOs, which have been progressively interpreted to allow the most comprehensive standing of the e-NGOs before the courts. A common criterion -established by the courts- for e-NGOs and citizens' standing is the assessment of the *vicinitas* (for further details on the definition, see §10), in order to exclude all cases of *actio popularis*. The doctrine has further observed that the conditions laid down for e-NGOs in Art. 13 L. 349/1986 do not appear to be disproportionate or to run counter the objective of facilitating the access to judicial review, especially considering that the standing is granted also to local branches of the e-NGOs listed in the provision. Roberto Caranta observes anyway that Art. 13 L. 349/1986 favors national organizations, while the requirements spelt out by the case law are meant to give standing to e-NGOs which are active at local or regional level. The Italian administrative courts have not yet been addressed by "foreign" e-NGOs: it is to believe that in this case standing should be allowed to both multinational or international e-NGOs and local "foreign" e-NGOs in case of negative cross-border effects of the challenged measures¹⁹¹.

33 To sum up, according to the case-law, standing for groups or associations (including e-NGOs) is linked to a number of cumulative requirements: 1) groups must be effectively involved in the protection of the environment on the basis of specific provisions in their By-Laws; 2) they must be linked to and be representative of the local community impacted by the challenged decision.

4.2 The recognition of e-NGOs

How does the formal structure of an e-NGO determine its access to justice in your national legal order?

Are e-NGOs or citizens' initiatives obliged to be recognized by authorities before they have legal standing in environmental procedures? What requirements need to be met? Did any criteria in the recognition procedure change since 2012?

4.2.1 Recognition of e-NGOs or citizens' initiatives

34 As said above, the law requires a formal recognition for the e-NGOs in order to be granted the standing before the courts. This formal recognition is not asked for citizens' initiatives. Nevertheless, for both categories, the case-law has set up a common criterion: the assessment of the *vicinitas* (see §10), in order to exclude all cases of *actio popularis*.

35 Under the Law n. 349/1986 the environmental organizations can be officially recognized by the Ministry of the Environment (MoE) and be granted access to justice in order to challenge unlawful administrative decisions "in general" – i.e. non necessarily subject to a public participation procedure – if they pursue (not occasionally) objectives of environmental protection described in their by-laws. It

¹⁹⁰ T.A.R. Lombardia, Milano, Sez. II, 8 February 2011, n. 383.

¹⁹¹ See Roberto Caranta, op.cit.

is not required that the appealed decisions fall into the specific field of activity of the associations. According to Art. 13, 1986 Law, any environmental organization can apply for the recognition by the decree of the MoE if it meets the following legal requirements:

- 1) *It shall have an environmental objective*
- 2) *It shall be nationally representative (representing national interests) or representative in at least 5 Regions of Italy*
- 3) *It shall have a democratic internal order*
- 4) *It shall grant a continuity of action and an external relevance of the activity*

36 Anyway, as seen above (§7.2), standing is now granted on a case-by-case basis (Consiglio di Stato and T.A.R.) even to e-NGOs which are not recognized according to these criteria, and therefore the provision does not operate as an exclusionary clause¹⁹².

37 This open interpretation of the courts toward a broader standing covers a period antecedent to 2012 (2010-2015).

Are there any special requirements on the organization of e-NGOs and, if so, are they comparable with Section 3 para 1 UmwRG*? [Is there any discussion on the compliance of these requirements?]

4.2.2 Requirements of the e-NGOs

38 As said above (§§7.1 and 7.2), the law and the interpretation of the courts have set up a series of pre-requisites of the right of action for the e-NGOs, which have been progressively interpreted to allow the most comprehensive standing of the e-NGOs before the Courts.

39 The common elements with Section 3 para 1 UmwRG are: 1. The recognition upon request; 2. The democratic participation for any person supporting the objectives of the association.

40 For the sake of completeness, the requirements are listed again here below:

4.2.2.1 Prerequisites of the right of action

Ex lege standing

41 Under the Law n. 349/1986 on the Establishment of the Ministry of the Environment (1986 Law) the environmental organizations can be officially recognized by the Ministry of the Environment (MoE) and be granted access to justice in order to challenge unlawful administrative decisions “in general” – i.e. non necessarily subject to a public participation procedure – if they pursue (not occasionally) objectives of environmental protection described in their by-laws. It is not required that the appealed decisions fall into the specific field of activity of the associations. According to Art. 13, 1986 Law, any environmental organization can apply for the recognition by the decree of the MoE if it meets the following legal requirements:

- 1) *It shall have an environmental objective*
- 2) *It shall be nationally representative (representing national interests) or representative in at least 5 Regions of Italy*
- 3) *It shall have a democratic internal order*
- 4) *It shall grant a continuity of action and an external relevance of the activity*

1) Environmental objective. The statutory objectives of the organisation shall be specifically dedicated to the protection of the environment.

¹⁹² Ibid.

2) National representativeness. The environmental protection objectives shall serve a national purpose.

3) Democratic internal order. The act of the MoE 24 October 1996, Prot. 2157/SCOC/96 has clarified that democratic internal order implies that:

a) The power to alter, amend or repeal the By-laws in whole or in part, or to adopt new By-Laws shall be vested in the organization's members (Assembly). The Assembly shall name the Board of Directors. Any limitation to the members of the organization violates the Assembly sovereignty.

b) Every member of the organization has the right to join the Assembly and the right to vote.

c) Any statutory body which derives its authority or is controlled by another governing body (with different objectives) limits the Assembly sovereignty.

4) Continuity of action and external relevance of the activity.

The MoE shall recognize the organization in 90 days from the application.

In concreto standing

42 Besides the decree of the MoE, the administrative courts have stated that an environmental organization can have the right of *locus standi* on a case-by-case basis¹⁹³.

Case-law: Consiglio di Stato

43 In this regard, three main complementary consolidated opinions of the Consiglio di Stato have formed an integrated approach, where the emerging ideas are the following:

A. The administrative court can acknowledge, case by case, the standing to local organizations that

a) In their By-Laws have the environmental protection as a main purpose and this protection shall not be occasional nor episodic and

b) Have a sufficient degree of representativeness and stability on a territory connected to the affected area.

B. The standing of the environmental organization can be considered as legitimate only if

a) The organization is not established for the only purpose to have an automatic standing before the administrative court

b) A consolidate "territorial connectivity" is proven and it has to persist in a significant period of time (in the case, 18 days were considered a "not significant period of time");

c) The organization has a consistent number of members, which shows the causal connection between the interest and the claimed prejudice.

¹⁹³ Elena Fasoli observed that "this strict legislative criterion is mitigated by judicial practice. In fact, the majority of the more recent Italian case-law tends to confer legal standing not only to the national (and "officially" recognized) associations, but also, on a case-by-case basis, to the representatives of the local associations, not acting on behalf of the national organization. The environmental associations are thus granted standing when they protect interests that could be prejudiced by the decisions once a concrete and stable connection with the territory is established. It is difficult to predict whether the existence of a conspicuous number of recent case-law, which effectively allow the representatives of local associations (not acting on behalf of the national ones) to go before the courts, could be considered sufficient to meet the requirements of clarity and precision necessary in order to be regarded as a valid implementation of the obligations arising e.g. from art. 10 (2) Directive 85/337/EEC", in E. Lohse, M. Poto, *Participatory rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective*, Duncker&Humblot, Berlin, 2015.

C. According to the leading case-law, the standing of national and ultra-regional environmental groups does not rule out the standing of local associations which represent a well-defined geographical area (local branches)¹⁹⁴. This is particularly true for spontaneous committees which are set up in order to protect the environment, the health and/or the quality of life of residents within a specific area. The areas and the populations threatened by activities possibly affecting the environment or public health would not otherwise have no way defend themselves in case of inertia of national environmental groups authorized to recourse.¹⁹⁵

Case-law: Tribunali Amministrativi Regionali (T.A.R.)

44 The administrative court of first instance (T.A.R.) has also specified that there is a “substantial criterion”, based on an assessment *in concreto* on the degree of the representativeness of the entity, related to its by-law and organizational structure, as well as its local branch and its previous activities to protect the environmental interest¹⁹⁶. The concrete and stable connection to the territory has also been considered an element of legitimation¹⁹⁷.

4.3 Preclusion of objections

Does your national legal order include restrictions on access to justice for e-NGOs, which are comparable to the “material” preclusion (materielle Präklusion) of section 2 para 3 UmwRG? If so, how is this evaluated in the professional legal discourse (relevant literature/case law) with special regard to its conformity with EU law and the AC?

Which requirements do e-NGOs have to meet in your national legal order to be able to participate in planning and licensing procedures?

4.3.1 General law on Administrative Procedure (L.241/1990)

45 In any major area of administrative law, it is necessary to refer to the general law on administrative procedures, that sets up the basic principles for any administrative action. Any special law applied to a specific administrative law area (such as environment, public procurement) may contain further and more specific provisions, according to the general rule “*lex specialis derogat legi generali*” (the special principle prevails on the general one), provided that the special provisions contain at least the basic guarantees of the general law. Law n. 241/1990 is the general law on administrative procedures and provides a general overview of the good administration principles, as set up by the Italian Constitution in Art. 97. More specifically, Law n. 241/1990 disciplines the administrative action, by providing:

- rules on good administration (duty to identify the subject responsible for the proceeding; duty to communicate the beginning of the proceeding; duty to give reasons about the final decision)
- rules on participation (any member of the public likely to be directly affected by the decision as well as anybody having a public or a private interest in a future decision by a public authority, including associations representing common interests, can participate in the decision/making where such interests are likely to be affected)

¹⁹⁴ A stricter reading of the Administrative Court of Appeal in Sicily (special only for this Region) and of Consiglio di Stato – dating 2006 and 2004- allowed standing only to the national representative of the organization: Cons. giust. amm. Sicilia, 22 November 2011, n. 897; CdS, Sez. IV, 14 April 2006, n. 2151, in Resp. civ. prev., 2006, 1098, note M. Poto, Il giudice e il legislatore di fronte alla questione ambientale, ovvero sulla sfida all’Idra di Lerna.

¹⁹⁵ CdS, Sez. VI, 24 May, 2011, n. 3107, confirmed by T.A.R. Sardegna Cagliari, Sez. I, 11 July 2014, n. 599.

¹⁹⁶ T.A.R. Sardegna, Cagliari, Sez. II, 24 March 2009, n. 324, recalling CdS, Sez. VI, 7 February 1996, n. 182; T.A.R. Liguria, Sez. I, 22 June 2004, n. 1020 and 18 March 2004 n. 267; T.A.R. Marche, 22 February 2002, n. 184.

¹⁹⁷ T.A.R. Umbria, Perugia, Sez. I, 14 January 2014, s.n.d.; T.A.R. Lazio Roma, Sez. II, 6 February 2013, n. 1282.

- rules on access to documents (right to have access to the documents and copy them)
- judicial review in case of rejection of the right to have access to documents (before the Ombudsman or before the administrative courts).

46 With regards to the participation in planning acts and procedure, Law 241/1990 does not guarantee it as a general rule implying that, participation in the environmental law area is wider than in other administrative areas not disciplined by special provisions (see §15).¹⁹⁸

4.3.2 Environmental Code

47 As said above (§14), the general law on administrative procedures, does not guarantee the e-NGOs' participation into planning acts and procedures. The framework has been re-shaped by the Environmental Code, EC: according to Articles 309 and 310, Legislative Decree n. 152/2006 (EC), the e-NGOs can participate to the procedures affecting their interests, by submitting observations to the competent authority¹⁹⁹. The Environmental Code does not differentiate between planning acts and licensing procedures, giving room to the broadest interpretation of the mentioned participation. The procedure allowing the participation is simply defined as any procedure confirming the adoption of precautionary measures adopted by the Ministry of Environment or by the Government. The participation will consist in the submission of written pleadings, regarding any case of environmental damages or threaten of imminent damage and in the request of State intervention for the protection of the environment. Art. 310 provides the legal standing to support this participation before the Courts. These two articles enshrine the right to participate of the e-NGOs into the environmental procedures, comprising both the planning acts and the licensing measures, without any further distinction between procedures. This right to participate to the planning and licensing procedure is not a *condicio sine qua non* for the right of standing, so that the standing is not conditional to the previous exercise of the right of participation. This implies that the right of standing is supported by a sufficient interest in all cases the e-NGOs' participation into the administrative proceeding was allowed or not allowed. Moreover, as said above, the right of standing is in any case granted where there is the violation of a right, regardless whether the e-NGOs have participated to the administrative proceeding (See § 2 of the Study). The requirements to participate are the same as the one set up for the general participation to the administrative procedure (Art. 9 L. 241/1990): legal personality and potential damage. The absence of a link between the two rights (participation to the administrative procedure and standing) is confirmed by

¹⁹⁸ V. Molaschi, The implementation of the Aarhus Convention in Italy: a strong "vision" and a weak "voice", in E. Lohse, M. Poto, Participatory rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective", Duncker&Humblot, Berlin, 2015, cit., pag. 90.

¹⁹⁹ 309. Richiesta di intervento statale 1. Le regioni, le province autonome e gli enti locali, anche associati, nonché le persone fisiche o giuridiche che sono o che potrebbero essere colpite dal danno ambientale o che vantino un interesse legittimante la partecipazione al procedimento relativo all'adozione delle misure di precauzione, di prevenzione o di ripristino previste dalla parte sesta del presente decreto possono presentare al Ministro dell'ambiente e della tutela del territorio e del mare, depositandole presso le Prefetture - Uffici territoriali del Governo, denunce e osservazioni, corredate da documenti ed informazioni, concernenti qualsiasi caso di danno ambientale o di minaccia imminente di danno ambientale e chiedere l'intervento statale a tutela dell'ambiente a norma della parte sesta del presente decreto. 2. Le organizzazioni non governative che promuovono la protezione dell'ambiente, di cui all'articolo 13 della legge 8 luglio 1986, n. 349, sono riconosciute titolari dell'interesse di cui al comma 1. 3. Il Ministro dell'ambiente e della tutela del territorio e del mare valuta le richieste di intervento e le osservazioni ad esse allegate afferenti casi di danno o di minaccia di danno ambientale e informa senza dilazione i soggetti richiedenti dei provvedimenti assunti al riguardo. 4. In caso di minaccia imminente di danno, il Ministro dell'ambiente e della tutela del territorio e del mare, nell'urgenza estrema, provvede sul danno denunciato anche prima d'aver risposto ai richiedenti ai sensi del comma 3. 310. Ricorsi 1. I soggetti di cui all'articolo 309, comma 1, sono legittimati ad agire, secondo i principi generali, per l'annullamento degli atti e dei provvedimenti adottati in violazione delle disposizioni di cui alla parte sesta del presente decreto nonché avverso il silenzio inadempiuto del Ministro dell'ambiente e della tutela del territorio e del mare e per il risarcimento del danno subito a causa del ritardo nell'attivazione, da parte del medesimo Ministro, delle misure di precauzione, di prevenzione o di contenimento del danno ambientale.

the provisions in Articles 309, 310 and 311 EC, where the right to participate is conferred to the environmental associations, while the right of standing is conferred only to the MoE. Nevertheless, the Italian legal system recognized the right of standing also to the e-NGOs, as said above, via the provisions of Art. 2043 Civil Code. It is worth mentioning a recent judgment of the Consiglio di Stato, that has recognized the right of standing to an e-NGOs that not only did not participate to the administrative procedure, but it did not even have a standing in the first instance judgment²⁰⁰.

4.3.3 Projects of Common Interest” (PCI)

48 Moreover, in compliance with the provisions set by Art. 9, Reg. EU n. 347/2013, the Italian Ministry of Economic Development has approved the Decree n. 81099, 11th February 2015, granting the public participation in case of plans and programs related to “projects of common interest” (PCI) in the trans-European energy infrastructure. The Decree contains the manual aiming at applying the principles of public participation to all the parties involved in the permit granting process. In this sense, the close –though not mandatory- cooperation between the project promoter, the investors and the competent authority (Ministry of Economic Development) is in line with the provisions of Art. 9.3 Reg. EU n. 347/2013. In particular, the project promoters are now required to dialogue with the local actors (institutions and civil society). When the project is approved or modified according to the suggestions of the public authority, at least one public consultation shall be carried out. The public consultation shall inform the stakeholders on the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file.

49 According to Art. 6 Decree n. 81099/2015 (recalling Annex VI (3), Reg. 347/2013), the stakeholders to be involved in the public consultation and participation project are: all the interested parties, affected by a project of common interest, including the national, regional and local authorities, the landowners and citizens living in the vicinity of the project, the general public and their associations, organizations or groups. All the stakeholders shall be extensively informed and consulted at an early stage, when potential concerns by the public can still be taken into account and in an open and transparent manner. Where relevant, the competent authority shall actively support the activities undertaken by the project promoter. This list therefore includes the e-NGOs that might be affected by a project of common interest, this way expressly recognizing their right to participate to planning procedures. Also in this case, the general requirement is an “interest”, connected to a potential damage.

Do they have the right to participate only in administrative procedures with a mandatory EIA or can they participate in other procedures as well?

4.3.4 Participation in case of mandatory EIA

50 The main context for the application of participatory rights of the e-NGOs is the EIA procedure, which is regulated at the national level and, within the framework of national laws, at the regional level (through subsidiarity). National legislation pertaining to the EIA procedure is in line with EU law.

51 The main legislative act covering the EIA procedure is the Legislative Decree 152/2006 “Norms on the Environment”, Part 2, Titles I (general principles), III (national EIA, Art. 19-29), and IV (interregional and trans-boundary EIA) as modified by Legislative Decree 128/2010. Annex II of L.D. 152/2006 contains a list of activities (identical to annex I to Directive 92/2011 on the assessment of the effects of certain public and private projects on the environment) for which EIAs are compulsory at the national level since they are deemed to have a significant impact. Additional activities listed in annex III of L.D. 152/2006 as modified (projects that are subject to an obligatory regional EIA, corresponding to those listed in annex II to the EU Directive) are also subject to EIA procedure at the regional level. Annex IV shows activities subject to a screening procedure to assess whether or not are

²⁰⁰ CdS, Sez. VI, 12 February 2015, n. 769.

likely to have a significant impact. The criteria to be subject to EIA (screening) are listed in annex V: this procedure serves to evaluate whether a project could have a significant or negative impact on the environment. Projects listed in Annex IV that are located in specified protected areas (including coastal and marine protected areas) are automatically subject to an EIA.

52 The public, including public interest groups such as e-NGOs, are entitled to participate both in the EIA and in the screening procedure. In the screening procedure the public concerned can send comments to the relevant public authority within 45 days from the presentation of the draft project and of its screening evaluation. EIA legislation stipulates that the public be informed at an early stage of the procedure. Accordingly, the proponent of the activity subject to the EIA procedure shall request the competent public authority for authorization and inform the public at the same time by publishing a notice in both the website of the Competent Authority, in a national and in regional/local newspapers that provide general information on the proposed activity, indicating where and for how long the relevant documentation will be available, and specifying practical details about public participation. The applicant assumes the expenses of publishing the notice as well as of providing EIA documentation (which includes a study on the adverse effects on the environment) and copies thereof. National legislation now foresees the possibility to provide written comments within 60 days (previous law allowed 45 days) from the day the documentation has been deposited and made available to the public. In order to favor the public, some flexibility on deadlines for submitting comments is applied. The competent authority can also decide to organize consultations through a public hearing where the EIA study, further technical opinions and observations by the public are discussed. The hearing by the competent authority is concluded with a report on the works and on the findings, which are kept into consideration for the final decision. The outcome of the EIA procedure in Italy is a Decree on the “environmental compatibility” of the proposed activity issued by the MoE and the Minister for Cultural Heritage on the basis of the opinion of an independent EIA/SEA Commission charged with assessing the documentation provided by the proponent. The assessment made by the EIA/SEA Commission is based *inter alia* on the comments provided by the public and on reasoned opinion. The opinion and the subsequent Decree can turn out to be either negative, in which case the project is not deemed to be environmentally compatible and is therefore not executed, or positive, in which case specific conditions for the execution of the project (including mitigation measures) are prescribed. The final decision (the assessment by the EIA/SEA Commission and the Decree on environmental compatibility) is published in newspapers, in the Official Journal and on the MoE’s website.

53 According to Legislative Decree 163/2006 a special EIA procedure, anchored at the early stage of planning, applies to specific projects (infrastructures) identified by the Government as strategic or of national interest. Provisions on public participation in this context remain unchanged.

54 If a change leads to an increase or to a substantially different activity, a new EIA procedure (including public participation) has to be carried out to change existing activities already subject to an EIA.

55 On Integrated Pollution Prevention and Control (IPPC), Legislative Decree 152/2006 “Norms on the Environment”, Part 2, Title III *bis*, (art. 29 *bis* - *quattordices*) as modified by Legislative Decree 128/2010 and implementing EU Directive 1/2008, foresees a similar procedure for public participation when issuing “integrated environmental authorization” (AIA), with 30 days for comments by the public.

4.3.5 Participation in all other cases

56 Legislation on EIA and IPPC, like any other sectoral environmental legislation, is complemented by general provisions on public participation in administrative decisions (Law 241/90), focusing on aspects not specifically regulated by sectoral legislation. As said above, according to Law n. 241/1990, any member of the public likely to be directly affected by the decision as well as anybody

having a public or a private interest in a future decision by a public authority, including associations representing common interests, can participate in the decision/making where such interests are likely to be affected. More specifically, the concerned public, so defined, is entitled to receive the relevant information, to have access to all documents and to give comments to be taken into consideration.

Do the authorities directly inform the e-NGOs about projects and administrative procedures that may have effects on the environment? If not: How and where can e-NGOs get information about those upcoming procedures? How do they get access to the relevant information and planning documents concerning the projects?

4.3.6 Duty to inform in the General Law on Administrative Procedure (1990)

57 Law n. 241/1990 did not foresee any specific duty to inform for the competent authorities. The legislation has progressively changed and nowadays the sectoral legislation provides a set of rules for the public authorities (case of mandatory EIA in the Environmental Code and Projects of Common Interest). Besides the case where the law provides a general duty for the public authority, it is extremely difficult to assess how and where the e-NGOs get information about the upcoming procedures.

58 Nevertheless, in recent years, the principle of total accessibility to the public administration activity has been added to numerous legislative measures, following the formula of an efficient “open government”²⁰¹. In compliance with Article 11, Legislative Decree. n. 150/2009, transparency is intended as total “accessibility”, through the publication -on governmental official websites- of the information concerning every aspect of the public administration’s organization. The main aspects of the total accessibility include:

1. Publication. It’s compulsory to publish: the balance sheets of politicians, and relatives within the second degree; acts of procedures for approval of plans and planning variants; data concerning health, appointments of general managers, as well as the accreditation of clinical facilities.
2. Transparency. A definition of the general principle of transparency: total accessibility to information regarding the organization and activity of the PA, in order to encourage widespread forms of democratic control on the pursuit of official duties and on the resource utilization, via data publication on institutional sites.
3. Data publication on the governmental official websites. To allow effective the knowledge of the action of PA and to solicit and facilitate the participation of citizens, information and public documents are to be disseminated and directly accessible on the governmental official websites.
4. Total accessibility. The model is inspired by the US Freedom of Information Act, which guarantees accessibility to anyone who requests it in any document or data held by the PA, except in cases where the law expressly excludes it (e.g. for safety reasons).
5. Civic Access. It introduces a new institution: the civic right to access. This new form of access is designed to empower the trust between citizens and public administration and to promote the rule of law (and the prevention of corruption). All citizens have the right to request and obtain that the P.A. publishes records, documents and information that have not been disclosed yet.
6. Quality and clarity of the information. It regulates the quality of the information disseminated by the P.A. through the institutional websites. All data formats must be intact, and published in such a way as to ensure that the document is stored without manipulation or forgery; the data

²⁰¹ Further details in the website: <http://qualitapa.gov.it/relazioni-con-i-cittadini/open-government/trasparenza-e-diffusione-di-informazioni-della-pa/>.

must also be updated and complete, easy to consult; they must indicate the source and be reusable (unlimited copyright or patent).

7. Obligation of deadline in publications. To determine the actual duration of the publication: 5 years starting as of January 1st of the year following the year in which the obligation of publication starts and in any case until the acts have produced their effects.
8. Transparent administration. A special section shall be created in the governmental official websites, named "transparent administration" - to post everything that establishes the measure.
9. Three-year plan for transparency and integrity. The three-year plan is governed by transparency and integrity - that is an integral part of the Plan of prevention of corruption - and that should indicate the modalities for implementing the transparency requirements, as well as objectives connected with the plan of performance.
10. Publication of the curricula, salaries and positions of the managerial staff. Other provisions relating to the publication of the curricula, the salaries, assignments and all other personnel data management, as well as the publication of notices on competitions measures adopted for recruiting the staff at the PA.

4.3.7 Duty to inform in the Environmental Code (2006)

59 EIA legislation stipulates that the public be informed at an early stage of the procedure. Accordingly, the proponent of the activity subject to the EIA procedure shall request the competent public authority for authorization and inform the public at the same time by publishing a notice in both the website of the Competent Authority, in a national and in regional/local newspapers that provide general information on the proposed activity, indicating where and for how long the relevant documentation will be available, and specifying practical details about public participation, such as the indication of the offices where it is possible to have access to the documentation, and the time limits to participate. The applicant assumes the expenses of publishing the notice as well as of providing EIA documentation (which includes a study on the adverse effects on the environment) and copies thereof.

4.3.8 Duty to inform in the Projects of Common Interest (2015)

60 As said above (§16), in case of Projects of Common Interest, the legislation has provided detailed criteria on the duty to inform. The project promoter shall, within a period not superior to 24 months, draw up and submit a concept for public participation to the competent authority, that shall request modifications or approve the concept. When the project is approved or modified according to the suggestions of the public authority, at least one public consultation shall be carried out. The public consultation shall inform stakeholders about the project at an early stage and shall help to identify the most suitable location or trajectory and the relevant issues to be addressed in the application file.

Are there any time limits to make an objection or give a statement in your national legal order? Will objections passing this time limit be excluded in the administrative procedure and the decision on the development consent of a project? Is an objection that has been made "out of time" also precluded in any legal proceeding against the decision on the development consent ("material" preclusion as described above)? Are there any specific requirements concerning the content of objections by e-NGOs?

4.3.9 Time limits in the General Law on Administrative Procedure (1990)

61 The General Law did not foresee time limits for participation, but it refers to specific provisions in case of planning and programming procedures, stating that the guarantees on participation are not

applicable to normative acts, planning and programming procedures, as well as tax proceedings, that have their own special discipline²⁰² (Art. 13).

4.3.10 Time limits in the Environmental Code (2006)

62 According to Art. 24, Environmental Code (as amended by Art. 2, paragraph 20, L. Decree n. 128/2010) within a period of sixty days from the submission of the EIA (Art. 23), any interested party can have access to the documents related to the project and its environmental study, submit its observations, even providing new or additional relevant information and evaluation. The measure of environmental impact assessment must take into account the comments received, considering them simultaneously, individually or for groups.

63 The competent authority may order that the consultation is carried out through a public inquiry to examine the environmental impact study, the advice provided by the public administrations and the comments from the public, without interrupting or suspending the deadline for the investigation. The mentioned investigation concludes with a report on the work and assess the results emerged, which are acquired and evaluated for the purpose of the measure of environmental impact assessment. The applicant, if the investigation does not take place, may, at its request, be asked to have a contradictory with the parties that have submitted observations or opinions. The minutes of the contradictory are acquired and evaluated for the purpose of the measure of environmental impact assessment. Within thirty days following the expiry of the period of the 60 days (time limit to participate), the proposer may request to modify the designs, partly as a result of observations or findings that have emerged. In case of acceptance of the request, the competent authority shall set for the acquisition of the documents a period not exceeding forty-five days which may be extended at the request of the proposer for justified reasons, and gives the measure of environmental impact assessment within ninety days from the submission of modified documentation. In case the authority considers that the changes are substantial and relevant to the public, it provides that the party deposits copy of these changes and, simultaneously, it gives notice of the filing. Within a period of sixty days from the publication of the amended proposal, any interested party has access to the project and its environmental study, submit its observations, even providing new or additional relevant information and assessment. In this case, the competent authority expresses the measure of environmental impact assessment within ninety days of the expiry of the deadline for submitting comments. On its website, the competent authority shall publish the documentation submitted, including observations, any counterclaims and any changes made to the project.

64 To sum up, we can observe that the time limit to provide written comments is now 60 days (previous law allowed 45 days) from the day the documentation has been deposited and made available to the public. No deadline extension is provided by the law, but the parties have sufficient margins to interact, also considering that the competent authority can also decide to organize consultations through a public hearing (public inquiry, following the model of the French *enquête publique*) where the EIA study, further technical opinions and observations by the public are discussed. The participation to the EIA is instrumental to have a right of standing before the courts, in case the parties are willing to initiate an administrative judicial procedure, pleading the violation of a legitimate interest. The legal standing is anyway granted in case of impairment of a right, for those that have not participated (see §2).

²⁰² Art. 13, Law n. 241/1990: Art. 13 (Ambito di applicazione delle norme sulla partecipazione) 1. Le disposizioni contenute nel presente capo non si applicano nei confronti dell'attività della pubblica amministrazione diretta alla emanazione di atti normativi, amministrativi generali, di pianificazione e di programmazione, per i quali restano ferme le particolari norme che ne regolano la formazione. 2. Dette disposizioni non si applicano altresì ai procedimenti tributari per i quali restano parimenti ferme le particolari norme che li regolano.

4.3.11 Time limits in the Projects of Common Interest (2015)

65 The period to grant public participation and consultation is slightly different from the provisions of the Regulation n. 347/2013 -24 months according to the Italian Decree-, but the procedure is very similar. The project promoter shall, within a period not superior to 24 months, draw up and submit a concept for public participation to the competent authority, that shall request modifications or approve the concept.

Is there a discourse (relevant literature / case law) on the participation procedure and the possibilities to make objections for e-NGOs with particular regard to the conformity with EU-Law and the AC in your country?

4.3.12 Literature on the implementation of the AC and the EU-law with regard to the participation of the e-NGOs

66 The doctrine has underlined the participatory gaps in the Italian implementation of the rules on the e-NGOs participation and therefore also on the possibility for them to make objections. In this regard, Viviana Molaschi has underlined that “First of all, participation is mostly limited to documental participation, like in the Italian law on administrative procedures, Law 241/1990. Surprisingly, this happens also in the case of the EIA regarding major public works, which generally raise tough opposition and protests by the communities involved, and in the case of the SEA, an instrument capable of orienting administrative decisions from the planning phase, when plural options are still possible, including those regarding the siting of projects. Neither legislation nor interpretation given by judicial decisions impose on the public authority any obligation of complete and precise motivation on how the participatory contributions offered by the public concerned are considered, an aspect that weakens the effectiveness of public participation and environmental protection itself. In fact, environmental safeguards can be achieved if the environmental point of view is represented in decision-making procedures and public authorities have the duty to consider and evaluate it, as a “rule of the procedure”, it being understood that the power to decide belongs to the public administration .When more advanced participatory tools are provided (like, in the “ordinary” EIA, public inquiry, and cross examination), their regulation follows a top-down layout: there is not any obligation to call in response to a request “from below”, according to a bottom-up scheme. Finally, the evolution of Italian legislation with respect to the AC, with its “stops and goes”, shows that both access to environmental information and public participation are granted more effectively when the AC impacts national procedural autonomy through the intermediation of the EU implementation . Under EU law, it is easier to “force” the recalcitrant national legislator”.²⁰³

²⁰³ V. Molaschi, The implementation of the Aarhus Convention in Italy: a strong “vision” and a weak “voice”, pag. 90.

4.4 Intensity of the Judicial Review (gerichtliche Kontrolldichte)

What are the requirements and limitations as to the intensity and the scope of judicial review in your national legal order in comparison to German law? Are these limitations in conformity with EU law?

Please give an overview on the limitations/restrictions of the “intensity of the judicial review” in your national legal order with special regard on the limitations in environmental and planning law. Do Courts have different approaches on e-NGOs’ lawsuits and citizens lawsuits?

4.4.1 Judicial review

67 As said above, and in line with the German law, the Italian Constitution provides that everyone has the right to access to the courts when her/his legal rights have been violated by public authorities. Art. 24 of the Italian Constitution states that, everyone has the right of access to courts for vindicating her/his own rights or legitimate interests.

68 The intensity of the judicial review is different depending on the jurisdiction (administrative courts on one side; civil and criminal on the other side).

4.4.2 Administrative Court

69 Any interested party can ask for a review of any decision of the public administration (i.e. order of the MoE) before the administrative court.

1. As for the intensity of judicial review, the administrative courts have unlimited jurisdiction in respect of the exhaustive cases set up by the law. This means that there are limited matters of administrative jurisdiction on the merits, where the court is responsible for deciding whether the act is correct on its merits (Art. 134 Administrative Procedure Code²⁰⁴). Environmental decisions and consequential damages are not included in the list. In case of environmental-related acts, the court’s control will be limited on the legality of the act under all aspects interested by breach of administrative law (including the review on the damages), depending on the claim raised by the party (i.e. violation of the general rules on administrative proceedings; violation of environmental rules set up by the environmental laws).
2. Both the Consiglio di Stato and the Corte di Cassazione have clarified that, though the control on the legality can be supported by technical expertise, it is always an external control, meaning that the administrative court cannot substitute its own decision for that of the authority.²⁰⁵
3. As for the control on certain areas of the environmental law, before the administrative courts is applied the principle that judicial decisions must be commensurate with the forms of order sought by the parties. This principle has two consequences: a) A court cannot of its own motion

²⁰⁴ The exhaustive list of cases is justified by the principle of separation of powers: in the Italian legal systems the courts cannot overrule the administrative activity but in specific cases. According to Art. 134 the unlimited jurisdiction of the administrative court covers: 1. Cases of judgments’ execution; 2. Electoral decisions; 3. Administrative sanctions; 4. Territorial delimitations and borders; 5. The denials of film authorization. (Italian: Art. 134 Materie di giurisdizione estesa al merito: 1. Il giudice amministrativo esercita giurisdizione con cognizione estesa al merito nelle controversie aventi ad oggetto: a) l’attuazione delle pronunce giurisdizionali esecutive o del giudicato nell’ambito del giudizio di cui al Titolo I del Libro IV; b) gli atti e le operazioni in materia elettorale, attribuiti alla giurisdizione amministrativa; c) le sanzioni pecuniarie la cui contestazione è devoluta alla giurisdizione del giudice amministrativo, comprese quelle applicate dalle Autorità amministrative indipendenti e quelle previste dall’articolo 123; d) le contestazioni sui confini degli enti territoriali; e) il diniego di rilascio di nulla osta cinematografico di cui all’articolo 8 della legge 21 novembre 1962, n. 161).

²⁰⁵ Cass. civ., Sez. un., 17 February 2012, nn. 2312 and 2313; Corte cost., 3 March 2011, n. 175; Cons. St., sez. VI, 9 February 2011, n. 871.

adjudicate on requests which have not been pleaded before it. The judicial review on the legality of the acts is therefore limited on the claims raised by the parties (Art. 112 Code civil procedure)²⁰⁶; b) the court cannot rule beyond the limits of the requests. This means that only the requests raised by the party shall receive an answer from the court. Therefore, “law relating to environment” is intended in a broad sense, including all the activities related to the environment, as far as the parties have requested a judicial decision on them.

4.4.3 Civil or Criminal Court

70 In case of action brought before the civil or criminal courts, the judicial review will be limited to an indirect control on the act, primarily focusing on the environmental damages as a consequence of the act: the court will assess on the damages, disapplying the illegitimate act. The illegitimate act is considered as *tamquam non esset* (=as if it did not exist) for the period of the judicial decision. The main difference between this judicial review and the judicial review before an administrative court is that the criminal and civil courts can disapply the act, while the administrative court can annul it. Also before the civil and criminal court is applied the rule that judicial decisions must be commensurate with the forms of order sought by the parties: any violation of environmental laws, broadly intended, might have caused damages to the parties.

Is there a discourse (relevant literature/case law) on the limitations of the “intensity of the judicial review” with regard to the conformity with the requirements in EU-Law of both effective justice in environmental matters and effective implementation of certain environmental protection standards (e.g. requirements concerning protected animals according to the Habitats-Directive 92/43/EEC)?

4.4.4 Discourse on the limitations of the intensity of the judicial review

71 To sum up, judicial review is performed in a peripheral way, since administrative court stop well short of acting as appellate bodies and of going into the merits of the decisions challenged in front of them. In this regard, Roberto Caranta quotes the case-law in which Consiglio di Stato limited its controls in deciding on the environmental impact assessment: only the shortcomings in the analysis performed and in the given reasons can be challenged in front of the administrative courts²⁰⁷.

72 In conclusion, it is noteworthy that the judicial review before an administrative court is still anchored to the idea of a “trial on the act” rather than a “trial on the relationship”, performing the review on the formal procedure rather than on the substance (the merits) behind the decision. Though the legislative provisions have been progressively harmonised the tools for the parties (L. Decree n. 104/2010: by introducing the judicial expertise also in the administrative judicial review, and the same set of evidence as the judicial review before the civil and criminal court), the administrative courts are still reluctant to conduct an assessment on the substance of the administrative decision. Therefore, administrative courts are very wary in naming expert witnesses, and when they do it, it is merely to check simple facts, while the assessment on the complex factual situation by the decision maker is not touched unless manifestly erroneous or lacking sufficient reasons²⁰⁸. It is difficult to say if it meets the EU standards, since the Court of Justice is not very specific as to the intensity of review required from the national courts²⁰⁹.

²⁰⁶ Cons. Stato, Sez. IV, 9 January 2014, n. 36.

²⁰⁷ Cons. Stato, Sez. IV, 5 July 2010, n. 4246.

²⁰⁸ Cons. Stato, Sez. V, 25 July 2011, n. 4454.

²⁰⁹ See case C-75/08 Mellor [2009] ECR I-3799, paragraph 59.

4.5 Legal Costs

Please give a general overview on how the distribution of costs for court fees, lawyer fees, expert fees, including fees for expert studies, or witness fees is regulated in your national legal order. Have there been any new regulations since the 2012 EU study to ensure that the access to justice in environmental matters is not prohibitively expensive? Do your national courts put in practice the rulings of the ECJ to ensure that the legal costs are not prohibitively expensive (e.g. with granting legal aid on an individual basis)?

How does your legal system deal with the restitution of experts' fees? Are these costs predictable and not too expensive? Are e-NGOs entitled to demand the fees for expert opinion that was ordered primarily for the preparation of the lawsuit when their appeal was successful? Is it possible for the developers who intervene in the trial to claim the refunding of the expert opinion fees from the losing party (e-NGO)?

4.5.1 Overview on the distribution of costs

73 The Italian Constitution has a special provision to assure a proper system of legal aid. Article 24.3 of the Constitution states that “the indigent are assured, by appropriate measures, the means for legal action in all levels of jurisdiction”.

74 Legal aid, which is usually applied in criminal and labor proceedings, has been extended to civil and administrative proceedings, is regulated by Presidential Decree 115/2002.

75 Not only individuals but also non-profit Entities or associations are entitled to legal aid, if they have an annual income lower than Euro 10.766,33 (this threshold is periodically updated by a decree of the Ministry of Justice according to the inflation increase).

76 The costs categories faced by an applicant when seeking access to justice in environmental matters are: the court fee; the stamp duties; the lawyer fees; the expert fees (when needed). The appeal must be introduced in writing to the Administration with stamp duties of around Euro 14,60. The lack of a stamp does not render the appeal inadmissible.

77 Normally, according to the general rules, after the judgment the losing party bears the costs of the proceeding. However, it is a general practice that the T.A.R. declares that each party should bear its own costs. Costs depend on the subject-matter and amount/value in controversy (so called *contributo unificato* or Court fees) and on lawyers' fees which vary from Euro 4,000-5,000 to Euro 100,000-150,000. Other costs are the expenses for notification (which vary from Euro 5 to 10 €).

78 Members of *Legambiente* have reported that Environmental NGO costs and lawyers' fees are a major obstacle. An NGO member has expressed worrying for an increase in the *contributo unificato* and for the insufficient level of funds available for parties entitled of State assistance. However, lawyers often provide legal assistance *pro bono*, which may be the case for large and well-known associations, since lawyers can count on publicity and prestige deriving from these activities²¹⁰.

79 As for the restitution of the experts' fees, the general rule in our system is that each party is responsible for anticipating all the court expenses and fees, including the experts' fees, and then the losing party has to reimburse the other side for costs²¹¹.

²¹⁰ See WWF website: <http://www.wwf.it/news/pubblicazioni/?2781/il-lavoro-degli-eco-avvocati-wwf-nel-2011> (abgerufen am 19.10.16).

²¹¹ Cons. Stato, Sez. IV, 19 March 2015, n. 1510.

80 The experts named by the courts can request a cheque or payable order payment in advance to pay for the expertise provided in the court. The final payment (fees, expenses, remuneration) will be liquidated in the judgment.

5 National report Poland

6

5.1 Access to Justice

I. What are the requirements under Polish law for the participation of environmental associations in planning and permitting procedures?

1 In Polish law, a distinction must be made between two groups of provisions:

- those implementing Art. 9 para. 2 and 3 of the Aarhus Convention (AC)
- and those implementing Art. 6 and 7 of the AC

2 The provisions of the AC regulating access to justice in environmental matters for environmental associations, i.e. Art. 9 para. 2 and 3 of the AC, have been implemented separately in Poland (see below). In responding to the questions posed, this paper primarily examines aspects of access to justice; in a few cases, problems related to public participation (including the participation of environmental associations) are taken into account where appropriate.

3 As regards the approval procedure for various planning documents (such as regional plans, programmes, development plans for individual economic sectors, etc.), it should be highlighted that many planning documents require a strategic environmental assessment (SEA; in accordance with Directive 2001/42/EC of 27 June 2001). Public participation is a part of this strategic environmental assessment and allows “everyone” (both environmental associations and members of the public concerned, without subjective restrictions) to raise objections. However, environmental associations do not have the right to appeal administrative decisions on these strategic planning documents, neither before the respective administrative instances (administrative appeal procedure) nor before the administrative courts. Polish experts have voiced criticism, pointing out that this situation is not in line with Art. 9 para. 3 of the AC. (See A. Haładyj, *Udział społeczeństwa w strategicznej ocenie oddziaływania na środowisko jako instytucja prawa ochrony środowiska*, Wydawnictwo KUL, Lublin 2015, p. 411 ff.)

4 On the other hand, environmental associations do have access to justice in environmental matters if a procedure’s aim is the issuance of an individual administrative act. However, the prerequisite for this access to justice is that an association joins an ongoing procedure, which means that the association pursues “foreign” interests rather than its own (although it cannot be ruled out that an association may also have its own interests in individual cases, for example as the owner of a plot of land). The term for the status of associations in these cases in the Polish Code of Administrative Procedure is “*podmiot na prawach strony*”, which translates as “*subject with rights of a party*”.

5 This means that associations are not considered actual parties to a case, but they are granted similar rights. In such cases, environmental associations have the right to appeal individual administrative acts.

6 The legal foundations for the participation of environmental associations in administrative and judicial procedures (including against administrative decisions) as subjects with rights of a party in Polish law can be divided in two categories:

7 Legal provisions which allow environmental associations to participate in procedures which involve public participation (including the right to appeal decisions taken in this context). These are provisions implementing Art. 9 para. 2 of the AC.

8 Legal provisions which allow for the participation of environmental associations in other types of procedures (with the same consequences as those described above, i.e. the right to appeal decisions taken in this context). These are provisions implementing Art. 9 para. 3 of the AC.

Legal provisions implementing Art. 9 para. 2 of the AC

9 According to Polish law, public participation takes place in the framework of procedures dealing with:

- a. decisions that require an environmental impact assessment,
- b. IPPC permits,
- c. certain types of permits for genetically modified organisms (also see question 2).

10 The public participation procedure gives everyone the right to submit comments or suggestions within a period of 21 days. The deadline for submissions is set by the authority responsible for issuing the specific administrative act. The comments and suggestions must be examined by this authority. However, this does not necessarily mean that those making suggestions will automatically become parties to the procedure.

11 It is important to point out that, according to Art. 44 of the Act on Providing Information on the Environment and Environmental Protection, Public Participation in Environmental Protection and on Environmental Impact Assessment (EIA) of 3 October 2008, which in the following will be referred to as the EIA Act (Dz.U. of 2013, Pos. 1235 with amendments), it is also possible for an environmental association to obtain the status of a "subject with rights of a party". As a consequence, that status allows an association to submit comments and suggestions not only during the 21-day-period, but throughout the whole legal procedure. In addition, associations have a right to appeal decisions.

12 According to Art. 3 para. 1 item 10 of the EIA Act, an environmental association is defined as a "social organisation whose statutory objective is environmental protection".

13 Legally, a group of people can be considered to be an environmental association if two conditions are met:

14 It is a "social organisation", which means it is registered, and is either organised as an association or a foundation. The act of 7 April 1989 on the law of associations provides for two types of associations: /i/ registered associations (at least 15 members, entry in a central register administered by the court) or /ii/ simple associations (at least three members, entry in a municipal register). The establishment of foundations is regulated in the act of 6 April 1984. Like a registered association, each foundation must be included in a central register.

15 The statutes need to state environmental protection as the objective of activities.

16 Informal groups, in particular various kinds of committees (citizens' initiatives) that are formed *ad hoc* with the goal, for example, of preventing the construction of industrial installations, must not be recognised as environmental associations.

17 On 1 January 2015, an amended version of Art. 44 of the EIA Act entered into force. It stipulates that only environmental associations that have taken up their statutory activities at least 12 months prior to the procedure's commencement are allowed to take part in a procedure (public participation). Before 1 January 2015 there was no such requirement.

Legal provisions implementing Art. 9 para. 3 of the AC

18 In types of procedures other than those with public participation described above, environmental associations can apply to be admitted to the procedure as subjects with rights of a party. The basis for this is Art. 31 of the Code of Administrative Procedure of 14 June 1960, which is referred to as the "codex" in Poland (Dz. U. of 2013, pos. 267 with amendments).

Art. 31

§ 1. A social organisation can intervene in a matter involving another person with a request to:

1) /...../,

2) participate in proceedings, if such participation is justified by its statutes and where there would be a public benefit in allowing it.

§ 2. The public administration body, in allowing the request of the social organisation, shall make an ex officio decision on commencement of proceedings or on admission of the organisation to proceedings. A decision refusing commencement of proceedings or admission to proceedings can be the made the subject of an interlocutory objection by the social organisation.

§ 3. Social organisations shall participate in proceedings with the rights of a party.

19 A social organisation may only make use of the rights stated in Art. 31 of the Code of Administrative Procedure if it is organised in the form of a (simple or registered) association or a foundation.

20 Art. 31 of the Code of Administrative Procedure is a generic provision and refers to all kinds of procedures and all types of social organisations, including environmental associations. On the basis of this article, an environmental association can request to join an environmental permitting procedure if this is in line with its statutory goals.

21 One difference between Art. 31 of the Code of Administrative Procedure and Art. 44 of the EIA Act is that, according to Art. 44, the authority is obliged to admit the organisation as long as it exists in the appropriate form (copy of the register entry as proof) and has incorporated environmental objectives into its statutes. According to Art. 31, on the other hand, the authority takes a discretionary decision on whether the association's access to the procedure would be a public benefit. Thus the provision in Art. 44 of the EIA Act is more favourable to environmental associations than Art. 31 of the Code of Administrative Procedure.

22 In practice, environmental associations often have problems obtaining information on ongoing procedures with public participation and therefore have little opportunity to apply for admission to the procedure (see below, answer to question III).

23 It should be noted that there are some special provisions which rule out the application of Art. 31 of the Code of Administrative Procedure altogether. Environmental associations do not have any right to join a procedure in the following cases:

24 Art. 185 para. 2 of the Act on the Protection of the Environment - regarding emission permits, excluding IPPC permits,

25 Art. 127 para. 8 of the Water Law of 18 July 2001 (Dz. U. of 2015, pos. 469) - regarding permits under water law,

26 Art. 28 para. 3 of the Building Law of 7 July 1994 (Dz. U. of 2013, pos. 1409 with amendments) - regarding building permits, with the exception of procedures with an integrated "repeated" EIA (see question II).

27 If an environmental association claims the rights granted in Art. 31 of the Code of Administrative Procedure, it is not required to prove that it has taken up its activities at least 12 months prior to the procedure's commencement.

II. Is the participation of environmental associations limited to projects and procedures for which an EIA must be carried out, or is their participation also allowed in other procedures?

28 According to Art. 44 of the EIA Act (which serves to implement Art. 9 para. 2 of the AC), environmental associations can participate in procedures with public participation. These are procedures with the purpose of issuing the following administrative acts:

29 A decision on environmental conditions that concludes the EIA procedure (according to Polish law, the EIA is carried out in the framework of the "special procedures to comply with the aims of 2011/92/EU", as referred to in Art. 2 para. 2 of the Directive);

30 A permit for the realisation of projects (such as a construction permit), in the framework of which a "repeated" EIA is carried out; according to the Act of 3 October 2008 a "repeated" EIA must be carried out for projects which have been subject to an EIA at an earlier stage (in the context of the decision on environmental requirements), but for which an assessment of new, additional circumstances seems necessary and which could not have been carried out earlier because necessary information was not then available;

31 A decision that requires a separate EIA for Natura 2000 sites according to Art. 6 para. 3 of Directive 92/43/EEC;

32 A so-called integrated permit according to Directive 2010/75/EU;

33 Permits for combustion plants according to Directive 2010/75/EU;

34 Permits related to the handling of genetically modified organisms.

35 Based on Art. 31 of the Code of Administrative Procedure (which implements Art. 9 para. 3 AC) environmental associations can apply to be admitted to other types of procedures that are environmentally relevant.

III. Do the authorities directly inform environmental associations about projects and procedures and the possibility of participation? If not: where and how can they obtain information about the procedures? How do they gain access to relevant information and planning documents for the projects?

36 Environmental associations are not informed directly about projects and procedures and their opportunities to participate. Neither Art. 44 of the EIA Act nor Art. 31 of the Code of Administrative Procedure provide for this.

37 However, if a procedure takes place that requires public participation (i.e. that falls within the scope of Art. 44 of the EIA Act), certain methods of informing the public about the initiation of procedures and access to documentation are provided for. These include:

- notification via the authority's website,
- information on the notice board of the authority,
- notifications near planned projects (for example public notices).
- Sometimes it may be necessary to publish information in daily newspapers (Art. 3 para. 1 item 11 of the EIA Act).

38 After having been admitted to the procedure, an environmental association receives the important rights of a party, which means it must be informed about all procedural steps the authority takes, including the final decision.

39 Exemptions apply if more than 20 people are involved in a procedure for the issuance of a decision on environmental requirements (mass procedure). In that case, the participants (including both

"true" parties and subjects with rights of parties) are not informed individually by mail, but via public notices (Art. 74 para. 1b of the EIA Act).

40 An environmental association receives information about administrative procedures and can inspect all related files at the seat of the authority. It can make copies and transcripts.

41 In administrative procedures to which Art. 31 of the Code of Administrative Procedure can be applied, public notification regarding the commencement of the procedure is not provided for.

42 However, Art. 31 para. 4 says:

"In commencing proceedings in a matter involving a third party, the public administration body shall inform the social organisation if it believes that the organisation would be interested in participating in proceedings as a result of its statutory objects and there would be a public benefit in allowing it to do so."

43 However, this provision is not applied in practice.

44 If such a procedure is already ongoing, it is unlikely that an environmental association will become aware of the procedure and be able to join it.

45 If, however, an environmental association does obtain information and is admitted to the procedure, it has the rights of a party and must be informed individually about all of the authority's procedural actions. It is entitled to inspect the authority's files, examine documentation and make copies (transcripts).

IV. Are there deadlines for raising objections or submitting comments under Polish law? If objections are raised after the deadline (late objections) in an administrative procedure, will they be disregarded in the administrative procedure and in the subsequent decision by the authority? Are late objections also ruled out in redress procedures against the permit decision taken by the authority (in the sense of "substantive preclusion" as described below)? Are there any particular substantive requirements for objections made by environmental associations?

46 Where not stated otherwise, the following answers to question IV refer to the participation of environmental associations according to both Art. 44 of the EIA Act and Art. 31 of the Code of Administrative Procedure.

47 In the course of a procedure before an authority of first instance in which environmental associations participate as subjects with rights of a party, they may raise any objections until the administrative act is issued.

48 Exceptions apply only to those objections that are raised in the framework of a public participation procedure by the following subjects: (i) natural persons that are not parties, (ii) social organisations that are not subjects with rights of parties because they have not submitted the necessary application. The above-mentioned subjects (i) and (ii) fall into the weak category "everyone".

49 As regards appeals and court procedures, it should be noted from the outset that these procedures consist of the following three stages in Poland:

- a. lodging a complaint against the administrative act, which is decided on by the next highest authority (which is a necessary prerequisite for action before an administrative court),
- b. if the authority of the second instance rejects the complaint, action can be brought against the rejection before an administrative court (court of first instance),
- c. if this action is dismissed, the last option is to consider applying for annulment with the appellate court of the highest instance (cassation), which is the High Administrative Court (NSA) in Warsaw, the second and highest in the hierarchy of administrative courts in Poland.

50 Everyone who lodges a complaint about a decision (administrative act) in the framework of an administrative or judicial procedure can raise any objections, both substantive and procedural, even if

those have already been brought forward at an earlier stage in the administrative procedure. In Polish law, there is no restriction in the sense of the German principle of substantive preclusion (*materielle Präklusion*).

51 The restriction concerns only the possibility to present new evidence supporting the objections raised. Namely, the administrative court decides on the basis of the documents that have been collected in the course of the administrative procedure and may admit new evidence in exceptional cases only - and only in the form “of documents” (art. 106 § 1 and 3 of the Proceedings before Administrative Courts Law Act - PACLA). Therefore, the objection raised before the administrative court may be “new” (i.e. not raised before during the proceedings), but shall be based on the materials which had been already collected in the files of the case. For example, the objection of the party to the proceedings may consist in pointing out the mistakes (shortages) in the EIA report, however the party shall present it as a mistake by the competent administrative authority which failed to examine the case properly; the party shall not enter into a substantive discussion with regard to the content of the EIA report, supporting his/her arguments with expert analysis submitted for the first time at this stage (i.e. before the administrative court). Similarly, the objection may concern the fact that the competent authority failed to consult another authority (although it was required by the law) or that the opinion of that authority has not been taken into account; in this case the party should point out - respectively - that the opinion of the other authority is not included into the files, or that the opinion was not reflected properly in the final administrative decision.

52 According to Polish law, both administrative and judicial procedures are based on the principle of legality, which means that the key criterion for a review of an administrative act is conformity with the law. All objections of this kind are permissible, not only those that have a direct impact on the rights of the plaintiff. For example, someone living next to a planned industrial plant can point out environmental risks which do not affect his own rights, but are the result of a violation of legal provisions.

53 There are judgments in which the administrative courts have dismissed objections raised by social organisations or other stakeholders. These objections usually referred to other parties in the case, e.g. one party died and the administrative authority wrongfully claimed to have informed his legal successor about the procedure. According to the High Administrative Court, such objections may only be raised by the legal successors themselves and not by other parties.

54 Apart from the exceptions described, there are generally no restrictions regarding the content of objections that may be raised by subjects who have a right to pursue legal action.

55 Neither the administrative authorities of the second instance nor the administrative courts are bound by the content of the objections. *Ex officio* they only examine the conformity of an administrative act with the law. It is quite common for an administrative act to be revoked for other reasons than those put forward in the complaint (administrative procedure) or the action (judicial procedure).

56 Only the High Administrative Court (NSA) is bound by the scope of the statement of claim.

57 In addition, it should be noted that, according to Art. 44 of the EIA Act, environmental associations may join an ongoing administrative procedure when it is before the authorities of first instance at any time, but may also appeal the decision in the second instance or may choose to bring action before the administrative court without the requirement of having become involved in the procedure at an earlier stage. In such cases, the legal action is the first action of an environmental association in the procedure. If, however, an environmental association wishes to act based on Article 31 of the Code of Administrative Procedure, it must participate in the procedure when it is before the first instance of administrative authorities in order to maintain its right to take legal action (both in the administrative and in the judicial procedure).

58 In Polish law, there are generally no specific substantive requirements for legal remedies that environmental associations (and natural persons who are parties) are entitled to. According to Art. 128 of the Code of Administrative Procedure, complaints against administrative acts do not require a particular justification. *“It is sufficient if it is evident from the appeal that the party is dissatisfied with the decision issued.”*

59 There are no specific substantive requirements for statements of claim in judicial procedures either. Only the review procedure before the NSA (cassation) must comply with certain formal requirements regardless of whether it is brought by an association or by another subject. Objections can only be made regarding the judicial procedure in the first instance and the judgment passed in this context. The action must be prepared by a lawyer or legal counsel (*obligation to be represented by counsel*).

60 It rarely happens that unfounded objections made by an environmental association are rejected for formal reasons. In practice, however, unfounded claims are not convincing and chances are low that the authority or court will use them as a basis for its decision, unless they contain an important aspect that has been completely neglected previously.

V. In Poland, is there a discussion in scholarly literature and the legal system on whether the participation procedures and the opportunities for environmental associations to raise objections against environmentally relevant projects are compatible with the Aarhus Convention and European law?

61 The problem of substantive preclusion is unknown in Polish law. There has, to date, never been any restriction of this kind in administrative or judicial procedures.

62 Other legal aspects of the participation procedures and the opportunities for environmental associations to raise objections against environmentally relevant projects are indeed under discussion, including the conformity of Polish law with the Aarhus Convention and European Union law. The following problems are being addressed:

- a. The scholarship (as mentioned above) highlights a lack of opportunities for environmental associations to access strategic (in particular planning) documents and criticises this as a violation of Art. 9 para. 3 of the AC (also see Haładyj, *Udział społeczeństwa w strategicznej ocenie oddziaływania na środowisko jako instytucja prawa ochrony środowiska /Public participation in the strategic EIA as a legal instrument of environmental protection/*, Wydawnictwo KUL, Lublin 2015, p. 411 f.)
- b. It must be added that the Frank Bold Foundation has filed a complaint against Poland for a violation of the AC with the Compliance Committee of the AC (ACCC/C/2014/119). The decision on this complaint is still pending.
- c. The Polish Advocate for Citizens' Rights (Ombudsman) has declared that he considers the limited options for environmental associations to challenge permits under water law (Art. 127 para. 2 of the Water Law) to be incompatible with Art. 9 para. 3 of the AC. Accordingly, in a letter dated 4 April 2013, he officially requested that the Environment Minister make necessary amendments to the law. (<http://www.sprawy-generalne.brpo.gov.pl/pdf/2007/09/568853/1712551.pdf>). The Minister replied that in his opinion, the existing procedural rights of environmental associations were sufficient or compensated for by other legal remedies, in particular the right to participate in administrative procedures regarding decisions on environmental requirements. He also promised to consider the problems addressed by the Ombudsman in the next amendment to the Water Law. (<http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=1712551>). The law has yet to be amended.

- d. In a 2014 commentary, Polish scholars pointed out that the exclusion of environmental associations from the administrative procedure for emission permits other than IPPC permits according to Article 185 para. 2 of the Act on the Protection of the Environment was not in line with Article 9 para. 3 of the AC. (see M. Bar, J. Jendrońska (w:) M. Górski, M. Pchałek, W. Radecki, J. Jerzmański, M. Bar, S. Urban, J. Jendrońska, *Prawo ochrony środowiska. Komentarz /The Act on the Protection of the Environment. Commentary/*, C.H. Beck, Warszawa 2014, p. 571).
- e. d) Finally, there are also experts who criticise the amendment of Art. 44 u.oos of 1 January 2015 as being incompatible with Art. 9 para. 2 of the AC (E.g. Z. Bukowski, "Rola sądów i trybunałów w ochronie środowiska" /*Conference: The role of courts in environmental protection/*, Wrocław, kwiecień 2015). According to the amendment receiving this criticism, environmental associations are only allowed to participate in a procedure if they have taken up their statutory activities at least 12 months prior to the commencement of the procedure.

5.2 Summary

63 Under Polish law, environmental associations have various opportunities to participate in environment-related procedures and to appeal administrative acts in matters that are linked with a public participation procedure. These are mainly procedures that are dealing with the following: /a/ administrative acts that require an environmental impact assessment, /b/ IPPC permits, /c/ certain types of permits for genetically modified organisms.

64 The legal provisions that establish the rights described above implement Art. 9 para. 2 of the AC. The only restriction on the participation rights of environmental associations is the requirement that they need to take up their environment-related activities in line with their statutes at least 12 months prior to the commencement of the procedure (this 12-month requirement has been in place since 1 January 2015).

65 In such cases, environmental associations need to prove that they are formally registered as a social organisation (i.e. an association or foundation, not an ad-hoc group) and that environmental protection is the objective of their activities according to their statutes. The above-mentioned rights result from Art. 44 of the EIA Act.

66 In the case of other environment-related decisions by the authorities (i.e. administrative acts that do not require public participation), environmental associations may apply to be accepted as participants in an existing procedure according to the general provisions of the Code of Administrative Procedure (Art. 31).

67 The authority will then review whether the organisation (environmental association) is registered and whether environmental protection is its objective according to its statutes. However, the decisive factor is whether the organisation's participation would bring about a public benefit, which point the authority may determine at its own discretion.

68 There are, however, special provisions that considerably limit the application of Art. 31 of the Code of Administrative Procedure. According to these provisions, environmental associations do not have the opportunity to participate in procedures: /a/ related to emission permits, excluding IPPC permits (according to Art. 185 para. 2 of the Act on the Protection of the Environment), /b/ related to permits under the Water Law (according to Art. 127 para. 8 of the Water Law), /c/ regarding building permits, with the exception of procedures with an integrated so-called "repeated" EIA (according to Art. 28 para. 3 of the Building Law). These legal restrictions are being criticised for their lack of conformity with Art. 9 para. 3 of the AC.

69 If environmental associations are already participants in a procedure (according to Art. 44 of the EIA Act or Art. 31 of the Code of Administrative Procedure), they are usually entitled to raise any

type of objection, both substantive and procedural. These objections may be raised in the administrative or in the judicial procedure. There are few exceptions to this rule in case law.

70 The principle of substantive preclusion is unknown in Polish law. Environmental associations may raise their objections at any stage during the administrative or judicial procedure. Certain exceptions apply to new objections raised before the administrative court. Only those objections that can be formulated based on the documents the authority already has in its files are admissible.

71 Polish law does not contain any particular substantive requirements for objections raised by environmental associations. There is no formal requirement to write a detailed, well-founded justification, but the formulation of the objection determines its success.

72 The authorities do not directly (individually) inform environmental associations about projects and procedures, nor about the opportunity to be admitted to an existing procedure. If a public participation procedure takes place, certain methods of informing the public are specified in the relevant laws (e.g. internet, notice boards etc.). This is the only way for an association to learn about procedures. In other cases, environmental associations are only able to become aware of a procedure through coincidence. Once they have joined the procedure, associations have the right to be informed about the administrative procedure and to inspect relevant documents.

73 As regards strategic, environment-related documents (plans, programmes etc.), environmental associations may only raise their objections in the framework of a strategic environmental impact assessment. They do not have the right to appeal approved documents under Polish law. This solution is being criticised [in scholarship] as a violation of Art. 9 para. 3 of the AC.

6 National report Sweden

6.1 Summary

1 Sweden has a “universally” applicable Environmental Code, which harmonised the general rules and principles in this field. The Code applies to all human activities that might harm the environment. However, certain activities are also regulated in special pieces of legislation, such as the Planning and Building Act. Infrastructure installations also have regulations of their own, as do mining and forestry. Fauna is protected, in part, through hunting law.

2 As for environmental decision-making, the municipalities play a key role under both the Environmental Code and the Planning and Building Act. The County Administrative Boards are also responsible for important environmental legislation and issue permits for environmentally hazardous activities. Installations and activities involving a substantial environmental impact must obtain a permit from the Land and Environmental Court, as must all kinds of water operations. Also national authorities, such as the Environmental Protection Agency and the Swedish Chemicals Agency are responsible for some environmental decision-making.

3 Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on the merits in a reformatory procedure, meaning that they replace the appealed decision with a new one following analysis of all the relevant facts of the case. Furthermore, the ultimate responsibility for the investigation of the case rests with the court according to the “ex officio principle”. The Environmental Code establishes a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. They are all divisions within the ordinary courts, but essentially act as administrative courts for cases under the Environmental Code and the Planning and Building Act. A Land and Environmental Court has some of the characteristics of a tribunal, consisting of both law-trained judges, technicians and experts. All members of the courts have an equal vote. The route for appeals in cases concerning the environment

is always the same: Municipal level → County Administrative Board → Land and Environmental Court → Land and Environmental Court of Appeal (MÖD). Some cases can also be brought to the Supreme Court. Thus all appeals of environmental decisions follow this route, although the starting-point and terminus differ. The decision-making procedure in environmental cases in Sweden is open, meaning that in principle everybody can participate in the proceedings leading to the first decision. On appeal, the scope of the trial is set by the claims of the action, which the appeal body will decide upon in accordance with the “ex officio principle”. Thereby, the appeal body or court decides the case on the merits, thus addressing both substantial and procedural issues raised in the administrative decision. The procedure may include all kinds of “actions” for annulment, performance, altering the decision, remit, etc.

4 The Swedish concept of standing in administrative cases is strongly “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”. Additional criteria are 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 very broad sense. To get 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, 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 a party with interest. Thus, everyone who may be harmed by an activity or exposed to even minor risks – for example neighbours, people affected by emissions or other disturbances from the activity – should have the right to appeal the decision in question. As the Environmental Code brought together all kinds of legislation which previously was separate, this formula is generally applicable. Accordingly, if a permit concerns water operations such as a marina, neighbours who will be affected by the road traffic to the marina are allowed to appeal. The determination of the public concerned is straightforward and depends on the kinds of disturbance (discharges into air and water, noise, odour, traffic, and so on) that the person in question can be affected by, and at what distance.

5 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 recent years, however, and in the wake of the case law of CJEU, ENGO standing rights have expanded by way of national courts applying the “so as to enable” formula according to the *Slovak Brown Bear* case. In the Environmental Code, standing is given to certain organisations in order to appeal decisions on permits, approvals or exemptions, 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 3 years in Sweden and has at least 100 members 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. These criteria have also been used by the courts in areas to which ENGO standing rights have been expanded in case law.

6 As the administrative procedure in Sweden in all instances is reformatory, the starting point is that the court scrutinizes every part of the appealed decision. Once the applicant is allowed to appeal, the scope of review is complete, meaning that s/he can invoke all kinds of interests in favour of the cause. No arguments are precluded. Thus, the appellant can plead any private or public interest in the case irrespective of the instance of appeal in a higher level of administration or in the courts. Moreover, all kinds of administrative decisions can be brought to the administrative courts by way of appeal, including administrative omissions. Any member of the public who is affected by a certain activity can notify the supervisory authority and ask for administrative action in his or her interest. In this situation, the authority is obliged to issue a decision on the case, be it to take action or not. That decision is appealable using the route described above, and accordingly, the matter will be dealt with in substance

by the environmental courts. Thus, there does not exist any administrative discretion in Sweden, at least as a general rule.

7 The environmental procedure in Sweden is as a general rule free of charge. There are no court fees, no obligation to pay the opponents' costs, no bonds to be paid for obtaining injunctive relief, or other costs to be paid, irrespective of whether the case is on administrative appeal or goes to court. As the ultimate responsibility to investigate the case lies with the administration and the environmental courts – which both have technicians participating in the decision-making – neither are there any witness or experts' fees to be paid. Basically, this makes the environmental procedure cheap and easily accessible to the public. The other side of the coin however is that when applicants want to be represented by counsel or use experts of their own – which may be necessary in complicated cases – they will have to pay out of their own pocket and the costs cannot be remunerated from a losing opponent. It is also noteworthy that there is no obligation to use lawyers in court, not even at the higher judicial levels.

6.2 Introduction

6.2.1 General outline over Swedish environmental law and procedure

8 The text under Section 1 is an updated version of the first sections in the country report from Sweden to the European Commission in the “Effective Justice” study of 2012. That text was written at the beginning of 2012. The reason for updating is mainly for the convenience of the reader, as many of the answers to the UBA questionnaire can be found in the general description of the legal system of Sweden, to which I often refer. Another reason is that the development of case law on access to justice in environmental matters in Sweden has been rapid since the 2012 study was published, thus it is necessary to give a broader picture from the beginning. This is especially true given that a number of the recent cases concern some of the key issues in the UBA study. Furthermore, in order to avoid repetition, I have cleared the 2012 text from those parts which are less relevant for this study.

6.2.2 Environmental legislation

9 Since 1999, Sweden has had a “universally” applicable Environmental Code (1998:808, MB), which harmonised the general rules and principles in this field. The Code applies to all human activities that might harm the environment. It is, in principle, immaterial whether commercial or private operations or measures are involved. The Code contains the environmental principles and provisions providing for environmental quality norms as well as environmental impact assessments. Certain listed water operations, industrial undertakings, quarries and other environmentally hazardous activities are subject to permit or notification requirements. The Code also contains provisions relating to nature protection, flora and fauna, genetically modified organisms, chemicals and waste.

10 However, certain activities are also regulated in special pieces of legislation. Planning and building issues are covered by the 2010 Planning and Building Act (2010:900, PBL). Infrastructure installations, such as railroads and highways, also have regulations of their own, as do mining and forestry. Fauna is protected, in part, through hunting law.

6.2.3 System for decision-making and administrative appeal

11 Both municipalities and special environmental administrative authorities act as supervisors under the Environmental Code. The authority to issue plans and permits under the Planning and Building Act resides with the municipalities. Decisions from the local level are appealed to the regional County Administrative Board. The County Administrative Boards are also responsible for “green” issues – that is, nature conservation and species protection – and supervision concerning water-related activities and larger industrial activities. Additionally, the Counties issue permits for environmentally hazardous activities, landfills, waste transportation and disposal, and chemical activities, amongst others. Installations and activities considered to have a substantial environmental impact

must obtain a permit from the Land and Environmental Court, as do all kinds of water operations. This latter situation, in which courts “exercise administrative powers”, is unique in Europe.²¹² Also national authorities, such as the Environmental Protection Agency, the Swedish Chemicals Agency and the National Board of Health and Welfare, are responsible for some environmental decision-making.

12 Permit decisions according to the specific legislation on mining and infrastructure projects are made by national authorities and their regional branches, such as the National Transport Administration and Geological Survey of Sweden. Those decisions can be appealed to the Government. Decisions regarding hunting are made by the County Administrative Boards or the Environmental Protection Agency. The Swedish Forest Agency and its regional branches make decisions regarding forestry.

13 Some larger projects require a preliminary governmental decision on “permissibility” before a permit can be granted (Chapter 17 MB). This system is today restricted to nuclear activities, major infrastructure projects and wind farms.

6.2.4 The role of the courts

14 Sweden has administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The administrative courts decide cases on the merits in a reformatory procedure, meaning that they replace the appealed decision with a new one. Another vital difference compared with civil procedure is that in the administrative procedure, the ultimate responsibility for the investigation of the case rests with the court according to the “ex officio principle”.²¹³

15 The Environmental Code of 1999 established a system of five Land and Environmental Courts and one Land and Environmental Court of Appeal. They are all divisions within the ordinary courts, but essentially act as administrative courts for environmental cases. Their jurisdiction covers all kinds of decisions made pursuant to the Environmental Code and the Planning and Building Act. They are also competent in cases concerning damages and private actions against hazardous activities. A Land and Environmental Court has some of the characteristics of a tribunal. It consists of one professional judge, one environmental technician and two expert members. Industry and national public authorities nominate the expert members. The underlying philosophy is that they will contribute their experience of municipal or industrial operations or public environment supervision. The Land and Environmental Court of Appeal is comprised of three professional judges and one technician. All members of the courts have an equal vote.

16 The route for appeals in cases concerning the environment is (almost) always the same and quite simple: Municipal level → County Administrative Board → Land and Environmental Court → Land and Environmental Court of Appeal (MÖD). Cases starting in the Land and Environmental Court can ultimately be brought to the Supreme Court (HD). Cases starting in an authority cannot be appealed beyond the Land and Environmental Court of Appeal, except in rare occasions when the court allows for such an appeal to be made. However, this is possible only in cases under the Planning and Building Act. Thus all appeals of environmental decisions follow this route, although the starting-point and terminus differ. Leave to appeal is required to bring an appeal to the Land and Environmental Court of Appeal or the Supreme Court.

17 Some cases are dealt with in a different manner. Decisions on hunting and forestry are appealed to the administrative courts. Governmental decisions can be challenged by seeking judicial review in the Supreme Administrative Court (HFD) pursuant to Act 2006:304. This procedure furnishes

²¹² C-263/08 DLV para 37.

²¹³ See Nilsson, AK: Enforcing environmental responsibilities (2012), also Darpö, J: Environmental Justice through the Courts (2009).

a legality control in accordance with the European Convention on Human Rights (ECHR) and the Aarhus Convention. There is no Constitutional Court in Sweden, nor is there any abstract norm control. Instead, when a court is dealing with a case, it is obliged to control the legal basis for the decision and must disapply any act or statute which is in conflict with the Constitution or superior norms. In addition to this, some municipal statutes and decisions can be challenged in a “legality-control” procedure in the administrative courts by any of the municipality’s inhabitants according to the Local Government Act (1991:900).

6.2.5 General on standing for the public concerned

18 The decision-making procedure in environmental cases in Sweden is open, meaning that in principle everybody can participate in the proceedings leading to the first decision. On appeal, the scope of the trial is set by the claims of the action, which the appeal body will decide upon in accordance with the “ex officio principle”. Thereby, the appeal body or court decides the case on the merits, thus addressing both substantial and procedural issues raised in the administrative decision. The procedure is reformatory and includes all kinds of “actions” for annulment, performance, altering the decision, remit, etc.

19 The set of criteria for standing is always one and the same, irrespective of the type of action and in all instances of appeal. When the appeal body or court decides on standing, this is done as a “preliminary issue”, strictly separated from the substance of the case and considered no later than the first round of communication (written appeal and first response from the counterpart). The preliminary decision exclusively concerns the standing issue, thus leading to situations where even clear cases of administrative misinterpretation of law or misuse of power can never be tried in court because the appellant is not regarded as affected by the decision and consequently did not have the right to appeal.

20 The Swedish concept of standing in administrative cases is strongly “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. Commonly in administrative proceedings, it is not very problematic to determine who belongs to the “public concerned” in a typical “two-party case”, that is, a case between an applicant and the authority or an authority and an addressee. The applicant/addressee can appeal if the decision affects him or her adversely. If the appeal body subsequently alters the decision, the deciding authority can then appeal. Things become more complex when a decision affects a broader scope of people. According to a basic principle of administrative procedure, all parties that are affected by an administrative decision and its preparation are able to participate in the proceedings and – at the end of the day – have the right to appeal the final outcome. In principle, this is true irrespective of the nature of the administrative decision-making. Such “multi-party cases” exist within several areas of administrative law, and are most common in areas concerning the environment, planning and building, security, public order, etc. All who are granted standing can vindicate any interest – be it private or public interest – in favour of his or her case. Thus, those other than applicants/addressees who are concerned are not at all dependent on the primary parties to advocate their interests. The time-frame for such an intervention is the same as for all parties in the administrative procedure, which is the time-frame for appeal. Normally, an appeal has to be made within three weeks from publication or notification of the decision. As always in the Swedish administrative procedure, natural and legal persons are treated alike as long as they are parties to the proceedings.

6.2.6 Standing for individuals

6.2.6.1 General on standing for individuals in environmental decision-making

21 Standing is defined generally in Section 22 of the Administrative Procedure Act (1986:223) as belonging to the “person whom the decision concerns”. Additional criteria are that the decision affects him or her adversely and that it is appealable, which it always is so long as the decision entails factual

or legal consequences in a very broad sense.²¹⁴ In some pieces of environmental legislation or case law, you can find definitions relating to “an interest which is protected by the law” or even “rights that have been infringed”, but basically the delimitation of who is entitled to appeal – the “public concerned” – goes back to the general and quite vague definition in the Administrative Procedure Act. To get a clearer picture of who falls within this category, one must study the case law that has been established in each administrative area or even under specific pieces of legislation. For example, people living in the vicinity of an activity or an area can be regarded as concerned by administrative decisions according to the Environmental Code, but not according to the Planning and Building Act. However, generally speaking, there has in recent years been a broadening of the range of individual actors who can appeal and represent themselves before the courts, not least as a result of the influence of EU law. It should also be noted that additional requirements for standing sometimes are expressly made in certain legislation within administrative law.

6.2.6.2 Standing for individuals in the Environmental Code

22 In the Environmental Code, the definition of standing for individuals is given in Chapter 16 section 12 (16:12 MB), essentially reflecting the provision in the Administrative Procedure Act (my italics):²¹⁵

Appeals may be made against appealable judgements or decisions by

1. anyone who is the subject of a judgement or decision against him;
2. local employees' associations that organise workers in the activity to which the decision relates in the case of judgements and decisions concerning permits for environmentally hazardous activities;
3. national employees' organizations within the meaning of the Employment (Co-determination in the Workplace) Act (1976:580), the corresponding employers' organizations and consumer associations in the case of decisions taken by a county administrative board or a central administrative authority pursuant to an authorization issued in accordance with Chapter 14, provided that the decision does not relate to an individual case; and
4. authorities, municipal committees or other bodies which have a right of appeal pursuant to specific provisions in this Code,(...).

23 The Supreme Court and the Land and Environmental Court of Appeal have interpreted this provision generously regarding who may be considered to be a member of the public concerned in line with a judgment from the Supreme Administrative Court in 1997 (*RÅ 1997 ref. 38*, see section 1.7), stating that:²¹⁶

...in principle, every person who may be harmed or exposed to other kinds of inconvenience by the environmentally harmful activity at stake in a permit decision is considered a party in interest. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient.

24 According to the quoted decision, everyone who may be harmed by an activity or exposed to even minor risks – for example neighbours, people affected by emissions or other disturbances from the activity – should have the right to appeal the decision in question. As the Environmental Code

²¹⁴ RÅ 2004 ref 8.

²¹⁵ Unofficial translation in a document from the Ministry of the Environment and Energy.

²¹⁶ The translation is made in the Milieu study 2007.

brought together all kinds of legislation which previously was separate, this formula was made generally applicable. Accordingly, if a permit concerns water operations such as a marina, neighbours who will be affected by the road traffic to the marina are allowed to appeal (*NJA 2004 s. 590 I*). The determination of the public concerned is straightforward in cases pertaining to traditional hazardous activities, and depends on the kinds of disturbance (discharges into air and water, noise, odour, traffic, and so on) that the person in question can be affected by, and at what distance. This can be illustrated by the two cases *MÖD 2003:98* and *MÖD 2003:99*, where a property owner – living 12 km downstream from industrial works discharging substances into a water course – was allowed to appeal a permit concerning certain substances in the first case, but not concerning other substances in the second case, as they were not considered to have any negative effect on her interests. It should however also be noted about Swedish administrative and environmental procedure that once the applicant is allowed to appeal, the scope of review is complete, meaning that he or she can invoke all kinds of interests in favour of the cause. No arguments are precluded. Thus, the appellant can plead any private or public interest in the case irrespective of the instance of appeal in higher levels of administration or in the courts (*RÅ 1993 ref. 97*).

25 Traditionally, mere public interests did not suffice for standing. Private interests, although generously interpreted, had to be been affected for the individual to gain admission to the court. Thus, in decision-making concerning shore protection, nature conservation and species protection, individuals did not have standing at all – not even close neighbours.²¹⁷ This state of affairs was criticized over the years in the literature and in the remits of the National Implementation Report from Sweden required in terms of the Aarhus Convention.²¹⁸ However, in a recent judgement, the Land and Environmental Court of Appeals expressly dissociated itself from previous case law on this issue (*MÖD 2015:8*). Here, the court instead emphasised that those who are concerned by a certain activity in environmental cases must be able at some point in the procedure to have a say when the issues raised are decided upon. If a certain decision – to which the individual cannot appeal – is decisive for the latter proceedings concerning that activity, those requirements are not met. In this case, a first decision concerned the protection of a species in the area. A second decision concerned the right to land in order to place sewage pipes there. The landowner was not granted standing to appeal the first decision, but he was able to raise the species protection issue in the subsequent proceedings where he had standing rights. However, the effectiveness of this was nullified by the fact that the deciding authority in the second set of proceedings used the first decision as a starting point, without questioning it in substance. According to the Land and Environmental Court of Appeals, such a division of the decision-making is not in line with the Aarhus Convention and it may also be regarded as a deprivation of the individual's right to a fair trial according to ECHR. Therefore, the claimant was granted standing in the species protection case.

26 All kinds of administrative decisions can be brought to the administrative courts by way of appeal. According to case law in the environmental area, this is also true about administrative omissions. Any member of the public who is affected by a certain activity can notify the supervisory authority and ask for administrative action in his or her interest. According to the jurisprudence of the Parliamentary Ombudsman, the authority must then issue a decision on the case, be it to take action or not (a decision not to take action is called a 0-decision). That decision is appealable using the route described above, and accordingly, the matter will be dealt with in substance by the environmental courts. For example, the inhabitants living on Hornsgatan, one of the main access roads of Stockholm, have been

²¹⁷ *MÖD 2001:29*, *MÖD 2013:32*, see also Darpö, J: Biological Diversity and the Public Interest. From de Lege 2009 (Juridiska fakultetens årsbok, Uppsala universitet), s. 201, available in full text on www.jandarpo.se (abgerufen am 19.10.16).

²¹⁸ See Opinion by Faculty of Law, Uppsala universitet, on the 2014 National Implementation report, www.jandarpo.se/ Övrigt material (2013: Remissvar: Den nationella implementeringen av Århuskonventionen. Miljödepartementets förslag till rapport till det femte partsmötet 2014), however only in Swedish.

challenging the local authorities' negligence to enforce the air quality standards for particulate matter and oxides of nitrogen in accordance with EU law.²¹⁹ The municipality of Stockholm has been unwilling to take any further action, but, following an administrative appeal, the County Administrative Board ordered additional measures to be taken in order to bring down the levels of PM₁₀. The inhabitants have appealed this decision, asking the Land and Environmental Court to strengthen the precautionary measures to protect their interests. This way, the final decision on how to protect the inhabitants' health will probably be dealt with by the Land and Environmental Court of Appeal. However, for many years this possibility to challenge omissions did not apply when the supervisory authorities refrained from bringing actions for the updating of permits for environmentally hazardous activities, such as IPPC installations. Such initiatives were regarded as the prerogative of the authorities. As this viewpoint clearly is in breach of the Aarhus Convention and the implementing EU law on access to justice, the case law was revoked by a judgment from the Land and Environmental Court of Appeal in late 2011 (*MÖD 2011:46*).

6.2.6.3 Standing for individuals in the Planning and Building Act

27 As already mentioned, standing for individuals is more restricted in the Planning and Building Act (PBL), compared with the Environmental Code. Even though the provision on standing – that is section 22 of the Administrative Procedure Act – has the same phrasing as 16:12 MB, case law differs. Concerning PBL decisions on building permits and local development plans, only those who live closest – “border neighbours” – can appeal. In addition to this, the Planning and Building Act presents additional criteria for standing. Most importantly – and this is unique within administrative law – there is a prior participation requirement. To be able to appeal a decision on a local development plan, the public concerned must have voiced their opinion during the participation phase of the decision-making, more precisely, when the proposed plan is published for consultation (13:11 PBL).

28 Furthermore, when the public concerned challenges local development plans, the scope of the review in court is supposed to be restricted. According to 13:17 PBL, the court can only scrutinize whether such a decision “is in breach of law in a manner that is described by the applicant or is clear from the circumstances in the case”. This provision is section 7 in Act 2006:306 about judicial review of certain governmental decision. In addition to this and in the same way as in judicial review, the procedure according to 13:17 PBL is cassatory. Thus, in contrast to the ordinary administrative appeal, the reviewing court can only accept or quash the local development plan. This provision in 13:17 PBL was introduced in 2011 when the procedural order for the appeal of such plans changed from the Government to the environmental court system. At the beginning, the Land and Environmental Court of Appeal took a very cautious attitude, largely abiding to the evaluation of the public interests that had been performed by the County Administrative Board. The court also meant that individual complainants could only invoke their own interests in the case (*MÖD 2013:47 Plankan*). This radically new approach was criticized in the literature, as it introduced elements in the procedure that were not foreseen in the legislation and also contradicted what was said in the preparatory works to the reform.²²⁰ In later case law, the Land and Environmental Court of Appeals distinguished its viewpoint on the matter. In *MÖD 2014:12 Seminariet*, the court emphasized that judicial review according to 13:17 PBL means that the courts shall respect the room for administrative discretion, but only to the extent it is allowed for in the substantive provisions of law. Furthermore, the court is still free to make its own evaluation of those private and public interests which shall be taken into account according to the PBL. Individual members of the public concerned can also invoke any interest – including public interests – to argue their case.

²¹⁹ Accordingly, this is a Swedish equivalent to the Janecek case (C-237/07).

²²⁰ Darpo: Allmänna och enskilda intressen (2013).

6.2.6.4 Standing for individuals to challenge governmental decisions

29 In some sectorial legislation, the administrative decisions are appealed to the Government. Some examples are permits for the building of railroads, highways and airports, mines and electric power lines, which all are decided by national agencies (Swedish Transport Administration, Mining Inspectorate of Sweden and Swedish Energy Market Inspectorate). Furthermore, as described above, one of the requirements for obtaining a permit for some large developments is a prior decision by the Government on the “permissibility” of the project according to Chapter 17 MB. All these Governmental decisions can be challenged by way of judicial review in the Supreme Administrative Court (HFD) according to Act 2006:304. The scope of the review in these cases is equally restricted as the one under 13:17 PBL, meaning that the court is supposed to leave more room for administrative discretion in a cassatory procedure. HFD commonly uses this description of the scope of the trial (“the intensity of review”) in judicial review:²²¹

Judicial review comprises of, besides the pure interpretation of the law, even such matters as facts and evidence evaluation and the question whether the decision is contrary to the requirements of objectivity, impartiality, and equality before the law. The trial also includes errors in procedure which may have affected the outcome of the case. If the applied provisions are so designed that the authority has some discretion in their decision-making, judicial review includes examining the question whether the decision falls within the freedom of action.

30 However, as in common law systems, the scope of the trial in judicial review largely is decided in case law. Also, on a general level, I think it is safe to say that, in recent years, there has been an expansion of the scope of review by way of court activism, not least as a result of the influence of EU law.

31 Individuals whose “civil rights or obligations according to Article 6.1 ECHR” are affected can apply for judicial review at HFD (section 1 in Act 2006:304). Under old case law, the Governmental decision on permissibility was binding for the permit bodies, including the courts, in all aspects upon which a judgment had been rendered. This system created two kinds of problems in environmental decision-making. First, it barred the full implementation of the legal requirements for permits – not least according to EU law – as the full consequences of the activity rarely were known when the Government decided on the permissibility and therefore important permit conditions could not be finally evaluated. That such a system is in breach of EU law was made clear by the Supreme Court in the *Bunge case*.²²² Second, another problem that occurred in practise regarding standing was that the governmental decision was taken at such an early stage that HFD had not been able to identify those who would be affected by the project. Accordingly, individuals who applied for judicial review were considered to lack standing and thus their cases was dismissed. When subsequently they appealed the permit for the project, they were prevented from challenging its localization and the basic parameters, as those issues had already been decided by the government.²²³ This Catch-22 situation clearly is in breach of Article 9.2 of the Aarhus Convention and was heavily criticized for many years in the legal literature.²²⁴ It therefore came as no surprise when the matter was brought to the European Court of Human Rights by the neighbours to a major railroad development and Sweden was found to be in

²²¹ My translation from RÅ 2005 ref 44.

²²² NJA 2013 s. 613. The case concerned a Natura 2000 assessment and permit, but the reasoning of the Supreme Court is generally applicable.

²²³ RÅ 2004 ref. 108 Botniabanan I and RÅ 2008 ref. 89 Botniabanan II.

²²⁴ See decision by the Compliance Committee of the Aarhus Convention on the EU funding of a landfill for waste in Lithuania, C/2006/17 (EU). See also Darpö, J: Rätt tillstånd för miljön. Om tillståndet som miljörettsligt instrument, rättskraften och mötet med nya miljökrav, part 2.3.5. Final report in the research program ENFORCE. Published 2010-07-12 on www.jandarpo.se (abgerufen am 19.10.2016); Artiklar & Rapporter, however only in Swedish.

breach of Article 6 ECHR.²²⁵ However, the standing rule applicable in those days related to the standard formula in section 22 in the Administrative Procedure Act and it seems that HFD in case law under Act 2006:304 allows for a wider circle of individuals who “may be affected” to apply for judicial review of a governmental decision on the permissibility of large scale developments.²²⁶ In my view, this latter problem relating to standing to appeal Governmental decisions is also taken care of by the legislator and HFD.

6.2.7 Case law in individual’s standing on environmental decision-making

32 As noted, the traditional stance of the courts on individuals’ standing is rather generous in the area of environmental law. The courts have also been quite sensitive to modern developments in the concept of standing, not least due to international law. Below, I have listed the landmark cases on standing for individuals in environmental law in Sweden.

6.2.7.1 Supreme Administrative Court (HFD)

RÅ 1993 ref. 97 Public concerned and the public interest

33 When an individual appeals a permit decision, both private and public interests can be invoked to advocate his or her cause.

RÅ 1997 ref. 38 Standing for individuals

34 The right of appeal is given to any person at risk of suffering harm or detriment caused by a decision, if that risk is not merely theoretical or completely insignificant.

RÅ 2005 ref. 44 The public interest and the scope of EIA

35 A neighbour appealed a municipal decision on a local development plan, claiming that it would have a negative impact on a protected species in the area (great crested newt), which was not taken into account in the EIA. HFD stated that individuals who are affected by such plans are able to invoke the public interest to advocate their cause. As an EIA should cover all relevant impacts of the development in order to be able to take them into account in the decision-making – including species protection – the plan was quashed.

6.2.7.2 Supreme Court

NJA 2004 s. 590 A uniform definition of public concerned in the Environmental Code

36 The ambition of the Swedish Environmental Code is to introduce a uniform and generous definition of “the public concerned”. Each person who may suffer any damage or nuisance from an activity – if the risk of such an impact concerns a legally protected interest and is not merely theoretical or insignificant – shall have the possibility to appeal a permit for that activity.

NJA 2012 s. 921 Public concerned in Swedish law and the Aarhus Convention

37 The Company Taggen Vindpark AB applied and received a permit to build 83 wind turbines 170m high, in the sea off the east coast of Sweden. The permit decision was appealed by a number of individuals and two NGOs. One of the NGOs was granted standing, whereas all other parties were dismissed. They appealed that decision first to the Environmental Court of Appeals and then to the Supreme Court.

²²⁵ ECtHR 2014-09 -25 in case No 29878/09 Karin Andersson and others v. Sweden.

²²⁶ RÅ 2008 ref 89, HFD 2011 not 26.

38 Concerning the individuals, the Supreme Court noted that according to case law, those individual members of the public concerned who live within 450m to 3 km from a planned wind farm can appeal the permit decision. The qualifying distance to entitle challenges depends upon the size and construction of the installation and the individual circumstances of the case in question. This case law is in line with what has been previously decided by the supreme courts of Sweden (*RA 1997 ref 38* and *NJA 2004 s. 590*) and meets the requirements of the Aarhus Convention. In this case, the complainants lived 11-12 km away from the offshore wind farm and although they claimed to be affected by disturbances from the installation – mainly noise, shadowing and blinking lights – they could not be regarded as affected in a way so as to grant them standing rights. Furthermore, investigations into the case exploring the impact of the windfarm, did not indicate that it would have any negative effect on the value of their properties. As merely an impact upon the aesthetics of the landscape affecting the individuals view of the coastline, was not considered to be a factor that gave rise to standing rights for the individuals, their appeals were dismissed.

6.2.7.3 Land and Environmental Court of Appeal

MÖD 2002:82 Public concerned at what distance?

39 Individuals living 5 km from an incineration plant and thus at risk of being affected by air pollution were allowed to appeal the permit decision for that operation.

MÖD 2003:19, MÖD 2004:31 Challenges to administrative to omissions

40 A decision of a supervisory authority not to intervene in a certain activity (a so-called 0-decision) can be appealed and its substance can be challenged by the public concerned.

MÖD 2003:98 and MÖD 2003:99 The definition of the public concerned

41 When deciding on who should be given the right to appeal a permit decision, decisive factors are the distance to the activity, the nature of the emissions (discharged substances) and their likely effects. A property owner, living 12 km downstream from industrial works was granted standing to appeal a permit concerning discharges into the water of not readily biodegradable and toxic substances (*MÖD 2003:98*). The same person was dismissed in another case, concerning a permit for that same industry for the discharges of formic acid, which is readily biodegradable and therefore was not considered to have any negative effect on her interests (*MÖD 2003:99*).

MÖD 2011:46 Public concerned and omission by public authority

42 A company operated a landfill under a permit issued in 2005. A neighbour complained to the supervisory authority (the County Administrative Board), claiming that the activity was operated in breach of several conditions in the permit. He asked the Board to initiate proceedings to revoke or update the permit. The authority, however, found no reason to undertake any measures. The neighbour appealed to the Environmental Court. The court dismissed the appeal on the grounds that the possibility to initiate proceedings to revoke or update a permit was the prerogative of the environmental authorities and that, according to consistent case law of the National Licensing Board and the Environmental Court of Appeal, individuals were not allowed to appeal decisions not to undertake such a measure.

43 The neighbour appealed to the Environmental Court of Appeal. This court stated that it is a general public law principle that those who are affected by an environmental decision should have the possibility to appeal the decision, and that this principle should also apply in cases where the activity operates under a permit. With reference to Sweden's international obligations – and thus revising its previous case law – the court found that a neighbour has the right to appeal a supervising authority's decision not to undertake any measure to revoke or update a permit. The court also referred to its case law on the possibility to appeal supervisory decisions concerning activities that operate without permits (cf. *MÖD 2003:19* and *MÖD 2004:31*).

MÖD 2014: 12 Appeals on a local development plan (Seminarier)

44 The city of Uppsala decided a local development plan for the area Seminarier. Neighbours and different associations appealed the decision to the County Administrative Board, which upheld the plan. However, both the Land and Environment Court and the Land and Environmental Court of Appeal – to which the city appealed – disallowed the plan. The Land and Environmental Court of Appeal emphasized that the aim of the trial is to decide whether the local plan is in accordance with the provisions of PBL. If the law gives room for discretion to the deciding administration, this must be respected by the courts. Thus, it is the substantive content of the provisions which set the scope of the trial and individual parties have a right to challenge whether those rules have been correctly applied. Furthermore, even if the County Administrative Board has a certain prerogative in the weighing of different public interest, this does not preclude the court from trying that it has been done according to the law. In this case, the Land and Environmental Court of Appeal found – in contrast to the County Administrative Board – that the proposed development would have a significant impact on the cultural values of the area, why the plan was quashed.

MÖD 2015:8 Public and private interests

45 A municipality planned to locate sewage pipes for sewage on the land of a private person. In order to be able to do so, they needed, first derogation from the species protection requirements, and second a permit from the Cadastral Offices. The County Administrative Board granted the species derogation and the property owner appealed to the Environmental court. However, the court dismissed his appeal in line with established case law (*MÖD 2001:29, MÖD 2004:55, MÖD 2013:32 and MÖD 2007:6*). According to this case law, private parties cannot challenge decisions that merely concern public interests, although they can invoke such interests in cases where they have standing.

46 The property owner appealed to the Land and Environmental Court of Appeals. The court noted that since the establishment of the old case law on the matter, Sweden and EU have ratified the Aarhus Convention. Article 9.3 of that convention has wide applicability and covers all kinds of decisions concerning the environment. Even though this provision does not have direct effect, the CJEU has emphasized that national standing rules must ensure wide access to justice and cannot invalidate EU law provisions that entitle the public concerned to bring actions before the competent courts. Furthermore, it is an obligation for the national courts to interpret – to the extent possible – existing rules on standing in order to apply them in line with Article 9.3 of the Aarhus Convention and the principle of legal protection in EU law (C-240/09).

47 Against this backdrop, the court stated, it can be questioned if the old case law – which partly is based on the “protected norm theory” – is compatible with modern environmental law and the Aarhus Convention. The derogation decision concerned general environmental interests to which Article 9.3 applies. The conventional requirements are not only for wide standing rights, but also for effective justice. Thus, those who are affected by a decision must be able at some point in the procedure to have their say when the issues raised are decided upon. If a certain decision – to which the public concerned cannot appeal – is decisive for the latter proceedings in the matter, those requirements are not met.

48 In this case, the first decision concerned the protection of a species in the area, which is a subject that an individual can raise in the subsequent proceedings where he has standing rights. However, the effectiveness of this is nullified by the fact that the Cadastral Offices used the first decision as a starting point, without substantively questioning it. Such a division of the decision-making is not in line with the Aarhus Convention and may also be regarded as a deprivation of the individual’s right to a fair trial according to ECHR. Thus, the property owner was granted standing in the case concerning derogation from the species protection.

6.2.8 Standing for groups and ENGOs

6.2.8.1 General about ENGO standing in Sweden

49 The experience of ENGO standing has been very positive in Sweden and the general opinion is that the organisations have used the possibility in a responsible manner.²²⁷ The most common appeals made by the Swedish ENGOs – mainly the Swedish Society for Nature Conservation (SNF) and the Swedish Ornithological Society (SOF) – since 1999 have been concerning permits to industrial installations and water works, exemptions to species and habitats protection, and shore protection.²²⁸ Concerning the protection of large carnivores, Swedish Carnivore Association (SRF) and Nordulv have been very active. In recent times and due to the less strict numeric criterion in 16:13 MB, local ENGOs have also raised actions in the courts.

6.2.8.2 ENGO standing according to the Environmental Code

50 The standing criteria do not change according to the nature of the claimant so long as the person, company or organisation represent their own interest as a member of the public concerned, stakeholder, operator of a business, owner of real estate, etc. As with civil rights and obligations protected by the ECHR, both natural and legal persons represent interests that they can defend by legal means in the environmental courts. However, according to the Environmental Code, a legal entity cannot represent an individual appellant. But nothing prevents a person who represents that entity from acting as counsel for the individual, something which quite often happens in environmental cases.

51 Provisions on standing for ENGOs and other organisations under the Environmental Code are provided for in 16:13 and 16:14 MB:²²⁹

Section 13 Appealable judgements and decisions concerning permits, approvals or exemptions issued pursuant to this Code, concerning withdrawal of the status of protected areas pursuant to Chapter 7 or supervision pursuant to Chapter 10 or questions relating to provisions adopted pursuant to this Code, may be appealed against by a non-profit association or another legal person

1. whose primary purpose is to promote nature conservation

or environmental protection interests;

2. who is non-profit;

3. who has operated in Sweden for at least three years; and

4. who has at least 100 members or by some other means shows that the activity is supported by the public.

The right to appeal pursuant to the first paragraph shall apply even in the cases where the appeal only refers to a condition or other provision in the judgement or decision and also in the cases where the judgement or decision is the result of an assessment pursuant to Chapter 22, Section 26, Chapter 24, Sections 2, 3, 5, 6 or 8 of this Code or an assessment pursuant to

²²⁷ See Implementation Report 2014 from Sweden: http://www.unece.org/env/pp/reports_trc_implementation_2014.html, (abgerufen am 19.10.2016), p. 27f.

²²⁸ The success rate of ENGO standing in environmental cases is reported to be almost 50% in the environmental courts, to be compared with 24 % for appeals from other actors in the environmental procedure, see SOU 2005:59, part 3.3.1.

²²⁹ Unofficial translation in a document from the Ministry of the Environment and Energy.

Chapter 7, Sections 13, 14 or 16 of the Act (1998:812) Containing Special Provisions concerning Water Operations. However, the right to appeal pursuant to the first paragraph do not apply to judgements or decisions relating to the Swedish Armed Forces, the Swedish Fortifications Agency, the Swedish Defence Materiel Administration or the National Defence Radio Establishment.

Anyone who wishes to appeal pursuant to the first or second paragraph must do so within the time limit fixed for the parties and for the claimants.

Section 14 The provisions of Section 13 concerning the right of appeal of certain non-profit associations shall be applicable regarding shore protection also for a non-profit association whose purpose according to their statutes is to promote outdoor interests.

52 In short, a non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests may appeal decisions on permits, approvals or exemptions pursuant to the Code. Additional criteria for such ENGO standing are that the organisation has been active for at least 3 years in Sweden and has at least 100 members 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.

53 The possibility for ENGOs to appeal certain environmental decisions originally was established in the Environmental Code in 1999, although at that time, the numeric criterion was 2,000 members. However, due to the judgment by the CJEU in the *DLV case* (C-263/08), the legislation was reformed in 2010. Further changes have been made to meet the access to justice provisions in the ELD (2004/35), enabling ENGOs to appeal supervisory decisions concerning contaminated land. Since 1999, there have also been proposals from different governmental commissions to expand ENGO standing to all kinds of decisions under the Environmental Code. Due to strong resistance from industry, these ideas have to date not survived negotiation within the Governmental offices. Still, there are some proposals pending for further reform of the provisions on ENGO standing. First, the Ministry of the Environment and Energy has suggested that the condition that the ENGO must have been active in Sweden for 3 years should be abolished.²³⁰ The national criterion surely is in breach of the non-discrimination clause in the Aarhus Convention. However, in practise, this is not a problem when an ENGO from another Nordic country appeals a Swedish decision, as it is equated to a Swedish organization in accordance with the 1974 Nordic Convention on Environmental Protection.²³¹ But if a Polish or a German ENGO appeals a Swedish permit for a combustion plant with far ranging effects on the atmosphere or the Baltic Sea, it will not meet the national criterion. Furthermore, according to the ministerial paper, the time criterion is in breach of Article 11 of the EIA directive (2011/92). It also argues that it is important for the quality of the decision-making and from an environmental democracy point of view that individuals from the public concerned have the possibility to organize in ad hoc groups in order to present their opinions and advocate their cause. For these reasons, the Ministry argues that the criteria on nationality and length of activity cannot stand. However, these proposals have been resting within the Governmental offices for some years now and their future must be regarded as uncertain.

54 This is quite surprising, as the courts have been very active in promoting standing rights for ENGOs. One can actually say that in this area of law, the role of legislator has been overtaken by the courts and that development has been rapid. In a series of judgements, the Supreme Court and the Land and Environmental Court of Appeals – the latter being in fact the body which creates precedents

²³⁰ Promemoria: Effektivare identifiering, beskrivning och bedömning av miljökonsekvenser. Remiss/Miljödepartementet 2012-08-17 (dnr M2012/2031/R).

²³¹ Nordiska Miljöskyddskonventionen (SÖ 1974:99).

in the area of environmental law – have expanded the standing rules in 16:13 MB in order to make them in line with the international obligations. In *NJA 2012 s. 921*, the Supreme Court stated that the criteria for ENGO standing in the Environmental Code must not be regarded as fixed, but should instead be used as mere starting-points for considerations on access to justice. Most importantly, the overall picture should be taken into account and someone must be able to challenge the decision at stake. In accordance with this judgement, the Land and Environmental Court of Appeals found that an association of bird watchers enjoyed the support from the public, despite the fact that they had only 40 members (*MÖD 2015:XX*). This court has also expanded the understanding of the locution “decisions about permits, approvals or exemptions” in 16:13 MB in order to have it cover all kinds of decisions by the supervisory authority in relation to activities that *may be in need* of such a formal decision (*MÖD 2012:47, MÖD 2012:48 and MÖD 215:XX*).²³² Thus, in order for ENGOs to have standing to challenge administrative omissions, it suffices that there is an allegation that a certain activity requires a permit or even that the argumentation in the case has brought the issue to the courts attention.

6.2.8.3 ENGO standing the Planning and Building Act

55 ENGOs which meet the requirements in 16:13 MB, can also appeal certain decisions according to the Planning and Building Act. The challengeable decisions are listed in law and all concern local development plans on certain activities, but only if they may have a significant effect upon the environment (13:12 and 4:34 PBL). The list reflects the Public Participation Directive (2003/35) and covers plans for industrial operations, supermarkets, parking lots and similar arrangement for densely populated areas, harbours for leisure boats, ski resorts, hotels, amusement parks, zoological gardens, permanent camping sites, tramways and metros. In addition to this, organisations meeting the 16:13 or 16:14 criteria– thus including organisations for outdoor recreation – can appeal municipal planning decisions which may have an impact upon the shore protection in the area (13:13 PBL). In the same way as when individual members of the public concerned appeal decisions on local development plans, 13:17 PBL applies to ENGOs. Thus, the scope of the trial is to evaluate whether there has been any breach of law in the decision-making. However, as ENGOs are regarded as representatives of the public interests (*NJA 2012 s. 921* with reference to C-115/09 *Trianel*), there is little difference compared with an ordinary reformatory administrative appeal procedure concerning the scope of the trial. As for the outcome of the proceedings, the court can only accept or quash the decision at stake.

6.2.8.4 ENGO standing to apply for judicial review of Governmental decisions

56 As noted, the provision on access to justice by ENGOs in 16:13 MB has also been expanded to certain other laws dealing with infrastructure projects, mining, electric power lines, and similar activities. Commonly, these permits are appealed to the Government. In relation to those decisions, there is a possibility open to ENGOs to apply for judicial review of governmental decisions in accordance with section 2 of Act 2006:304. Here, it is stated that ENGOs meeting the criteria of the 16:13 MB shall have the possibility available to them to challenge any such “governmental permits to which Article 9.2 of the Aarhus Convention applies”. As the reader is aware, Article 9.2 covers two situations. First, if an activity is listed in Annex I to the Convention (Article 6.1.a). This annex lists major industrial operations, landfills, energy operations, mines and other kinds of large scale operations with great impact on the environment and natural resources. Second, Article 9.2 also covers activities which are not listed, but still may have a “significant effect to the environment” (Article 6.1.b). In most – but not all – situations, the criteria for ENGO standing for judicial review is similar to the obligation to produce an Environmental Impact Assessment according to the EIA Directive (2011/92).

²³² These cases have been confirmed by later decisions from the Land and Environmental Court of Appeals, see for example MÖD 2014:30 and MÖD decision 2014-03-18 in case No 11609/13.

57 Thus, decisive for ENGO standing is whether an activity may have significant impact to the environment. HFD has dealt with this question in different situations. The first one is obviously when ENGOs apply for judicial review. Such examples can be found in *HFD 2011 not. 17 Tollare* and *HFD 2012 not. 54 Shore protection i Sollentuna*. In these two cases, HFD dismissed the ENGOs as the plans in question did not entail significant effects to the environment. However, in *HFD 2011 ref. 4 Norra Djurgårdsstaden*, the ENGO Djurgården-Lilla Värtan (DLV) was granted standing as the local plan in question concerned a major development in Stockholm, where an EIA procedure was compulsory. The second situation is when individuals ask for judicial review of a Governmental decision, claiming that an EIA procedure should have been performed in the decision-making. Thus, HFDs evaluation of such a claim in substance has importance for the understanding of ENGO standing in other cases, as the requirements are the same.

58 However, as the local plans since 2011 no longer are appealed to the Government, but to the environmental courts, fewer cases of this category will occur in HFD. But for those activities which remain to be appealed to the Government, Act 2006:304 still applies, including the Article 9.2 criteria. It should be noted that those criteria are “closed” in that they cannot be interpreted to include environmental decisions according to Article 9.3. In my view, this procedural order certainly does not meet the requirement of the Aarhus Convention when the Government decides on matters which do not require an EIA, but which still relate to the environment. This problem may be solved by way of a generous attitude from the government in granting ENGO standing directly, as all “parties to the proceedings” can ask for judicial review. This is however less likely, considering the general attitude at the political level towards ENGO standing.

6.2.8.5 ENGO standing in sectorial legislation

59 Traditionally, ENGO access to justice was not provided for in important environmental legislation outside the Environmental Code, such as the Forestry Act and the legislation on hunting. Although vital parts of the Habitats Directive are implemented by this legislation, decisions pursuant to those laws could not be challenged by ENGOs. However, on this area of law, the general principles on standing according to section 22 of the Administrative Procedure Act apply and the development of case law after the *Slovak Brown Bear* has been rapid.

60 It all started when the Swedish Environmental Protection Agency (SEPA) authorized hunting seasons both in early 2010 and again in early 2011 with a bag limit of 27 and 20 wolves respectively. Several ENGOs appealed these decisions; but the appeals were thrown out because the organisations were found not to have standing under Swedish law. However, in early 2012, the CJEU’s judgement in the *Slovak Brown Bear* case (C-240/09) had begun to influence the jurisprudence of the Swedish administrative courts concerning hunting decisions. As the reader knows, in this case, the CJEU ruled that national courts must, to the extent possible, interpret national procedural rules in such a way so as to allow ENGOs standing to appeal national implementation of EU environmental laws. So when yet another hunting decision was taken at the end of 2011 and the complaining ENGOs were denied access to justice by the lower administrative courts, HFD in the summer of 2012 decided that the issue of standing must be reviewed in light of our international obligations. The case was remitted back to the Stockholm Administrative Court of Appeal, which subsequently granted the ENGOs standing, referring to the Aarhus Convention and the case law of CJEU (the *Kynna wolf case*). In doing so, it applied the criteria for standing in 16:13 MB, as the hunting legislation for obvious reasons, lacks such provisions. Ever since that case, ENGOs have standing to challenge hunting decisions by the SEPA. Accordingly, the decisions on the hunting licenses in 2013 and 2014 were brought to court and subsequently quashed. After this, the Swedish government barred the possibilities to challenge these decisions in court, which triggered the EU Commission to initiate an infringement case in 2014. Moreover, in January 2015, HFD issued leave to appeal on the question as to whether such a procedural order is in line with EU law.

61 ENGOs standing rights have also expanded into areas of (exclusive) national environmental legislation. In the *Ånok case*, HFD granted standing to the Swedish Society for Nature Conservation in a case concerning a permit for a clear-cutting operation according to the Forestry Act. The Land and Environmental Court of Appeals has applied the same viewpoint in cases concerning the legislation on shore protection, which also is mainly according to national law.²³³

6.2.9 Case law on ENGO standing in environmental decision-making

62 Below, you can find the landmark cases concerning ENGO standing in environmental matters.

6.2.9.1 Supreme Administrative Court

63 HFD, decision 2012-06-28 in case No 2687-12 and Stockholm Administrative Court of Appeals, judgement 2013-02-07 in case No 4390-12: The Kynna wolf case

64 In November of 2011, SEPA made a decision under administrative provisions on ‘protective hunting’ to cull an individual wolf, known as the Kynna wolf. The Swedish Society for Nature Conservation (SNF) appealed the decision and requested an injunction. The case was rejected by the Stockholm Administrative Court, which found that the organisation lacked standing to proceed. The Stockholm Administrative Court of Appeal (CoA) agreed. SNF appealed to the Supreme Administrative Court (HFD). Although the wolf had already been shot, HFD ordered Stockholm Administrative CoA to hear the case. HFD noted that Sweden is a signatory to the Aarhus Convention, and referred to the *Slovak Brown Bear* case, as well as its own lack of precedent on the right of environmental NGOs to appeal administrative decisions pertaining to hunting of species protected by EU law.

65 In February of 2013, the Stockholm Administrative CoA determined that SNF should have had standing in the case. Article 9.3 of the Aarhus Convention grants the public the right to challenge acts and omissions that violate national environmental law. Jurisprudence of the CJEU in *Slovak Brown Bear* established that while Article 9.3 does not have direct effect, national procedural law must be interpreted so to give effect to Union law. Thus, Swedish administrative law, which according to section 22 in the Administrative Procedural Act generally requires appellants to be ‘concerned’ and negatively affected by a decision, must be interpreted in such a way that it is possible for environmental organizations to challenge in court administrative decisions that conflict with EU environmental law.

66 Although SEPA’s hunting decisions were made under hunting law and not environmental legislation, the decision clearly concerned EU environmental law. The court therefore used the same criteria for ENGO standing that is set out in the Environmental Code: in order to have standing to appeal, an NGO must have a primary purpose of nature protection or other environmental interests, be non-profit, have been active in Sweden for at least three years, and have at least 100 members or else show that it has “support from the public”.

HFD 2014:8 Ånok: ENGO standing according to the Forestry Act

67 The National Forest Agency permitted a clear-cutting operation in Northern Sweden in a mountain forest with high conservation value. The Swedish Society for Nature Conservation (SNF) appealed the decision and claimed that the operation was in breach of the Forestry Act. The Administrative Court granted standing and quashed the decision. The property owners and the Forest Agency appealed to the Administrative Court of Appeal, which decided that the ENGO lacked standing in the case. SNF appealed to the Supreme Administrative Court (HFD).

²³³ MÖD 2013:6.

68 HFD noted that there is no standing rule in the Forestry Act, and this is why the issue must be decided using general administrative law principles. In case law, those who have “noteworthy interest” in the matter shall be considered to have standing to appeal the decision at stake (*RÅ 1994 ref. 82*, *RÅ 1995 ref. 77*).

69 HFD then went on to consider if the decision to permit clear-cutting in the area is an administrative act which is covered by the Aarhus Convention. According to the court, Article 9.2 is not applicable as forestry operations are not mentioned in the list in Annex I to the Convention (Article 6.1.a) and the operation in this case cannot be regarded as having a significant effect on the environment (Article 6.1.b). Concerning Article 9.3, the court referred to the Implementation Guide 2013 (at page 206f) and noted that the provision covers decisions which relate to the environment. Furthermore, it is not necessary to establish that a breach of law has taken place in order to give standing, it suffices if the public concerned alleges that there has been such unlawful conduct. HFD then noted that according to the Forestry Act, nature conservation and environment protection shall be taken into account in the decision-making. Also, a permit for a clear-cutting operation in the mountains must not be issued if it “contravenes essential nature conservation values”. The Environmental Code can also be applied in these cases. HFD therefore concluded that the permit in question was clearly covered by Article 9.3 of the Aarhus Convention.

70 Regarding the issue of ENGO standing, HFD pointed out that although the legal basis for the decision was national law, this situation was closely related to those to which EU law on the environment applies. The court then cited the *Slovak Brown Bear* (C-240/09), where CJEU established that it is a Union law requirement to interpret the national procedural rules widely in order to allow ENGO standing in environmental decision-making. HFD furthermore stated that there is also, on a more general level, a need for a common understanding of the standing rules, irrespective of whether national or EU law is applied. In sum, in order to secure effective legal remedies for the public concerned, they should be able to appeal a decision on clear-cutting in the mountains. Accordingly, SNF was granted standing in the case.

6.2.9.2 Supreme Court

NJA 2010 s. 419: Numeric criterion

71 As a result of the preliminary ruling by the CJEU in the *DLV case* (C-263/08), the Supreme Court set aside the numeric criterion in the Environmental Code for NGOs to have at least 2,000 members as a requirement for having standing rights.

NJA 2012 s. 921: Fixed criteria for ENGO standing

72 The Company Taggen Vindpark AB applied and received a permit to build 83 wind turbines 170m high, in the sea off the east coast of Sweden. The permit decision was appealed by a number of individuals and two ENGOs. One of the ENGOs was granted standing, whereas all other parties were dismissed. They appealed that decision first to the Environmental Court of Appeals and then to the Supreme Court.

73 The decision to dismiss the appeal for one of the ENGOs was confirmed by the Supreme Court, although some clarifying statements were made. According to Chapter 16 sections 13-14 of the Environmental Code, a “non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests” may appeal decisions on “permits, approvals or exemptions” pursuant to the Code. Additional criteria for such NGO standing are that the organisation has been active for at least 3 years in Sweden and has at least 100 members or else can show that it has “support from the public”. The Supreme Court started by citing CJEU in the *DLV case* (C-263/08), where that court accepted numeric criteria, but only to the extent that they are necessary to decide whether the organisation still exists and is active. The standing criteria further-

more must not be set at a level that conflicts with the aim of providing the public concerned a wide access to justice. Also local associations must be able to use legal means to protect their interests according to the environmental legislation. It is therefore necessary, stated the Supreme Court, that one utilizes a generous attitude in these matters, and that fixed criteria in law is applied only as a starting point for decisions on standing to appeal. One must also consider the overall picture – especially in cases where no individuals have standing rights – and take into account that someone must be able to challenge the decision. In this case, however, it was unclear how much support the ENGO had, and it was therefore acceptable to dismiss their appeal (one should note however, that the other ENGO was allowed to appeal).

6.2.9.3 Land and Environmental Court of Appeal

MÖD 2001:9: In Sweden

74 The geographic criterion “in Sweden” in Chapter 16 section 13 of the Environmental Code for NGO standing entails the possibility to appeal decisions concerning permits, approvals or exemptions in all parts of Sweden, irrespective of where the organisation is registered according to its statutes or has its activities. However, the provision does not furnish a right to appeal a supervisory decision in a case concerning nature protection.

MÖD 2006:22: Different associations

75 The national association of real estate owners (Villaägarnas Riksförbund) was not considered to be an environmental NGO from the mere fact that its statutes said that one of the objectives of the organisation was to promote environmental interests.

MÖD 2008:28: Different associations

76 The national association of fishermen (Sveriges Fiskares Riksförbund) was not regarded as an environmental NGO having standing under the Environmental Code.

MÖD 2008:45: Numeric criterion

77 MILKAS, an established NGO opposing nuclear power, was not allowed to appeal a decision concerning a deposit of radioactive waste at Forsmark nuclear power station due to the fact that the organisation has only two other legal entities as members, the well-known NGOs Friends of the Earth and The Peoples Campaign against Nuclear Power.

MÖD 2009:6: Numeric criterion

78 A subdivision of the Swedish Society for Nature Conservation (SNF) is a separate legal entity and cannot appeal a decision according to Chapter 16 section 13 of the Environmental Code if it does not have the required number of members (at least 2,000 at the time).

MÖD 2012:47 and MÖD 2012:48: Different kinds of decisions

79 According to Chapter 16 section 13 of the Environmental Code (16:13 MB), certain ENGOs may appeal decisions on “permits, approvals or exemptions” pursuant to the Code. According to old case law, those provisions were read narrowly, restricting the types of decision which could be subject to appeal. In two cases, the Land and Environmental Court of Appeals distinguished itself from this old case law and clarified that the application of fixed standing criteria must comply with the Aarhus Convention and EU law.

80 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. Both appeals were dismissed by the Environmental Court.

81 The Environmental Court of Appeals, however, noted that the Swedish Council of Legislation had criticised the formulation of 16:13 MB for being too restrictive, especially concerning the possibility to challenge decisions from the supervisory authorities. Moreover, case law of CJEU emphasises the necessity of giving the public concerned wide access to justice in environmental matters (C-240/09 *Slovak Brown Bear*). Even though both County Boards' decisions can be regarded as such supervisory decisions that are not covered by 16:13 MB, they are not expressly excluded. The decisions were also closely connected to "exemptions and permits", as they related to the legislation on species protection and Natura 2000. Furthermore, developments within EU law should be taken into account when deciding the standing issue and the national courts have a responsibility of their own in this regard. Also, the challenged decisions were without any doubt covered by Article 9.3 of the Aarhus Convention. Given this context, 16:13 MB should be read in order to fulfil the international obligations and thus be understood as also relating to a decision on whether an exemption and a permit is needed or not. SNF was therefore granted standing in both cases.

MÖD 2015:XX (MÖD 2015-04-15 in case No M 8662-14) Public support

82 According to Chapter 16 section 13 of the Environmental Code (16:13 MB), an ENGO has standing rights on condition that it has at least 100 members or else can show that it has "support from the public". In old case law, this criterion has been read narrowly, excluding for example an organisation with 92 members (*MÖD decision 2010-09-21 in case No M 1505-10*). In this case, a local bird association with only 37 members appealed a municipal decision relating to the development of wind turbines, but was dismissed both by the County Administrative Board and the Environmental Court for lack of standing. The ENGO appealed to the Land and Environmental Court of Appeals.

83 To begin with, the Land and Environmental Court of Appeals noted that the Swedish Council of Legislation had criticised the formulation of 16:13 MB for being too restrictive and that the Supreme Court has emphasised that the standing criteria in 16:13 MB should be read generously. One must also consider the overall picture – especially in cases where no individuals have standing rights – and take into account that someone must be able to challenge the decision. Moreover, case law of CJEU emphasises the necessity of giving the public concerned wide access to justice in environmental matters (C-263/08 *DLV* and C-240/09 *Slovak Brown Bear*). Even though the number of members in the organisation did not meet the numeric criterion in 16:13 MB, it had been regularly active for a long period of time. The organisation had arranged annual bird watching exhibitions with as many as 500 visitors and it also had taken part in public hearings in cases concerning nature protection. Therefore, the Land and Environmental Court of Appeals found that the ENGO had the support from the public in the sense that was meant in 16:13 MB. As the court also considered – along with previous case law from recent years (*MÖD 2012:47, MÖD 2012:48, MÖD 2014:30*) – that the decision in question was covered by 16:13 MB, the ENGO was granted standing in the case.

6.3 The UBA Questionnaire

6.3.1 Access to Justice

84 Article 9.2 relates to activities covered by Annex I to the Aarhus Convention – either because they are listed directly (items 1-19) or they require an EIA procedure according to national legislation (item 20). This follows from Article 6.1.a AC. Furthermore, Article 9.2 also applies to all other kinds of activities and measures that may have a significant effect to the environment (Article 6.1.b). Thus, my understanding is that Article 9.2 goes further than EU law in the sense that it requires access to justice for the public concerned, irrespective of whether the activity is listed or not. This can be illustrated by the example of a clear-cutting operation in forestry, an activity which is not listed under the EIA Directive. If such an operation may have a significant effect on the environment, Article 9.2 is directly applicable in the Member State. In Swedish case law, this was indirectly clarified by the Supreme Administrative Court in the *Ånok* case.

85 Furthermore, according to this provision, members of the public shall have the possibility to challenge any “decision, act or omission” concerning the permitting of those activities mentioned above. In my understanding, this means that the public concerned shall have the possibility to challenge in court any decision in relation to those activities, including those on reconsiderations and updating of the permit. And this applies irrespective of whether the authority decides to update the permit condition or not. Thus, the possibility to challenge the authority’s omission in that respect still belongs to Article 9.2. Understood otherwise, the word “omission” would lose all meaning. This is also how I interpret the CJEU’s reasoning in *Mellor*²³⁴ and *Boxus*²³⁵ (see *Effective Justice*, part 3.2.3). To conclude, if an authority chooses not to update a permit condition covered by Article 9.2 and its implementation in EU law, this still falls under Article 9.2, not under Article 9.3.²³⁶

86 The distinction between Articles 9.2 and 9.3 is decisive for the access to justice possibilities in Sweden only in two situations. Both concern “closed” provisions, that is, procedural rules which cannot be interpreted so as to enable ENGO standing. The first is section 2 of the Act on judicial review of certain governmental decisions (2006:304), where ENGO standing directly relates to Article 9.2. The other is 13:12 PBL, which only covers certain listed activities, such as industrial installations and supermarkets. All these activities are regarded as Article 9.2 permits according to EU law. Other kinds of decisions under PBL cannot be challenged by the ENGOs.

How has Art. 9.3 AC hitherto been implemented in your national legal order?

87 Exclusively by case law, no measure taken by the legislator (except for what is required in terms of EU law, for example implementing Article 12 and 13 ELD (2004/35)).

Does the Aarhus Convention require uniform or at least similar rules on access to courts, standing and legal protection for individual and for collective (NGO) actions in environmental law?

88 As showed in part 1, individuals’ standing follows from general administrative law principles and case law, which differs from one area to another. For obvious reasons, environmental law has very distinct features in this context. Thus, from the starting point of open provisions in the Administrative Procedure Act and the Environmental Code, more detailed standing rules for individuals in environmental decision-making have been created in the case law of the Supreme Administrative Court, the Supreme Court and the Land and Environmental Court of Appeals.

89 In contrast, standing for ENGOs is decided by criteria in express legislation, at least as a starting point. In recent years, however, and in the wake of the case law of CJEU, ENGO standing rights have expanded by way of national courts applying the “so as to enable” formula according to the *Slovak Brown Bear* case.

90 All in all, as the express legislation and the case law relate to individuals and ENGO respectively, I would answer in the negative to the question. Rules on standing are distinct between individuals and ENGOs, even though there are similarities.

We are interested in how exactly courts and scholars in your national legal order distinguish the legal requirements of Art. 9.2 AC on the one hand and of Art. 9.3 AC on the other. Please give an overview on the scientific debate.

91 The cases where this has been an issue are mentioned under section 1.8.4. Here, you can also find an elaboration on the two remaining situations where the distinction between Article 9.2 and 9.3 has importance. In other cases, the courts sometimes mention the two provisions, but do not take any

²³⁴ C-75/08 Mellor para 66.

²³⁵ Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 Boxus (2011-10-18), § 57.

²³⁶ For a similar reasoning, see the Compliance Committee in case C/2010/50 Czech Republic, § 82.

firm position on which to apply, as they tend to find support for standing in either of them. In this respect, *Ånok* (sections 1.8.5 and 1.9.1) is a clarifying exception, as the HFD actually deals first with Article 9.2, then with Article 9.3. But I would guess that in the following, the Swedish courts will be even more reluctant to distinguish between the two articles in the Convention and prefer instead to refer to *Ånok* directly.

92 One of the drawbacks with choosing Sweden as a comparative example, is that it is a small country of no more than 9 million inhabitants. As can be seen from the list of literature, most of what has been written on the Aarhus Convention was authored by me. Moreover, one cannot really say that there is a legal scientific debate on the division between Article 9.2 and 9.3.²³⁷ The *MB-commentary* (under 16:13 MB) and *Michanek & Zetterberg* (2012, parts 19.3-19.4) mentions the issue, but without any detail. *Ebbesson* (2002) elaborates on Article 9.2, but does not really debate the distinction between that article and Article 9.3. Besides, Ebbesson's article is from 2002 and his textbook is also rather old (2008, a new edition is due to be published in August 2015). In a case commentary to MÖD 2012:47 and MÖD 2012:48, *Annika Nilsson* (2012) claims that a decision by a supervisory authority not to initiate reconsideration and updating of a permit belongs to Article 9.3. As mentioned under B.1, I do not agree with this conclusion concerning activities covered by Article 9.2.

Have there been alterations or amendments in your national legal order in order to transform the standing requirements of Art. 9.2/9.3 AC or EC-Directive 2003/35?

93 ENGO standing was introduced by the Environmental Code in 1999. When Sweden ratified the Convention, minor changes were introduced in the legislation concerning access to justice in environmental matters. Through Governmental bill 2004/05:65, it was made clear that the public concerned can submit complaints to the competent authorities about activities that may be hazardous for the health or the environment, and that the authorities then are obliged to control compliance with permits and other conditions for the activity in question (26:1 MB). In this reform, a reference was also made to 16:13 MB in the sectorial legislation on highways, railroads, water fairways, airports and mines, enabling ENGOs to appeal permit decisions on those developments. Further changes in 16:13 were by Governmental bill 2006/07:95, partly to bring the provision into line with Articles 12 and 13 of ELD. Through Governmental bill 2008/09:119, 16:14 MB was introduced, allowing ENGOs and recreation associations to challenge decisions on shore protection. Finally, as a result of CJEU's judgement in *DLV case*, changes were made to the numeric criterion in 16:13 MB through Governmental bill 2009/10:184.

94 ENGO standing according to 13:12 PBL was introduced by Governmental bills 2004/05:65 and 2009/10:184, implementing the PPD (2003/35). Also, when the ENGOs and recreation organisations were given standing rights to challenge decisions on shore protection through Governmental bill 2008/09:119, a similar provision was introduced in 13:13 PBL.

95 ENGO standing rights were introduced in the Act (2006:304) on judicial review of certain government decisions, enabling them to challenge governmental decisions on permits for activities covered by Article 9.2 of the Aarhus Convention (Governmental bill 2005/06:56).

Please provide a text and an English translation of the national provisions on standing in environmental matters.

96 See sections 1.6.1, 1.6.2, 1.6.4 (individuals) and sections 1.8.2-1.8.4 (ENGOs).

²³⁷ I discussed the matter with Jonas Ebbesson, Gabriel Michanek and Charlotta Zetterberg and we all agree on that conclusion.

Consider and describe especially the scale, scope and prerequisites of the rights of action for environmental groups (NGOs) and for individuals and report the professional discourse among legal scholars and the relevant national case law.

97 See Part 1 in respect of the first question. Concerning the legal debate among scholars, see Part 2, section B.1.3, first arrow-point.

Do rights of action allow the courts to control the legality of administrative decisions under all aspects or are they limited to the control of certain areas of the law (especially “environmental law” provisions)? How is the term ‘law relating to the environment’ which is used in Art. 9.3 AC defined or understood in your national legal order? Does it include any law that relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, animal protection, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment?

98 As the administrative procedure in Sweden in all instances is reformatory, the starting point is that the court scrutinizes every part of the appealed decision. In other words, there is no administrative discretion, at least as a general rule. This is also true for the proceedings under the Environmental Code. As mentioned above, the judicial review of local development plans under 13:17 PBL and of Governmental decisions under Act 2006:304 are restricted more or less to legality issues, meaning that the court is supposed to leave more room for administrative discretion in a cassatory procedure. In this way, these appeal procedures under PBL and Act 2006:304 are closer to judicial review in the common law sense.

99 Case law has defined Article 9.3 widely, basically covering any decision which may have an impact to the environment. Examples of such decisions are species protection under the hunting legislation and Environmental Code, forestry, industrial activities, etc.

Please give us information about the discussion in your national legal order – if there is any – concerning the implications of the ECJ’s Slovak bear judgment C-240/09. Please give us also a first impression on the reactions on the ECJ judgments in C-401-403/12 P and C-404-405/12 P.

100 The reactions from the farmers’ and hunters’ organisations, as well as from the competent authorities under the sectorial legislation – not least the Forest Agency – have been coloured by either anger or denial. Interestingly, the authorities even fight ENGO standing in the court proceedings, neglecting the principle of sincere cooperation under Article 4.3 TEU. Industry as a whole and the Government are silently resisting. In contrast, the response from the courts and academia has been as a whole very positive.

101 There has been no reaction yet to the Dutch cases on internal review, other than an article by Sanja Bogojević in Yearbook on European Law. The article is interesting and I agree with her that the stinginess of the CJEU in internal cases (direct action) is compensated by the attitude from the same court concerning access to justice in national courts (indirect action). We believe that CJEU strongly advocates a procedural order where the national courts act as watchdogs for EU law, cooperating with CJEU by way of preliminary rulings.

Is Art. 9.3 AC in your national legal order considered to give a right of action mainly or only for NGOs or for individuals as well? Give a general overview on how the standing criteria for individuals from the public concerned are applied in environmental cases in your legal order. Does the individual have to show a specific interest in the decision at stake, or does it suffice that s/he lives in the vicinity of the (proposed) activity?

102 As elaborated upon in Part 1, Article 9.3 is equally relevant for individual members of the public concerned and ENGOs.

103 A general overview on the standing criteria is given in Part 1.6. The affected individuals do not have to show a specific interest, it suffices that s/he lives in the vicinity. But, as mentioned above, if the decision concerns *only* public interests – such as shore protection – the individuals in the neighbourhood do not have standing to appeal. But then again, one can argue that this does not hold true after the judgement in MÖD 2015:8.

Does your national legal order differentiate between the standing criteria for individuals and for NGOs? If yes, are there special rules for this differentiation in the field of environmental law? Do the same rules apply to individuals and NGOs of other Member States / Parties to the AC?

104 This question is already answered under Part 2, section B.1.3. ENGO standing only exist under environmental law, although standing for different kinds of organisations – such as tenants associations and trade unions – exists in other areas of administrative law. The 16:13 criteria exclude “foreign” ENGOs by the locution “in Sweden”. However, it seems to be commonly understood that this criteria will be disregarded by the court, if ever the situation arises (see also NJA 2012 s. 921).

6.3.2 The recognition of e-NGOs

How does the formal structure of an e-NGO determine its access to justice in your national legal order?

105 To be able to constitute a non-profit association, it suffices to have statutes and a board of directors. Thus, three persons can establish such an association. There is no requirement for registration, be that to the tax authorities or the company register (although one can register on a voluntary basis or in order to protect the organization’s trade mark). Any non-profit association with an environmental interest in the statutes will be regarded as an ENGO. There is no requirement for a “democratic structure” or similar. Thus, Greenpeace has standing in environmental cases, if they can show that they have “support from the public”. The latter condition, in my view, does not create a problem for the well-established organizations in Sweden. Basically, it is the time criterion – 3 years of existence – that poses a barrier to access to justice for the local associations and ad hoc groups.

Are e-NGOs or citizens’ initiatives obliged to be recognized by authorities before they have legal standing in environmental procedures? What requirements need to be met? Did any criteria in the recognition procedure change since 2012?

106 The answer to the first question is negative. There have been no reforms since 2012 – with one exception – since the standing provision in section 22 in the Administrative Procedure Act and 16:13 MB are open, thus enabling the courts to grant ENGOs standing in environmental cases. The exception is the reform in late 2014, when the hunting decisions were delegated to the County Administrative Boards in order to prevent the courts from quashing the wolf hunting decisions. It is expected that this situation will be remediated in late 2015, either by HFD in the ongoing case concerning last winter’s licensed hunt or by express legislation as a result of pressure from the Commission.

Are there any special requirements on the organization of e-NGOs and, if so, are they comparable with Section 3 para 1 UmwRG*? [Is there any discussion on the compliance of these requirements?]

107 The criteria in section 3.1.1 and 3.1.2 are partly also expressed in 16:13 MB, except that the Swedish courts will not require the organisations to have been active for the full duration of time. Section 3.1.3 – 3.1.5 do not have any similarities in 16:13 MB, although “non-profit” surely may qualify as “public benefit purposes” in many cases...

6.3.3 Preclusion of objections

Does your national legal order include restrictions on access to justice for e-NGOs, which are comparable to the “material” preclusion (materielle Präklusion) of section 2 para 3 UmwRG? If so,

how is this evaluated in the professional legal discourse (relevant literature/case law) with special regard to its conformity with EU law and the AC?

108 The only examples can be found in early case law under 13:17 PBL, which is commented upon in Part 1, section 1.6.3 and 1.7 concerning MÖD 2013:47 *Plankan* and MÖD 2014:12 *Seminariet*. Furthermore, there are no tendencies to differ between individual and public interests in cases concerning judicial review on governmental decisions under the Act 2006:304, except for some conflicting cases from HFD, dating 20 years back to when Sweden was not a member to the European Union.

Which requirements do e-NGOs have to meet in your national legal order to be able to participate in planning and licensing procedures?

Do they have the right to participate only in administrative procedures with a mandatory EIA or can they participate in other procedures as well?

109 The Swedish planning and environmental procedure is open in its participatory phase. Anyone can take part in the proceedings and all arguments can be brought into the case and must be considered by the authorities according to the ex officio principle. We do not ask people where they live, so to say, and this is actually one of the basic components in environmental procedure in Sweden. Thus, all members of the public can participate in decision-making concerning planning and environmental matters.

Do the authorities directly inform the e-NGOs about projects and administrative procedures that may have effects on the environment? If not: How and where can e-NGOs get information about those upcoming procedures? How do they get access to the relevant information and planning documents concerning the projects?

110 If the project concerns an activity which requires a permit and an EIA or a local development plan, a public announcement is made to alert the public. If a large number of people are affected by a “smaller” operation, which does not require a permit procedure, the authority in charge – commonly a municipal board – may also issue a public notice in order to simplify the procedure.

111 In other cases, the public concerned must rely on what can be found in the media and in the dockets of the deciding authorities. Here, one should observe that since 1766 Swedish administration is based on the constitutional principle of transparency, meaning that the public can ask for any document in the hands of an authority (Chapter 2 of the Freedom of Press Act, 1949:105, TF). The access right covers information from all documents that are held by the authority (TF 2:3), have been drawn up or received by the authority (TF 2:6-7) and are not deemed to be secret according to express legislation in the Public Access to Information and Secrecy Act (2009:400, OSL). Concerning environmental decision-making, most information is therefore open to the public and must be disclosed by the authorities “promptly”, in most cases within 1 or 2 days.

Are there any time limits to make an objection or give a statement in your national legal order? Will objections passing this time limit be excluded in the administrative procedure and the decision on the development consent of a project? Is an objection that has been made “out of time” also precluded in any legal proceeding against the decision on the development consent (“material” preclusion as described above)? Are there any specific requirements concerning the content of objections by e-NGOs?

112 No, there are no such time limits. Any objection submitted to the authority before the decision is made, must be communicated with the other parties to the proceedings and factored into the decision-making. The only exception to this is when the comment is of no or little relevance. The only example of “preclusion” in environmental law is found in 13:11 PBL, which states that those who appeal a local development plan must have voiced their opinion during the consultation period for the plan.

But this is actually not a preclusion of arguments, rather a prerequisite for standing. There are no specific requirements concerning what an ENGO can or cannot say.

Is there a discourse (relevant literature / case law) on the participation procedure and the possibilities to make objections for e-NGOs with particular regard to the conformity with EU-Law and the AC in your country?

113 Apart from my article about the *Plankan case*, there is no such discussion (see Part 1.6.3). The *MB-commentary* (under 13:17 MB) refers to the preparatory works to the 2011 reform and refers to two cases from the Land and Environmental Court of Appeal (MÖD 2012:31 and MÖD 2012:37), which only partly deal with the issue. However, *Plankan* and *Seminariet* are not mentioned. *Michanek & Zetterberg* (2012, part 25.1.3, p. 466ff) discusses 13:17 and the possibilities for the public concerned to invoke individual and public interests. Without mentioning *Plankan* or *Seminariet*, the authors express the same view as I have on the issue.

6.3.4 Intensity of the Judicial Review (gerichtliche Kontrolldichte)

What are the requirements and limitations as to the intensity and the scope of judicial review in your national legal order in comparison to German law? Are these limitations in conformity with EU law?

114 In the ordinary environmental review – both within the administration and in the courts – the process is “full” and reformatory, as described in Part 1. As noted, judicial review of governmental decisions according to Act 2006:304 and of local development plans according to 13:17 PBL is more restricted. In my view, limitations in the scope of the trial would be problematic to introduce in the environmental procedure. As I argued in the article *Allmänna och enskilda intressen* (2014) about the *Plankan case*, in doing so, there is an imminent risk of restricting the scope of the trial in a way that runs counter to EU law on the environment.

Please give an overview on the limitations/restrictions of the “intensity of the judicial review” in your national legal order with special regard on the limitations in environmental and planning law. Do Courts have different approaches on e-NGOs’ lawsuits and citizens lawsuits?

115 See above under Part 1, section 1.6.3 and 1.6.4 and Part 2, section B III. There is no difference between individual members of the public concerned and ENGOs in this respect. They are treated the same in the environmental procedure.

Is there a discourse (relevant literature/case law) on the limitations of the “intensity of the judicial review” with regard to the conformity with the requirements in EU-Law of both effective justice in environmental matters and effective implementation of certain environmental protection standards (e.g. requirements concerning protected animals according to the Habitats-Directive 92/43/EEC)?

116 See above under Part 2, section B III.

6.3.5 Legal Costs

Please give a general overview on how the distribution of costs for court fees, lawyer fees, expert fees, including fees for expert studies, or witness fees is regulated in your national legal order. Have there been any new regulations since the 2012 EU study to ensure that the access to justice in environmental matters is not prohibitively expensive? Do your national courts put in practice the rulings of the ECJ to ensure that the legal costs are not prohibitively expensive (e.g. with granting legal aid on an individual basis)?

117 Environmental procedure in Sweden is as a general rule, free of charge. There are no court fees, no obligation to pay the opponents’ costs, no bonds to be paid for obtaining injunctive relief, or other costs to be paid, irrespective of whether the case is on administrative appeal or goes to court. As

the ultimate responsibility to investigate the case according to the “ex officio-principle” lies with the administration and the environmental courts – which both have technicians participating in the decision-making – neither are there any witness or experts’ fees to be paid. Basically, this makes the environmental procedure cheap and easily accessible for the public. The other side of the coin is that when applicants want to be represented by counsel or use experts of their own, they will have to pay out of their own pocket and the costs cannot be remunerated from a losing opponent. Thus, although the procedure on the face of it can be regarded as very “democratic”, it also has its drawbacks. Under these circumstances, almost no law firms engage in representing the public concerned in environmental cases. In addition to this, in complicated permit procedures, there may be an urgent need for inexperienced neighbours to use counsel and experts to be able to match the expertise of the operators. So although there is no obligation to use lawyers in court – not even in the Land and Environmental Court of Appeals or the Supreme Court – sometimes this is necessary to be able to protect one’s interests effectively.

118 The only exception to the general rule of a “free” environmental procedure is found in the permit procedure for water operations.²³⁸ The applicant here has to pay the litigation costs of all those who will be affected by the activity - the “water law stakeholders”. The parties covered, however, is narrower than the public concerned and consists of those whose real estate will be affected by the activity, for example by flooding, loss of fishing water, etc. Accordingly, the stakeholders in cases concerning permits for water operations almost always are represented by counsel in court. If the stakeholder chooses to appeal the permit decision, s/he may at the most risk having to pay his or her own costs in the Land and Environmental Court of Appeals and the Supreme Court. Thus, the loser pays principle does not apply even in these cases. As already mentioned, however, a stakeholder can be ordered to remunerate the opponents if he or she has acted recklessly in the procedure (“mala fide”).

119 The system of litigation costs in the water procedures entails uncertainty, which sometimes can be very problematic. As the ultimate decision on who belongs to the circuit of stakeholders lies with the court, those who consider themselves affected by the activity have to hire a lawyer at their own risk. Most commonly, they can rely on real estate insurance including legal aid. But if the environmental court – or in the worst case, the Land and Environmental Court of Appeals – at the end of the day does not consider them to be water law stakeholders, they will have to pay their own litigation costs and the insurance might not cover all the expenses incurred.

120 As the environmental procedure in Sweden is basically free from costs, there is little legal aid available. The issue has been raised in some cases, where claimants have asked the court to grant legal aid according to Act 1996:1619. These applications have generally been turned down by the Land and Environmental Court of Appeals, the court referring to the “ex officio principle” and the investigatory responsibilities of the courts (MÖD 2003:66).

121 Some of the national authorities provide grants for environmental NGOs, which they can use at their own discretion. Most importantly, the SEPA each year distributes funds to organizations – among them the SNF – to be used for taking legal action in order to develop case law in the environmental area. Also the Swedish Transport Administration and the Swedish Consumer Agency provide grants to ENGOs to increase public influence on different decision-making processes in the environmental area.

²³⁸ However, in a quite recent and rather curious judgement from the Supreme Court, it was decided that an ENGO was liable for the litigation costs in a case concerning an application to reopen a permit case due to manifest error in the decision-making procedure (NJA 2011 s. 884). The application was turned down and the losing party was ordered to pay the operator’s costs.

How does your legal system deal with the restitution of experts' fees? Are these costs predictable and not too expensive? Are e-NGOs entitled to demand the fees for expert opinion that was ordered primarily for the preparation of the lawsuit when their appeal was successful? Is it possible for the developers who intervene in the trial to claim the refunding of the expert opinion fees from the losing party (e-NGO)?

122 If the public concerned or the developer employs experts, they have to pay for this by themselves. ENGOs commonly work with in-house lawyers and experts are often quite willing to give a helping hand on a voluntary basis, at least to the most important organisations and in respect of the more controversial cases.

7 Symposium March 9th 2016

7.1 Agenda

Agenda of the Symposium: "Comparative View on Access to Justice in Environmental Matters"
Berlin, 9 March 2016

Facilitators: Karl Stracke, Dr. Michael Zschiesche
 Independent Institute for Environmental Issues (UfU)

12:15 p.m. Start of the registration of participants

12:45 p.m. Welcome Speeches

Tina Mutert, Federal Environmental Agency (UBA) and Dr. Michael Zschiesche, Independent Institute for Environmental Issues (UfU)

Panel 1: The implementation of Art. 9.2 and 9.3 AC

01:00 p.m. The German legal situation – Open questions and possible consequences for the German lawmaker in a comparative view

Prof. Dr. Bernhard Wegener, University of Erlangen-Nuremberg, Germany

01:30 p.m. Does Art. 9.3 AC provide for a special status for e-NGOs leading to the requirement of an objective power of review? – the French approach

Prof. Dr. Michel Prieur, University of Limoges, France

01:45 p.m. Access to justice derived from collective interest protection goals (coastal protection, conservation and species protection law) – recent developments in Swedish law

Prof. Dr. Jan Darpö, University of Uppsala, Sweden

02:00 p.m. Discussion/Questions of understanding

02:30 p.m. The admissibility of different national requirements for access to justice under the AC - Standing under Section 31 (3) SCA 1981 and Section 288 TCPA 1990 in Great Britain

Carol Day, Consultant solicitor, London, Great Britain

02:45 p.m. The importance of criminal proceedings and claims for damages in the judicial enforcement of environmental law and the relation to administrative proceedings in Italy

Prof. Dr. Margherita Poto, University of Torino, Italy

03:00 p.m.	The Polish debate on legal protection in administrative proceedings preceding the licensing procedure <i>Magdalena Bar, Attorney at law, Warszawa, Poland</i>
03:15 p.m.	Discussion/Questions of understanding
03:45 p.m.	Coffee break/Pretzels
	<u>Panel 2: The scope of review and the preclusion of statements</u>
04:15 p.m.	The German legal situation – Open questions and possible consequences for the German lawmaker in a comparative view <i>Prof. Dr. Alexander Schmidt, University of Applied Sciences Anhalt, Germany</i>
04:45 p.m.	The scope of review in the judicial practice of <i>France, Prof. Dr. Michel Prieur, University of Limoges, France</i> Great-Britain, Carol Day, Consultant solicitor, London, Great Britain Italy, Prof. Dr. Margherita Poto, University of Torino, Italy Sweden, Prof. Dr. Jan Darpö, University of Uppsala, Sweden presented by a case study on natural conservation law.
05:45 p.m.	Discussion/Questions of understanding
06:15 p.m.	The preclusion of statements without prior participation - the application of the Country Town and Planning Act by English Courts <i>Carol Day, Consultant solicitor, London, Great Britain</i> <i>Prof. Dr. Michel Prieur, University of Limoges, France</i>
06:30 p.m.	Discussion
06:45 p.m.	Closing Speech/Remarks <i>Daniel Lamfried, Federal Environmental Agency (UBA)</i>
07:00 p.m.	End of Workshop
07:30 p.m.	Optional common dinner nearby (on own expenses)

7.2 Protocoll

Preliminary note: This is a documentation of the presentations held in Panel 1 and 2 at the abovementioned symposium on 9 March 2016, in Berlin, by Prof. Dr. Michel Prieur (France), Carol Day, Consultant solicitor (Great Britain), Prof. Dr. Margherita Poto (Italy); Magdalena Bar, Attorney at law (Poland) and Prof. Dr. Jan Darpö (Sweden).

Panel 1:

The implementation of Art. 9.2 and 9.3 of the Aarhus Convention

In the first panel the discussion is intended to elaborate on the requirements of Art. 9.3 AC that have so far not been implemented by special legislation in Germany. The discussion should indicate whether the AC requires a further widening of “standing” and other judicial control criteria under German law. The panel will therefore address the following topics and questions specially related to the country-studies made by the foreign experts invited:

7.2.1 France: Does Art. 9.3 AC provide for a special status for e-NGOs leading to the requirement of an objective power of review? – the French approach.

7.2.1.1 What is the general objective of the AC for e-NGO standing ?

AC requires for e-NGOs an active role through access to justice

In general:

- preamble, recitals 7, 8, 13, 18
- art. 3-1; 3-4; 3-9
- art.2-5 e-NGOs shall be deemed to have an interest

In art. 9 AC: 9-2 objective of giving e-NGOs “wide access to justice”. Art. 3-5 allows a “wider access”

7.2.1.2 Are conditions for standing different for art 9.2 and art. 9.3 ?

- To get environmental information: access to justice for e-NGOs “without an interest having to be stated” art.9-1 et art.4-1
- To participate to decision making of art.6 and of other provision of AC and challenged in court: “the interest of any NGO shall be deemed sufficient” art. 9-2 et 2-5
- To challenge national law relating to the environment (art.9-3) will interest of e-NGO shall be deemed sufficient?

Standing for art 9-2 and 9-3 should be the same even if art 9-3 does not mention NGOs and does not mention public concerned; why?

- Because art. 9-3 is not isolated but is submitted to the preamble, the definitions of art. 2 and the general provisions of art.3 of the AC
- Because each Party must establish a consistent (coherent) framework to implement the AC art. 3-1
- Because the preamble (18) refers to NGOs as requiring effective judicial mechanisms (art. 9-4) to protect legitimate interests and enforce the law
- Because the requirement of “effective remedies” (art.9-4) needs not to differentiate the standing according to the decision involved ;such differentiation could be considered as a discrimination
- Because there is a double reference: art.9-3 is without prejudice to the review procedure referred to in para 2; and art 9-2 is without prejudice to para 3
- Because to ensure wide access to justice is required by the compliance committee (2008/31 concerning Germany , para 92)
- Because as stating by the meeting of Parties (decision II/2 of 2005):parties which choose to apply criteria under art. 9-3 are invited “to take fully into account the objective of the Convention to guarantee access to justice”

Consequence of Art 9-3 having no direct effect

CJUE 8 march 2011 C/240/09: Even without direct effect : “therefore if the effective protection of EU environmental law is not to be undermined, it is inconceivable that art. 9.3 of the AC be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law” (§49)

7.2.1.3 As a consequence of standing why do e-NGOs have an objective power of review?

- e-NGOs have standing because they are considered as challenging not in their subjective interest but in the interest of the environment
- It is because of this representation of a general interest that they have an objective power of review even if national law does not confer individual rights
- They may challenge the legality of a decision in the public interest as a duty to protect the environment as a constitutional obligation
- e-NGOs are considered to have a legitimate interest in environmental matters

7.2.1.4 Is a special status needed for standing of e-NGOs under the AC?

- National law may (not an obligation) establish criteria for standing art. 9.3. But criteria is not “an excuse for introducing or maintaining so strict criteria that they effectively bar NGO from challenging”(ACCC/C/2005/11 Belgium)
- National law may impose specific requirements art. 2.5
- But always in conformity with the general requirements of AC about e-NGO role

7.2.1.5 What are the French conditions for standing leading to the requirement of an objective power of review?

- It is not actio popularis decided by French law but there is a liberal interpretation of legal criteria by the judge
- Specific requirements for e-NGOs exist more about their participation in decision making than for access to justice
- The legal regime of recognition of e-NGOs modified in 2011 does not affect access to justice
- The consequence of the standing is the objective power of review by the judge

Conditions for standing in administrative courts

- e-NGOs standing is the same for all national law on the environment: specific chapter of environmental Code (L142-1). Requires By-law about environment + specific habilitation by the board
- Any e-NGO has standing L 142-1-1°al if they justify a sufficient direct interest
- Recognized e-NGO are deemed to have a sufficient interest on the territory of their recognition L 142-1-2°al (presumption of interest)

Conditions for standing in criminal courts

- Recognized e-NGO have the right to oblige to initiate criminal prosecution for damages to environmental collective interests being a violation of a criminal rule L 142-2 (since 1976)
- Idem for not recognized NGOs but only registered since 5 years having the objective of protection of water or fighting against industrial pollution L 142-2-2°al

7.2.2 Great-Britain: The admissibility of different national requirements for access to justice under the AC - Standing under Section 31 (3) SCA 1981 and Section 288 TCPA 1990

7.2.2.1 Standing in England and Wales: Judicial Review

- Exercised by High Court judges under the Part 54 of the Civil Procedure Rules (CPR)
- Applies to:
 - Decisions by public authorities (development corporations, LPAs, statutory agencies and by the relevant Secretaries of State)
 - Decisions by domestic tribunals and certain courts (e.g. the Magistrates' Court)
 - Decisions by Parliament if incompatible with EU law or the ECHR
 - Decisions not to act in the exercise of a public function (e.g. an LPA not taking enforcement action against a breach of planning control)
 - The legality of subordinate regulations and rules, including statutory instruments as well as policies, advice and guidance
- No automatic right for third parties to challenge a decision, act or omission of a public body in the High Court
- Must have sufficient "standing" – section 31(3) Supreme Court Act 1981

7.2.2.2 Standing in England and Wales: Statutory Appeal

- Applies to:
 - Challenges to a decision made by the Secretary of State following a planning appeal
 - "Call in" of an application that would normally be decided by an LPA
 - The adoption of a development plan document
- No automatic right for applicants to challenge such decisions
- Challenges brought by an "aggrieved person" via statutory review proceedings under s.288 of the Town and Country Planning Act 1990 (TCPA)

7.2.2.3 Standing in Judicial Review in England and Wales

- Test of "sufficient interest" has evolved to be liberal - R v HM Inspectorate of Pollution ex parte Greenpeace Ltd no.2
- Few individuals or environmental groups refused standing - Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change
- Standing based on a theory of interests as opposed to rights:

"What modern public law focuses upon are wrongs - that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the text for standing for public law claimants, which is interest based rather than rights based "

- No differentiation between the standing criteria for individuals and eNGOs
- No amendments to the SCA 1981 to reflect the requirements of the Aarhus Convention or the PPD
- No legislative requirement as to the formal structure or standing of an eNGO or community group relevant to the question of standing comparable with s.3 of the UmwRG

- Local residents can form a group to challenge a decision and the courts do not require the body to have a distinct legal entity:
- Unincorporated bodies
- Incorporated bodies
- Amalgamation does not provide an enhanced interest - “an aggregate of individuals each of whom has no interest cannot of itself have an interest” (R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd)

7.2.2.4 Standing and the meaning of the “Public Concerned”

- No restrictions regarding geographical scope – R (on the application of An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change & NNB Generation Co Ltd
- Parish Councils capable of being the “public concerned” under the AC (R (Halebank Parish Council) v Halton Borough Council)
- Local Planning Authorities also capable of being the “public concerned” when not acting in its capacity as a decision-maker but instead bringing a JR claim in the interests of its constituents (R (HS2 Action Alliance Ltd & London Borough of Hillingdon) v. Secretary of State for Transport)

7.2.2.5 Standing in Judicial Review: Northern Ireland and Scotland

Northern Ireland

- Position is as England and Wales
- “Sufficient interest” test appears in the relevant court rules (Order 53, rule 3(5) Rules of the Court of Judicature (Northern Ireland) 1980)
- Same liberal approach in modern case law - Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety

Scotland

- Pre 2011 - based upon the protection of rights and significantly more restrictive (Schutz-normtheorie)
- Post 2011 - Supreme Court case of Axa held the “title and interest” test derived from private law should be replaced with “directly affected”

7.2.2.6 Statutory Appeal – Section 288 TCPA 1990

“Proceedings for questioning the validity of other orders, decisions and directions”

(1) If any person

- (a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—
 - (i) that the order is not within the powers of this Act, or
 - (ii) that any of the relevant requirements have not been complied with in relation to that order; or
- (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—
 - (i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section”.

- “Aggrieved” taken in the ordinary sense of the word as any person whose rights (legal, procedural, monetary or personal) have been infringed
- Liberal approach to allowing “aggrieved” parties to bring applications for statutory challenges since the 1970s
- But the meaning of “aggrieved person” has traditionally been more restrictive than that of “standing” in JR
- Relevant principles identified in the case of Ashton – drawing on Article 10a of the EIA Directive, *Miljöskyddsörening v Stockholm* and *Commission v Ireland* (Case C-427/07)

7.2.2.7 An “Aggrieved person”

- Ashton principles:
 - Wide access to the courts is required under s.288 of the 1990 Act
 - Participation in the planning process normally required
 - Sufficient participation will depend on the opportunities available and the steps taken
 - A failure to participate will not necessarily be a bar to challenging a decision
 - The nature and weight of a person’s substantive interest and the extent to which it is prejudiced is also relevant
 - The sufficiency of the interest is to be assessed objectively - there is a difference between feeling aggrieved and being aggrieved
 - What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under s.288
 - It may not be possible to assess the extent of the person’s interest if s/he has not participated in the planning procedures
 - While recognising the need for wide access to the courts, weight may be given to the public interest in the implementation of projects and the delay involved in judicial proceedings
- Principles in Ashton modified further by the wide approach to the “person aggrieved test” taken by the Supreme Court in *Walton v Scottish Ministers* [2012]
- “Person aggrieved” depends on:
 - the particular legislation involved
 - The nature of the complaint made
- Wide interpretation appropriate in Ashton given the quality of the natural environment was of legitimate concern to everyone
- In particular, a person would ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and if their complaint was that the decision was not properly made

7.2.2.8 What the Aarhus Convention requires – Articles 9.2 and 9.3

- Article 2(5) of the Convention defines “The public concerned” as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes

of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”

- Article 9(2) therefore gives special protection, in terms of standing to “non-governmental organizations promoting environmental protection”
- Article 9(3) of the Convention is much less prescriptive, allowing contracting Parties to set their own criteria for standing: “each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures”

7.2.2.9 The UK tests and Articles 9(2) and (3) Aarhus Convention

- Consensus view is that the tests for standing in JR and an “aggrieved person” in SA do not present an obstacle to complying with Art 9(2) and 9(3) Aarhus Convention
- Pre-Axa restrictive position for JR in Scotland substantially addressed
- Concern expressed that the courts could return to a narrower interpretation of sufficient interest at any time should they wish to do so. SCA 1981 should be amended to guarantee appropriate access
- Test for “Aggrieved person” in SR now more in line with standing following Ashton and Walton v Scottish Ministers
- Uniform test?

7.2.3 Italy: The importance of criminal proceedings and claims for damages in the judicial enforcement of environmental law and their relation to administrative proceedings in Italy.

7.2.3.1 Background information

From the 1960s nationwide environmental legislation was gradually introduced in Italy. A feature of the Italian environmental policy is its reliance on administrative and criminal enforcement

7.2.3.2 Current legislation

Legislative decree n. 152/2006 provides a systematic overview to the fragmented pieces of legislation that previously were in place

7.2.3.3 Actors in charge of the enforcement

- Ministry of the Environment and other Ministries (Cultural Heritage, Health, Public Works)
- Regions, Provinces, Municipalities
- A strong impact on the public opinion is given by the activism of the public prosecutors

Criminal Law: the EcoMafia (environmental crime businesses that involves the Mafia)

- The “Land of Fires” and the action of Legambiente
- Strong link between waste-related environmental crime and role of organized crime
- Coordinated actions of the Government for mapping territories, controlling and prohibiting cultivations in the most polluted areas and for coordinating interventions for land reclamation

Enforcement of environmental law via prosecutors

- The National Anti-Mafia District coordinates all the investigations related to the organized activities of illegal trafficking (National EcoMafia Prosecutor)

Two new eco-crimes (thanks to the pressure of Legambiente and the actions of prosecutors)

- a. Art. 260 152/2006 (introduced in 2001): illegal trafficking of waste
- b. D.132/2014: illegal burning of waste (Toxic smokes)

Still, the enforcement is weak.

- waste related crimes have to be considered corporate crimes (investigations involved legal representatives of legal firms rather than mafia members)
- Criminal liability cannot be ascribed to a company: therefore only administrative liability

7.2.3.4 Role of the courts: administrative and criminal

- AC: Ministries and local authorities are responsible for administrative permitting and remediation procedures. Their measures are under the administrative court scrutiny
- CC: The public prosecutors are under a constitutional obligation to enforce the violation of the environmental law with criminal relevance

7.2.3.5 The environmental permit

- To carry out activities potentially dangerous to the environment, there is need of a prior environmental permit, granted by the competent authority for the area in which the activity or the plant is located
- An activity carried out without the permit, is declared as illegitimate by the court
- In case of infringement of an existent environmental permit, both criminal and administrative liability can arise (no criminal sanction in case the polluter has duly and timely notified the contamination and performed the remediation of the site)

7.2.3.6 Damages

- In case of infringement of environmental laws, as well as of the environmental permit, the damaged party can go before an administrative or criminal court.
- Legal standing for the State, the local authorities, the e-NGOs

7.2.3.7 Judicial review of the criminal courts on the administrative act

- Articles 4 and 5 L. 2248/1865 (All. E) state that the ordinary courts (civil and criminal) are not entitled to review on the legitimacy of the act, with the consequences that they cannot annul, revoke or overturn the act.
- They can only temporarily disapply the act, which means that they can review the effects of the act (leading to a criminal conduct), suspending the review on the legality of the act itself

7.2.3.8 Judicial review of the administrative courts

- The administrative court can review the act, with specific limits on the intensity of this review. The judicial review is formal and intrinsic.

Which branch of law is more important for the protection of the environment?

- Civil law does not play a dominant role (civil damages are often asked before the criminal court)
- From the legislative view point, criminal law and the role of public prosecutors activism have contributed to a dramatic change of the environmental awareness
- In practice, the implementation of the legal provisions is still in progress: therefore, at least for the Eco-mafia crimes, the easiest solution remains to classify them in the framework of administrative liabilities

The answer is: Administrative Law

7.2.4 Poland: The Polish debate and the currently pending case ACCC/2015/119 on legal protection in administrative proceedings preceding the licensing procedure

7.2.4.1 Art. 9.3 AC and strategic documents

- "...each Party shall ensure 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"
- It is widely acknowledged that Art. 9.3 encompasses decisions on strategic (planning) documents, such as spatial plans, sectoral plans, air protection plans etc. - see e.g. ACCC findings in cases: ACCC/C/2005/11 (Belgium), ACCC/C/2011/58 (Bulgaria)
- Thus, access to justice in such cases shall be widely granted

7.2.4.2 Access to justice in Poland

- No legal basis for NGOs to challenge adopted plans or programs
- In some cases individuals have a right to challenge the adopted document (e.g. spatial plans)
- However the criteria are strict (legal interest in the case, narrowly interpreted) = access to justice is limited
- Jurisprudence of administrative courts confirms that environmental NGOs have no right to challenge plans or programs because there is no legal basis for this (e.g. verdicts in cases IV SA/Wa 338/05; II OSK 40/10; II OSK 1736/09; II OSK 1457/05)
- In case II OSK 40/10 the Court has even referred to Art. 9 of AC – but stated that it allows to limit standing to those „having the interest in the case” (?)
- Seems the court mixed Art. 9.3 with 9.2 + disregarded Art. 2.5 („non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest’

7.2.4.3 ACCC/C/2014/119

- The above situation – subject to complaint to the ACCC – by the Frank Bold Foundation
- The complaint focused on spatial plans, however the same allegations could be raised with regard to other plans and programs
- The case is still pending

7.2.4.4 Literature

- The academic discussion on the issue – very limited
- The current situation criticised in ‘Public participation in the strategic EIA as a legal instrument of environmental protection’ by Dr Anna Haładyj

7.2.4.5 Further developments?

- Currently - no plans to change the law (no discussion / draft laws)
- Perhaps the findings of ACCC will change the approach of the government

7.2.5 Sweden: Access to justice derived from collective public interests protection goals (coastal protection, conservation and species protection law) – recent developments in Swedish law.

7.2.5.1 RÅ 1993 ref 97, RÅ 2005 ref 44, MÖD 2003:19 and MÖD 2004:31, MÖD 2011:46

- Invoke all interests ...
- Certain restrictions on multi-stage decision-making ...
- Administrative omissions are challengeable ...

7.2.5.2 C-115/09 Trianel, C-240/09 Slovak BB => HFD (2687-12), HFD 2014:8, NJA 2012 s 921, MÖD 2012:47 and MÖD 2012:48, MÖD 2015:17

- A new understanding of “those who are affected”, also if NOT EU law ...
- Generous reading of “permit decisions” ...
- Generous reading of numeric criteria ...

7.2.5.3 HFD about the Problem of legal protection

CABs in 2014, SEPA confirmed, AC => ACoA => HFD 2015-12-18; Case No 312-15

- Art 12 Habitats Directive is unconditional and clear, case-law under Art 288 = “rights” ...
- Legal principles of Union law includes legal protection in court; Art 4(3) & Art 19(1) 2nd para TFEU, Art 47 European Charter...
- C-240/09; P of equivalence, P of effectiveness (48), to the fullest extent possible (C 432/05 Unibet), but here NOT...
- P of “useful effect” (effet utile) means that a court must have the possibility to check whether a national authority has acted according to clear and unconditional obligations according to a directive and – if not – can disapply conflicting national rules (C-127/02 p 66, C-263/08 p 45)...
- Thus have ENGOs “rights” according to the Habitats Directive, which must enjoy judicial protection...
- ...in a court according to Article 267

Panel 2:

The intensity of review and abusive conduct in legal proceedings / legal costs

7.2.6 The intensity of review in the judicial practice of France, Great-Britain, Italy and Sweden presented by case studies on nature conservation law

At the current state of our comparative study it is not completely clear to us how far the intensity of judicial review goes in the countries studied. This is especially true with regard to cases where EU law has to be observed. Therefore, we would like to use the symposium to discuss this issue in a broader way based on case studies.

From a general point of view, there are some differences concerning the intensity of judicial review in the countries surveyed. The spectrum ranges from a low intensity of control on merits in the United Kingdom to a mixture of different control-levels in France or Italy and a “full” review in Sweden. However, when comparing the different approaches as such it is not clear whether the intensity of judicial review also varies strongly in practice. This question arises especially in cases where EU law applies.

In such cases there should be no major differences between the decisions of the courts because the “*effet utile*” must be observed in every Member State.

As described in our questionnaire, in Germany the intensity of judicial review is subject to a discourse especially concerning environmental law. Under Article 19.4 GG (German Constitution) everyone has the right of access to the courts when their legal rights have been violated by public authorities. Therefore, as a general rule, the Administrative Courts shall completely review administrative decisions with respect to the application of the law. This is true in particular when a plaintiff claims an infringement of fundamental rights. Although actions brought by eNGOs are not subject to Article 19.4 GG the principle of “complete review” applies. However, it is recognized that administrative decisions are not fully reviewed by the courts when the law states that public authorities have discretion (*Ermessen*). Furthermore, under the case law of the Federal Administrative Court public authorities may also have a “margin of assessment” (*Beurteilungsspielraum*) with regard to certain requirements for the application of the law. If such a case occurs the limitations for judicial review provided in Section 4a.2 UmwRG (Environmental Appeals Act – amendment of 2013) must be observed.

Such a “margin of assessment” is especially accepted in nature conservation law, for instance, the application of Section 44.1 BNatSchG (Federal Nature Conservation Act) implementing the requirements for the protection of species under Art. 12 of the Habitats-Directive (92/43/EEC) and of wild birds under Art. 5 of the Birds-Directive (2009/147/EC). This is justified by the Federal Administrative Court (BVerwG: 27.06.2013 – 4 C 1.12; 06.11.2013 – 9 A 14.12) as follows: It is not specified by the law how the inventory of protected species has to be made and how the impacts of projects on the conservation status should be evaluated. Moreover, there are pretty much no accepted professional standards to answer ecological questions arising in cases where impacts of projects on protected species have to be assessed. Therefore, it is the task of the competent authority to decide case-by-case which conditions are relevant for taking into account the professional scientific discourse.

The previously described jurisdiction is criticized in legal discourse referring to the principle of “complete review” and to the judgement of the ECJ (07.09.2004, C-127/02) concerning the requirements of the Habitats-Directive (92/43/EEC). At the same time, German economic interest groups seek more limitations on the intensity of the judicial review to compensate the extended right of action for e-NGOs since 2006. However, the case law on “margins of assessment” also affects companies when e.g. an administrative decision on imposing certain obligations for a wind-energy-plant (for instance switch off times to protect endangered species) cannot be fully reviewed in Court.

In practice, a “margin of assessment” is especially relevant with regard to the question whether the operation of wind-energy-plants will significantly increase the risk of killing specific wild birds. Since the killing of protected species is prohibited under the abovementioned EU laws this is a crucial issue in reviewing the licensing of such plants. In this context it would be interesting to get information on how the courts in other EU Member States usually handle the judicial review based on case studies (for example concerning permissions for wind-energy-plants).

Please give an overview on the legal practice and the case law in your country with regard to the following questions:

- 1. To what extent do courts examine the compliance of the administrative decisions with the law and especially EU law (e.g. permissions for wind-energy-plants)?**
- 2. Do the courts usually investigate the facts / the factual situation themselves when the claimant raised doubts on the risk-assessment for the protected birds by the authorities or do they allow the authorities a margin of discretion or assessment?**
- 3. Which criteria do courts apply to decide whether this margin of discretion or assessment was exceeded by the authority?**

4. **Does the intensity of judicial review usually relate to the objections provided by the claimant? Does it make a difference whether EU law applies or not?**
5. **Is it more likely that courts investigate the facts themselves and intensify their review when the claimants objections are supported by an expert opinion?**
6. **Is it common especially for e-NGOs to submit an expert opinion to support their objections in such cases?**
7. **Can claimants request a refund for the expert opinion fees in general or when their claim has been successful?**

7.2.6.1 Intensity of review in France

To what extent do courts examine the compliance of the administrative decisions with the law and especially EU (e.g. permissions for wind-energy-plants)?

- Categories of review of the legality of administrative acts include
 - Administration under a mandatory duty (compétence liée) = normal review or full control (contrôle normal) including legal appreciation of facts (Gomel 1914).
 - Administration with absolute or limited discretion (pouvoir discrétionnaire)= intensity of review variable: always review for competence, procedure (substantial formality), mistake of fact and of law, misuse of power, but:
 - a. Normal review (full control) + legal appreciation of fact;
 - b. Limited review (contrôle restreint): only manifest error of appreciation (1961): no reasonable administrator could have reached that view;
 - c. Limitation of limited review (minimum review) = refusal of legal appreciation of facts and of manifest error (applies in some technical issues or in sensitive policy measures or decision of an examination board);
 - d. Maximum review: balance sheet (Bilan 1970) + proportionality (expropriation, administrative police powers).

Intensity of review within the meaning of the decision

If the law provides that a permit may be refused only if it disturbs a sensitive area:

- a. Refusal of the permit: normal review = legal appreciation of fact by the judge
- b. Issue of the permit: limited review = only review of manifest error (CE 1968 plage de Pampe-lonne)

Examples for wind-energy-plant cases:

- Wind energy plants are not necessarily forbidden in Natura 2000 sites (EC guidance “wind energy development and Natura 2000” of 2011)
- Evaluation of risks by impact assessment and Natura 2000 study of incidence (CJUE 21 July 2011 and CJUE 11 April 2013)
- CAA Marseille 4 July 2013 wind plant issued in ZNIEFF inventory and 5 km from a Natura 2000 site: limited review; confirmation of the permit: no demonstration by the plaintiffs of environmental damages for birds; only wintering area for the protected species in Natura 2000 site where the displacement of the species are very rare (no manifest error);

- CAA Bordeaux 31 October 2013 refusal of wind plant in special protection area: normal review; confirmation of the refusal: risk of environmental damages, appropriate assessment insufficient, no imperative reason of overriding public interest to carry out the project in the site; Habitats-Directive mentioned, reference to CJUE 21 July 2011 and requirement of “no reasonable scientific doubt” over the absence of adverse effects (CJUE 11 April 2013 – § 40).

Do the courts usually investigate the facts / the factual situation themselves when the claimant raises doubts on the risk assessment for the protected birds by the authorities – or do they allow the authorities a margin of discretion or assessment?

The courts investigate the facts if there is a mistake of fact, but evaluation of risks and appropriate assessment allow a margin of discretion.

What criteria do courts apply when deciding whether this margin of discretion or assessment was exceeded by the authority?

Criteria applied by the courts: facts stated correctly, procedural rules satisfied, errors of law, but legal appreciation of facts only for review of refusal; if the permit is issued: only limited review for manifest error, which gives a large margin of discretion .

Does the intensity of judicial review usually relate to the objections provided by the claimant? Does it make a difference whether EU law applies or not?

Yes - without difference whether EU law applies or not.

Is it more likely that courts investigate the facts themselves and intensify their review when the claimants objections are supported by an expert opinion?

The courts investigate the facts themselves; intensity of review depends of the objections and scientific demonstration by the NGOs with or without expert opinion, on the basis of the environmental assessment and of the Natura 2000 appropriate assessment. As required by CJUE 11 April 2013 (C-258/11) the assessment “must be complete, precise and definitive with conclusions capable of removing all reasonable scientific doubt” §44 applying the precautionary principle.

Is it common especially for eNGOs to bring an expert opinion to support their objections in such cases?

It is not common; for wind plant and Natura 2000 there are no examples; but examples for public security required for wind energy plant and impact on weather radar system CE 13/12/2013 refusal of permit confirmed after expert opinion demonstrated a risk; but TA Amiens 18/2/2014 refusal of permit quashed after expert opinion demonstrated absence of risk.

Can claimants request refund of the expert opinion fees in general or when their claim has been successful?

Normally expert fees are paid by the unsuccessful party when expertise is requested by the judge. Each party support expert fees for their own expert. The judge may with discretionary power decide to charge or not the loser to pay all fees or decide to share by both.

7.2.6.2 Intensity of review in Great-Britain

To what extent do the courts examine the compliance of the administrative decisions with the law and especially EU law (e.g. permissions for wind-energy-plants)?

The Courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker.

Planning / development proposals and balancing of material considerations is a matter for the public body and subject to the irrationality / unreasonableness test.

Case-law demonstrates more willing to intervene on some issues concerning EU law

Interference with rights => proportionality

EIA - Evans v Secretary of State for Communities and Local Government [2013]

Do the courts usually investigate the facts / the factual situation themselves when the claimant raises doubts on the risk assessment for protected birds by the authorities – or do they allow the authorities a margin of discretion or assessment?

No [R (on the application of Frack Free Balcombe Residents Association v West Sussex County Council (2014)]

Which criteria do courts apply to decide whether this margin of discretion or assessment was exceeded by the authority?

No distinction (in terms of the scope of JR) between environmental cases and other cases

= Unlawful/illegal

= Unfair (procedural impropriety)

= Incompatibility with the ECHR

= Not in conformity with EU law

= Unreasonable (irrational)

Application of proportionality in practice in some EU cases

Does the intensity of judicial review usually relate to the objections provided by the claimant?

Does it make a difference whether EU law applies or not?

The Court can consider any issue and if it is an EU obligation then it is under a freestanding obligation to ensure compliance with EU law (but this does not happen in practice).

Is it more likely that courts investigate the facts themselves and intensify their review when the claimants objections are supported by an expert opinion?

Case-law suggests that this is true if claimant eNGO is an expert body and not challenging a statutory body.

Is it common especially for eNGOs to bring an expert opinion to support their objections in such cases?

Yes, whether internal or external depends on expertise and matters in dispute.

Can claimants request refunding for the expert opinion fees in general or when their claim has been successful?

Yes, when successful (i.e. “loser pays”)

Costs recovery in environmental cases is subject to a cross-cap of £35,000 so claimants and their lawyers may end up considerably out of pocket.

7.2.6.3 Intensity of review in Italy

To what extent do the courts examine the compliance of the administrative decisions with the law and especially EU law (e.g. permissions for wind-energy-plants)?

The Administrative Court is the Court in charge of examining such cases. In a recent judgment, the TAR Liguria (02/12/2015) was asked to assess whether the hunting calendar was in compliance with the Directive n. 2009/147. The case was raised by an e-NGO (Onlus associazione Verdi Ambiente) that claimed that the hunting calendar was not in compliance with the ISPRA (Institute for Environmental

Protection and Research) opinion, stating that the hunting activity should start in a date anterior to the one declared by the ISPRA. The administrative court in this special case rejected the claim, saying that the hunting calendar provisions were not in contrast with the EU Directive provisions (Including Dir. 2009/147). By saying so, the administrative court motivates its decision by saying that it is stated within “the limit of the judicial review of the administrative court –limits that are set by the so-called legitimacy control”. This legitimacy control shall not go beyond the assessment on the satisfaction of procedural rules.

The limits of judicial review are the “legitimacy or legality of the decision”. It is a formal, extrinsic judicial review. (TAR Liguria, Sec. I, 02/12/2015, ISPRA case)

Do the courts usually investigate the facts / the factual situation themselves when the claimant raised doubts on the risk-assessment for the protected birds by the authorities or do they allow the authorities a margin of discretion or assessment?

Before the administrative courts, the parties (including the authorities) can present their own factual situation, even supported by technical experts. In this regard, there are three different perspectives: two offered by the two opposite parties and one offered ex officio. Theoretically, the final assessment of the court goes beyond both the technical expertise provided by the parties and the one ex officio, since the final decision can differ from both of them. Nevertheless, the case-law in this specific matter shows that the final judgment does not differ from the one offered by the authorities.

Which criteria do courts apply to decide whether this margin of discretion or assessment was exceeded by the authority?

Mere procedural criteria, the so-called “legitimacy control” (See TAR Liguria 02/12/2015). TAR Pescara sec. I, 24/10/2014 n. 427 states that in case of judicial review of an environmental impact assessment, the judge cannot replace the public administration assessment, since the p.a. has the widest margins of discretionary powers. The judicial review is limited to the control on manifestly illogical, irrational, unreasonable and arbitrary decisions of the public administration (in line with Cons. Stato, Sec. IV, 09/01/2014 n. 36). The administrative courts have unlimited jurisdiction in respect of the exhaustive cases set up the law (e.g. cases of judgments’ executions, electoral decisions territorial delimitations or borders). Environmental decisions and consequential damages are not included in the list.

Does the intensity of judicial review usually relate to the objections provided by the claimant? Does it make a difference whether EU law applies or not?

The judge has to limit their judicial review to the objections of the parties, and cannot go beyond these limits. Like the ordinary courts, the administrative courts apply the principle that judicial decisions must be commensurate with the forms of orders sought by the parties. This principle has two consequences: 1) a court cannot of its own motion adjudicate on requests which have not been pleaded before it; 2) the court cannot rule beyond the limits of the requests. (See. Cass. Civ. Sez. Un., 07/01/2014 n. 66, where the principle is applied to a case where an e-NGO was the claimant). It does not make any difference whether EU-law applies or not.

Is it more likely that courts investigate the facts themselves and intensify their review when the claimants objections are supported by an expert opinion?

It is not a matter of likelihood. The courts cannot investigate the facts themselves, nor intensify their review due to the submission of technical expertise. The case law has repeatedly affirmed the principle that judicial review is limited to manifestly illogical decisions or erroneous reconstructions of factual background (Cons. Stato, Sec. IV, 09/01/2014 n. 36), but it cannot replace the decision of the public administration, even in case of a technical expertise supporting the parties objections.

Is it common especially for e-NGOs to bring an expert opinion to support their objections in such cases?

It is not so common, but it is what happened in the case decided by TAR Liguria, Sec. II, 02/12/2015 quoted above. Here the ISPRA opinion was brought before the court for consideration by an e-NGO. Nevertheless, in this case the court did not consider the ISPRA opinion infringed by the public administration decision (approval of the hunting calendar in contrast with the technical opinion)

The parties can present their own factual situation, even supported by technical opinions (see ISPRA case). A technical expert submission can be ordered also by the judge ex officio. Nevertheless, the judge can decide to dissent from both the parties and the ex officio technical expertise (see ISPRA case).

Can claimants request refund of the expert opinion fees in general or when their claim has been successful?

The general rule is that the refunding of judicial expenses is provided only in case of a successful claim (Cons. Stato, Sec. IV, 19/0372015, n. 1510). There are also cases where the courts can decide on the compensation of expenses (not recorded in the environmental law decisions), where the case is particularly complex and controversial. In this case, every party shall support the judicial expenses on its own.

7.2.6.4 Intensity of review in Sweden

To what extent do the courts examine the compliance of the administrative decisions with the law and especially EU law (e.g. permissions for wind-energy-plants)?

All land and environmental courts in Sweden – that is the five land and environmental courts and the Land and Environmental Court of Appeals – will decide the case on the merits in a “full review” of all facts and aspects of law. This is according to the general principles of administrative procedure, including the responsibility of the administrative courts to by its own accord find the correct application of law in the situation at stake (the “ex officio principle” or the “inquisitorial principle”). In order to fulfill this task, the courts have technical judges who have equal voting with the legally trained judges (1+1 in the lower courts, 3+1 in LECOA).

Do the courts usually investigate the facts / the factual situation themselves when the claimant raised doubts on the risk-assessment for the protected birds by the authorities or do they allow the authorities a margin of discretion or assessment?

The courts always look into all details of the case and make an evaluation on its own. This is actually even irrespective of whether the claimant has invoked a “counter-investigation” of his or her own. There is no such thing as “administrative discretion”, not least when EU law is involved. Thus, the judicial review in court in Sweden is more similar to the ordinary administrative appeal in other member states of the EU.

Does the intensity of judicial review usually relate to the objections provided by the claimant? Does it make a difference whether EU law applies or not?

If the neighbor in a permit case only argues about the noise level from the activity, s/he still can make an appeal about every aspect of the operation, such as waste management, discharges by substances to air and water, etc. However on next level of appeal, s/he cannot expand her complaint further (“jumping revision”). But this is rarely a problem, as most complainants are unhappy with most aspects of large scale operations (permit cases). In other cases concerning enforcement, s/he is free to come back to launch a new complaint to the administration, over and over again.

Is it more likely that courts investigate the facts themselves and intensify their review when the claimants objections are supported by an expert opinion?

That seems likely, but it is really not decisive. The technical judge's evaluation of the operator's application and EIA is usually decisive and, of course, s/he is often alerted to issues raised by a high quality counter-investigation by eNGOs, especially in larger cases.

Is it common especially for e-NGOs to bring an expert opinion to support their objections in such cases?

Very common, not to say, always ...

Can claimants request refunding for the expert opinion fees in general or when their claim has been successful?

As a general rule, no, and never for ENGOS. However, the larger ENGOS receive public funding for bringing cases of topical interest.

7.2.7 Examples for abuse rights of action

On 15 October the ECJ has ruled that the German "material preclusion of statements" is not in accordance with EU law (Case 137/14, para 78 – 80). However, in addition the ECJ also held (para 81) that "the national legislature may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings."

This has led to a discourse on how abusive conduct in legal proceedings can be defined:

Do you have any experience in your national legal order with provisions about abusive conduct in legal proceedings and especially with courts excluding objections in environmental cases because the plaintiff has submitted an argument abusively?

7.2.7.1 Abusive conduct in France

Abusive argument in courts:

- In French administrative procedural rules and in environmental law there is no concept of "abusive" arguments in courts. Raising a plea of law for the first time in courts is always possible
- If the argument raised is "abusive" it will be rejected as "inopérant" ineffective, irrelevant: that is about a non-applicable or non-existing rule of law, consideration on facts have nothing to do with the issue

Abusive action in administrative courts

- if there are no serious reasons; capricious action by a professional plaintiff; making false certification, defamatory arguments
- fine of 3000 euros (R 741-12 CJA)= no violation of Human rights convention(35009/02-2/12/2005)
- Since 2013: damages for abusive urban law action (to stop action of monetizing withdrawal of action) (L 600-7 urban code)
- Decision of judge refusing action which is manifestly inadmissible (R 222-1 CJA)

Abusive action in judicial courts

- Art. 32-1 civil procedure code: fine of 3000 euros for dilatory or abusive action
- Art 1383 civil code: compensation for damages caused by abusive action
- used for abusive action on urban permits: fine for using abusively a legal instrument

7.2.7.2 Abusive conduct in Great-Britain

Frivolous and Vexatious Claims in JR

Permission

- The Court's permission to proceed is required in a claim for JR (CPR 54.4)
- The test for the grant of permission is low
- Permission will be granted where the Claimant can show there is an "arguable" case (R v. Secretary of State for the Home Department, ex parte Rukshanda Begum [1990])
- An "arguable" case - a case that is not hopeless, frivolous or vexatious, but may have some merit
- April 2013 - March 2015 - 48% of environmental cases granted permission to proceed (cf 16% for all other JRs in 2014 and 7% in the first quarter of 2015)

Totally Without Merit (TWM)

- July 2015 – Claimant's automatic right to an oral permission hearing in JR claims withdrawn
- Cases deemed on the papers to be "totally without merit" are no longer entitled to an oral renewal (CPR 52.15)
- Samia Wasif v Secretary of State for the Home Department: Mohammed Hossain v Secretary of State for the Home Department (2016) - Court of Appeal gave guidance on the meaning of totally without merit:
- Claims should not be certified as TWM unless the Judge is confident that the claim was truly bound to fail
- Criteria to be applied in answering that question is distinct from those pertaining to applications for permission to seek JR

Whether a claimant can raise a new ground in JR depends on the nature of the point:

- If legal (e.g. allegation of failure to comply with PSED or conduct EIA) - should not matter if not raised before (although a judge is still likely to take it less seriously, depending on circumstances)
- If factual - hard to raise if not raised before

7.2.7.3 Abusive conduct in Italy

Cases of abusive conduct in legal proceedings has been recently disciplined by the Code of administrative proceedings. Art. 26 Cap has set out exceptions to the previously mentioned rules on the limits of judicial review and on judicial expenses incurred in case of abusive conduct of the parties. In particular, in case of "lite temeraria":

1. The judge can condemn the abusive party and mandate the refunding of judicial expenses, up to double of the total expenses
2. The judge can condemn ex officio the abusive party to the payment of a fine, to an amount not less than the expenses incurred and no more than the sum equal to the quintuple of the judicial fees.

The abusive conduct is said to have occurred any time a party has presented reasons that are manifestly unfounded or has abusively filed a claim or abusively resisted to it. The case of abusive conduct has not been recorded yet in environmental cases.

7.2.7.4 Abusive conduct in Sweden

There are no such experiences to common knowledge. Certainly, there are “unnecessary” cases going to court, but they commonly involve quarrelling neighbors. That is a rather complicated problem to deal with through legislation; how can one define “abusive” or “unnecessary”? However, there exist certain good examples of using ADR (alternative dispute resolution mechanisms, like mediation) at the municipal level in such cases.