



# Comments on the Commission's Notice on Access to Justice in Environmental Matters

Position Paper

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# Table of Contents

<b>INTRODUCTORY REMARKS</b>	<b>1</b>
<b>COMMENTS ON THE NOTICE</b>	<b>1</b>
<b>I. Overarching Comments</b>	<b>1</b>
A. Form of the Notice	2
B. Content of the Notice	2
C. General Approach to the Issues Involved	3
<b>II. Comments on Section A “Introduction: Access to Justice in EU Environmental Law”</b>	<b>4</b>
<b>III. Comments on Section B “The Legal Context: National Courts and EU Environmental Law”</b>	<b>6</b>
<b>IV. Comments on Section C “Guaranteeing Environmental Access to Justice”</b>	<b>6</b>
A. On Section C.1 “Public Interests. Obligations and Rights Relevant to the Exercise of Judicial Protection”	6
B. On Section C.2 “Legal Standing”	10
1. Specific activities subject to public participation requirements	10
2. Other subject-matter	14
C. On Section C.3 “Scope of Judicial Review”	18
1. The relationship between standing and scope, and the scope of the Convention in general	18
2. Standard of review	20
D. On the Issue of Preclusion	21
E. On the Application of Article 9, paragraph 4 to procedures under Article 9, paragraph 3	22
F. On The Lack of a Section on “Fair and Equitable” Procedures	23
G. On Section C.4 “Effective Remedies”	24
H. On Section C.5 “Costs”	25
I. On Section C.6 “Time Limits, Timeliness and the Efficiency of Procedures”	25
<b>CONCLUDING REMARKS</b>	<b>26</b>

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## Comments by Justice and Environment on the Commission's Notice on Access to Justice in Environmental Matters

### INTRODUCTORY REMARKS

1. Justice and Environment (“J&E”) is an association governed by Czech law. It consists of 13 member associations, almost all of which are established in EU Member States. Its aim is the adoption and application of stronger environmental legislation to protect the environment, people and nature.
2. In the course of the most recent EEB Law working group meeting that took place on December 11-12, 2017, representatives of the Commission presented its Notice on Access to Justice in Environmental Matters (“Notice”),<sup>1</sup> and discussed these in some depth with the NGOs attending, including J&E. In furtherance of the productive and forward-looking spirit of these discussions, J&E submits these comments,<sup>2</sup> which reflect more than a decade of experience working both as a network and as individual member organizations towards the implementation of the Access to Justice pillar of the Aarhus Convention. They were prepared by J&E’s Aarhus Access to Justice Topic Leader, and benefitted from input from the team of J&E’s legal experts working on this topic. This team works in a cooperative manner, and reflects diverse views and a supportive approach to implementation of the Convention within the Member States.

### COMMENTS ON THE NOTICE

#### I. Overarching Comments

3. Justice and Environment **welcomes the Communication**. We recognize the **clear efforts** the creation of this document entailed, and its **potential value** in assisting Member States, the public, and stakeholders towards supporting the achievement of access to justice in the EU. We also appreciate that the Communication is **very extensive, touching upon virtually all aspects of access to justice**.

<sup>1</sup> [http://ec.europa.eu/environment/aarhus/pdf/notice\\_accesstojustice.pdf](http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf)

<sup>2</sup> J&E published on its website and elsewhere its first detailed impressions on the Notice in August 2017. The present Comments build on that and our long-standing work in this area generally, and specifically on our oral comments in response to the Commission’s presentation of the Notice at the EEB’s Law working group meeting in December of 2017.

## A. Form of the Notice

4. **We also appreciate that this is “not just any soft instrument** from a lower level of administration within the DG Environment”, but rather “has a certain status as it has been processed among the different DGs in the Commission and was officially approved by the College of Commissioners at its meeting in April” 2017.<sup>3</sup> **However, we remain convinced that a binding instrument is ultimately still needed** for the reasons laid out in the Darpö Report, namely to “furnish a level playing field and to promote predictability and legal certainty.”<sup>4</sup>
5. In this regard we note further that the European Parliament has also expressed its view that the Notice does not go far enough and has therefore called on the Commission to come forward with a new legislative proposal on minimum standards for access to judicial review.”<sup>5</sup> The European Economic and Social Committee (EESC) has also since issued a strongly-worded Opinion on this Notice.<sup>6</sup> While welcoming the Notice – as we at J&E do – the Opinion also “calls for overarching and binding EU legislation necessary to achieve consistency and completeness in implementing Access to Justice throughout the Union,”<sup>7</sup> and points out that the “Commission’s own Staff Working Document<sup>8</sup> assessed binding EU legislation as the ideal approach.”<sup>7</sup> The EESC also took care to acknowledge the analysis and recommendations of the Darpö report and the need for Member States to be supportive of such objectives and not frustrate their pursuit.”<sup>8</sup>

## B. Content of the Notice

6. While **we appreciate that some references to the Implementation Guide<sup>9</sup> have been included** in the Notice, we think in many instances there **should have been a greater reliance** on this. Yet more crucially, **we very much regret that references to the findings and recommendations of the Aarhus Convention Compliance Committee (ACCC) have not been included.** These are extensive, consistent, and detailed. Accordingly, they could be most helpful in completing the picture in this regard, addressing aspects not clearly covered, and providing much-needed depth and detail across a wide range of sectors. **Including references to Advocate General Opinions could also provide crucial insights into this complex area of law.** The draw-backs of the Notice’s conservative approach by relying only on CJEU case-law (i.e., the Court decisions themselves) and “drawing careful inferences” therefrom results in a document that is unclear and unambitious at points. Even having CJEU case-law that “touches on” a subject (see para. 7 of the Notice<sup>10</sup>), does not mean that such case-law has

<sup>3</sup> *On the Bright Side (of the EU’s Janus Face) The EU Commission’s Notice on Access to Justice in Environmental Matters* at p. 388; *Journal for European Environmental & Planning Law* (2017) 373-398

<sup>4</sup> This and all further references to the Darpö Report are intended to refer to Effective Justice? Synthesis report of the study on the implementation of Articles 9(3) and (4) of the Aarhus Convention in the Member States of the European Union, by Professor Jan Darpö, from 2013, which was prepared for the Commission; see p. 25 of the Report for this reference

<sup>5</sup> Resolution 2017/2819 at para. 15, dated 15 November 2017, in response to the Commission’s Communication on an Action Plan for Nature, People, and Economy, which was published in April of that year

<sup>6</sup> [C\(2017\) 2616 final](http://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/access-justice-national-level-related-measures-implementing-eu-environmental-law), (henceforth “EESC Opinion”). Available for download at: <http://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/access-justice-national-level-related-measures-implementing-eu-environmental-law>

<sup>7</sup> *Ibid.* at 1.3, citing Commission Staff Working Document, Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, SWD (2017) 255 final, from 28.6.2017

<sup>8</sup> *Ibid.*

<sup>9</sup> The Aarhus Convention: An Implementation Guide, UNECE, 2nd Ed., 2014

<sup>10</sup> All paragraphs cited are intended to refer to the Communication, unless otherwise stated

addressed the subject to sufficient depth. This is most evident in the sections dealing with article 9, paragraph 3 of the Convention, and with costs under article 9, paragraph 4 of the Convention, as there was at the time of the Notice's publication very limited CJEU case-law in these areas and significant gaps remain.

7. **This brings us to a further point: CJEU case-law is constantly evolving** – in this respect the cases in C-529/15 (*Gert Folk*) and C-664/15 (*Protect*) go quite some way in clarifying the CJEU's position on article 9, paragraphs 2 and 3, for example. These cases are discussed in greater detail below. **The Notice – and any guidance materials for the implementation of Article 9 – should therefore be regularly updated** to include such important new cases.<sup>11</sup> **The body of findings and recommendations from the ACCC has also grown since the issuance of the Commission's Notice<sup>12</sup> and could provide further vital interpretive guidance.**

### C. General Approach to the Issues Involved

8. We note further that in some respects the Communication is a step back from the Darpö Report, which covers a number of issues which are not at all addressed by the Notice – access to justice against private parties being just one such example. **In this regard and quite in general, we find a clear acknowledgment that there are still major hurdles in access to justice in environmental matters within the Member States should be included.** That access to justice is blocked has been demonstrated time and again by studies,<sup>12</sup> infringement and preliminary reference cases,<sup>13</sup> cases before the ACCC,<sup>14</sup> and even the Commission's recent Environmental Implementation Review (EIR)<sup>15</sup>. In some countries, such as AT<sup>16</sup>, access has been blocked almost entirely.<sup>17</sup> In other countries the exercise of access rights which exist in principle are burdened by prohibitive costs (UK, DE, likely HR and BG due to recent proposed legislative changes), or rendered meaningless due to a lack of effective remedies (BG, CZ, ES, RO, SK).
9. We also think that **a clear and unequivocal statement is needed in the Notice to the effect that it is suggesting only minimum standards, that there should be no derogations or back-sliding.**<sup>18</sup> Some Member States are engaging in back-sliding due to anti-democratic trends. The recent legislative changes in CZ,<sup>19</sup> where members of the public, including NGOs, have been stripped of participatory (and concomitant access to justice) rights in procedures outside the remit of EIA procedures illustrates the reality and severity of this problem. What is more, many of these rights trace back to 1999 or even 1992. The recent legislative proposals for changes in the procedural rules governing

<sup>11</sup> The EELC would appear to also support this position. See to that effect 1.7

<sup>12</sup> See the Darpö Report, Milieu Study, and the Commission's recently issued Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters ("Impact Assessment on Access to Justice") and references cited therein, available at: <http://data.consilium.europa.eu/doc/document/ST-8752-2017-ADD-1/en/pdf>

<sup>13</sup> To cite just a few examples, see Cases C-243/15, C-570/13, C-137/14, C-72/12, C-260/11

<sup>14</sup> To cite just a few examples, see Austria ACCC/C/2010/48; ECE/MP.PP/C.1/2012/4, 17 April 2012 ("C-48 (Austria)"); ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012 ("C-50 (Czechia)"); Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, 11 January 2013 ("C-58 (Bulgaria)")

<sup>15</sup> 21 Member States are identified as failing to providing sufficient standing or prevent prohibitive costs, e.g. <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1493972666323&uri=CELEX:52017DC0063>

<sup>16</sup> All references to Member States are indicative, and not exhaustive

<sup>17</sup> The Supreme Administrative Court in Austria has very recently in a groundbreaking judgment issued in the wake of the CJEU *Protect* Decision (C-664/15) discussed *supra* certainly changed the situation in Austria, paving the way to expanded access to justice rights after years of struggle. See *VwGH 19.2.2018 Ra Ra 2015/07/0074-6*

<sup>18</sup> To this effect see also the EESC Opinion at 1.7

<sup>19</sup> Specifically, changes to their domestic EIA Law, Building Act, and Law on Nature and Landscape Protection

costs in HR are also of concern. Finally, two developments in BG are further examples of back-sliding: First there is as of the date of writing<sup>20</sup> a pending legislative proposal to drastically increase the court taxes for the second court instance (court of cassation) from up to 14 times for individuals and 74 times for NGOs (from 5 to 370 BGN)<sup>21</sup>; and second, a law that strips the cassation instance of its competence on EIA cases of strategic importance is now in force. Therefore, a statement should be added that derogations are not permitted, neither in response to the Notice, developing CJEU case-law, nor simply for domestic political reasons.

10. A related issue, but one that merits its own separate treatment, is that the Notice should also clearly address **environmental defenders, and make clear that they must not face harassment or penalties for exercising access to justice rights, or be prevented from exercising these in the first place for fear of such threats.**<sup>22</sup> To be clear, this should cover not only protections for lawyers, that is, those who would bring such cases to court; but rather also potential clients, judges and all those who might face harassment in connection to access to justice rights. We have increasing evidence that this is indeed happening in AT, BG, HU and PL and, more recently, in HR. This includes not only attacks by the media and by right-wing politicians labeling environmental activists “foreign agents and Sorosoids” but also the use of SLAPPs. This seems to be a serious trend, one which requires diligent attention and a swift response.
11. Other gaps and points of unclarity we address below in their respective sections. **A final overarching remark is that the Notice would very much benefit from concrete examples**, perhaps presented even in a graph or other form, which would enable practitioners to understand the proper application of the Notice and the CJEU case-law upon which it based within their countries. Similarly, **inclusion of best practices (including possibly links to projects with such practices, findings and comparative studies)** would be of great help for practitioners. We are constantly asked by diverse stakeholders (including representatives from competent authorities, environmental ombudsmen, and economic actors) about concrete examples of practices in other countries. In many cases the path to implementation in a given country would be greatly assisted by increased capacity-building efforts, knowledge of precisely how and why access to justice in other countries works.

## II. Comments on Section A “Introduction: Access to Justice in EU Environmental Law”

12. As stated above, we think the Notice needs a clearer acknowledgment of persisting access to justice problems in the Member States. The Notice merely observes that “a number of problems have been identified” (at para. 8) and that there are “big gaps” in how EU environmental laws and policies are put into practice (at para. 12). This is too general, and falls short of a clear acknowledgement. We think the first few paragraphs in this Section would be the appropriate place to include more discussion about this very real and widespread problem, and to explain it is this problem that necessitates action on the part of the Commission in the first place.<sup>23</sup>

<sup>20</sup> March, 2018

<sup>21</sup> Previously the administrative cassation taxes were 5 BGN for both individuals and NGOs; with this draft bill they are divided into two categories – NGOs falling into the one for organizations, including businesses

<sup>22</sup> See also EESC Opinion at 1.11; see also the Budva Declaration on Environmental Democracy for Our Sustainable Future; ECE/MP.PP/2017/16 Add.1-ECE/MP.PRTR/2017/2 Add.1) at paras. 4-8; see also Decision VI/3 on promoting effective access to justice; ECE/MP.PP/2017/CRP.1, paras. 3 and 14(a)(iv)

<sup>23</sup> Thus see to this very effect, the Commission’s own Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, cited at fn 7 *supra*

13. Furthermore, we note that the Notice itself observes that “[n]ational courts are increasingly filling the gaps in national procedural law....but they cannot provide all the clarity and predictability necessary to guide investment decisions.” (para. 8, 3<sup>rd</sup> bullet). We absolutely agree with this statement, both with regards to the factual observation as to what is occurring and with regards to the considerable negative effect this is having on all actors, notably also economic actors. This has been widely acknowledged, for example, in AT by NGOs and industry lawyers alike. As a consequence, we regret that the Notice (at para. 9) does not, unlike perhaps later (para. 211) address itself to the Member States as a whole. This could have the advantage that, i.e., legislatures might thereby recognize the need for action on their part to achieve a greater legal certainty that would be a clear benefit for all.
14. As a related point, we are compelled to point out that Notice itself, and its reliance on judicially-made determinations regarding procedural questions concerning access to justice (namely the CJEU), exemplifies the very same problems in terms of creating a common framework<sup>24</sup> which is adequately clear and predictable. This leads not only to implementation problems with regard to EU environmental law, but also the proper functioning of the internal market more generally.<sup>25</sup>
15. With regard to the Environmental Implementation Review (“EIR”), (para. 12), we would like to point out that this process was undertaken without sufficient engagement with the public, particularly NGOs, who – as the “end users” of access to information, public participation, and access to justice rights – could have contributed knowledge, experience, and perspective that would have enhanced the depth and overall quality of the reports.<sup>26</sup> We therefore call for greater participation in this process in the future.
16. Also, we regret that the section of the reports dealing with access to justice issues focused only on standing and costs issues, omitting a range of other areas of concern, such as scope of review and adequacy of remedies. We are accordingly wary as to the effectiveness of this mechanism in assessing the state of affairs in the Member States and achieving implementation. We therefore welcome the Notice’s statement (para. 13) that it will continue to use infringement procedures to ensure Member States fulfil their obligations under the EU *acquis*.
17. Finally, we regret that the Notice does not address decisions, acts and omissions of private parties, which do indeed fall in the scope of article 9, paragraph 3. While it is conceivable that collective redress mechanisms would provide a means of addressing this aspect, brief guidance in this regard would be appropriate in this Notice as well. In this respect we must refer again to the Darpö Report, where civil actions against private parties (such as operators) and the drawbacks associated therewith, such as inequality of arms issues, are addressed in some detail.<sup>27</sup>

<sup>24</sup> See paras. 1 and 201

<sup>25</sup> We again refer to the Darpö Report’s conclusions as to why legislative action is needed to create an adequate common framework in this context

<sup>26</sup> By way of illustration: The 2012-2013 country reports which were used to create the Darpö Report serve as the ostensible basis for the conclusions in the EIR country reports. Yet these reports are not even entirely accurately reflected. The DE EIR report, e.g. says absolutely nothing about costs, though this issue is flagged in the 2012-2013 DE country report, which speaks (at p. 18) quite a bit about prohibitive costs relating to lawyer’s fees and the costs for expert reports. The AT EIR report says that prohibitive costs are not an issue in the country, despite the fact that the 2012-2013 AT country report explicitly cited to states (pp. 29 and 43) that NGOs and citizen groups repeatedly report the “chilling effect” that lawyer’s fees and expert costs have. These are again mentioned in the Darpö Report itself, which synthesizes the country reports. What is not in any of these rather out-of-date references is the fact that now the public in AT can bear additional costs by virtue of being deemed “the applicant” for a procedure in ELD cases, which can be tens of thousands of Euros and cannot be assessed beforehand, and that it is furthermore quite possible that these very same rules could apply in other cases, once article 9, paragraph 3 is finally fully implemented in AT.

<sup>27</sup> See pp 29-30

### III. Comments on Section B “The Legal Context: National Courts and EU Environmental Law”

18. We note that the Notice (at para. 23) correctly observes that the “role of Article 267 may be put in doubt if access to national courts is either impossible or rendered excessively difficult.” We think a clear direction to the effect that national courts really must refer is needed, as unfortunately practice has shown that this is not always occurring, even where it has been quite clear that key provisions of EU law (access to information, Habitats Directive, the SEA Directive, e.g.) were at issue and NGO claimants suggested that the court refer.<sup>28</sup>

### IV. Comments on Section C “Guaranteeing Environmental Access to Justice”

#### A. On Section C.1 “Public Interests. Obligations and Rights Relevant to the Exercise of Judicial Protection”

19. We find that Section C.1 offers helpful guidance in many respects. We greatly appreciate, for example, that this section begins with and several times emphasizes the **dual purposes of access to justice in environmental matters**, namely **both to ensure individuals and associations to exercise their rights conferred under EU environmental law, but also that the aims and obligations of EU environmental law are attained** (see, e.g., the table directly under C.1.1).
20. Though this is long-established<sup>29</sup> and has been repeatedly reaffirmed by CJEU case-law (as the Notice correctly points to in its fn. 29), it is vital that this message is stated simply, directly, and often. This should make clear to those Member States whose legal traditions adhere to a strict “rights-based” approach that this is simply not adequate in the context of access to justice in environmental matters. The CJEU’s judgment in *Protect* and Advocate General Sharpston’s Opinion in this case may be the clearest affirmation of these dual purposes and their critical relationship with the binding effect of EU law to date.<sup>30</sup>
21. We also find quite commendable that the Notice expressly recognizes the importance of “active involvement of the public” as a “concomitant environmental public interest” that supports the aims of EU environmental legislation (table directly under C.1.2), and the reasonably detailed description of procedural rights (paras. 44-47). This was discussed in some detail already in *Brown Bears II* and again more recently in *Protect*. In the latter case, the Court noted that, “when applying Directive 2000/60, a Member State is required to respect the substance of Article 14(1) of that directive, which consists of an obligation to encourage *all relevant parties actively to participate* in the implementation of that directive.”<sup>30</sup> The ability “to actively participate in the decision-making process permits setting out in greater detail and more appositely arguments relating to the risks for

<sup>28</sup> See to that effect the Austrian Constitutional Court cases in 2016 V 87/2014-11, and V134/2015

<sup>29</sup> See for example the CJEU’s judgment in *Kraaijveld*.

<sup>30</sup> Case C-664/15 at pt. 75

the environment of the project envisaged [...] and by presenting those arguments in the form of objections that should have been taken into account by the competent authorities.”<sup>31</sup>

22. The Court went on to acknowledge that the “active participation of [...] a fully constituted environmental organisation operating in accordance with the requirements of applicable law is *all the more important, given that only such organisations are oriented towards the public interest, rather than towards the protection of the interests of individuals.*”<sup>32</sup> Moreover, as Advocate General Sharpston noted, involvement of environmental organisations at any early stage to put forward relevant environmental considerations makes for a balanced procedure, may reduce the likelihood of subsequent litigation, and promotes procedural economy.<sup>33</sup> Thus it seems the CJEU favors active participation in general, and is will recognize a broad obligation for Member States to provide this.
23. What is clear from this judgment, however, is that at a minimum: Where the national procedural law at issue conditions judicial review on participation in the administrative proceedings themselves – such as being a so-called “party” to the proceedings – then these participatory rights must be afforded to NGOs and possibly other members of the public concerned.<sup>34</sup> This holds even when the decision-making at issue falls outside the scope of article 6.
24. In certain legal systems,<sup>35</sup> the right of judicial review is indeed linked in this way to participation in the administrative procedure as a so-called “party”, and it is only via this status that active participation in these procedures can be assured (as opposed to the mere status of being “an interested party” or being excluded from the administrative proceedings altogether). In the wake of the *Protect* judgment party status should therefore be given to recognized NGOs.
25. In this context it should be further clarified that, while Parties retain discretion as to laying out the precise procedural rules for participation, at least where article 6 of the Convention applies, a system where those having full “party rights” are accorded more rights than other members of the “public concerned” is incompatible with the Convention.<sup>36</sup> Such rights commonly include the right to peruse the administrative file (which would thereby give some members of the public concerned more access to the information relevant for the decision-making at issue than others), and the right to have ones comments taken into account, or given more weight than those comments of other members of the public concerned, in addition to the right to appeal the administrative decision discussed above. Thus such legal systems appear problematic in some contexts not merely in terms of access to justice rights under article 9, but also in terms of the participation rights accorded under article 6, where the decision-making at issue falls under the scope of this latter article.
26. Returning to the Notice itself, we find this discussion could benefit in general from concrete examples and/or best practices. Moreover, some mention of the impermissibility of “back-sliding” in this area would be appropriate. As discussed above, participatory rights in environmental procedures outside of the scope of the domestic EIA legislation have now been stripped away in CZ in a manner that runs counter to both the Convention and EU law, especially the CJEU interpretations in *Brown Bears II* and *Protect*. These developments are moreover deeply concerning from a pure rule of law and democracy perspective.

<sup>31</sup> Ibid. at 78

<sup>32</sup> Ibid. at 79 (emphasis added)

<sup>33</sup> Advocate General Sharpston’s Opinion in *Protect*, at pt. 105

<sup>34</sup> *Protect* Case C-664/15 at Pt. 81

<sup>35</sup> Such as in AT, which is the country which led to the preliminary reference in *Protect*, and other countries which have followed the *Schutznormtheorie*

<sup>36</sup> See the Report of the Compliance Committee: Compliance by Czechia with its obligations under the Convention, ECE/MP.PP/2017/38 at paras. 32 and 37; 28. July 2017

27. Also we find the discussion concerning procedural rights (paras. 44-47) could lead to some confusion as to when article 9, paragraph 2 rights apply, vs. paragraph 3. The Notice discusses, for example, the *Kraaijeveld*<sup>37</sup> and *Brown Bears II*<sup>38</sup> decisions and their relationship with other provisions of EU environmental law, notably the SEAD. This could be interpreted as suggesting that judicial review rights also as to plans, programs, and policies should flow from article 9, paragraph 2 (as well as possibly article 9, paragraph 3). Further guidance or clarity on this point, perhaps even a graph with concrete examples, could be most helpful. We note in this respect that the Implementation Guide suggests an “opt-in” might be needed for article 9, paragraph 2 to apply in such cases,<sup>39</sup> and the ACCC has indicated in a number of decisions that article 9, paragraph 3 is the provision for which access to justice regarding plans, programs, and policies is foreseen.<sup>40</sup> This is just one example where reference to the ACCC’s findings and the Implementation Guide<sup>41</sup> would be useful.
28. Also the Darpö Report devoted an entire section<sup>42</sup> to analyzing the relationship between article 9 paragraph 2, and its paragraph 3. A similar section, with up-to-date examples, would be highly valuable here. It could evaluate in greater detail, e.g., the extent to which the existence of a procedure in which the public could conceivably participate in is determinative or suggestive of something being covered by article 6 (and consequently article 9, paragraph 2), building on the CJEU’s reasoning in *Brown Bears II*, among other sources. It furthermore could elaborate on cases of accidents and nuisances, and lay out reasoning as to why these might (or might not in some cases) fall under article 9, paragraph 2, and so on. We recognize that the relationship between article 9(2) and 9(3) is complex and is the subject of a dynamic process of case law, and the Notice goes some ways towards clarifying matters. However, a greater degree of elaboration and precision would be very helpful for practitioners. Indeed, we note with appreciation in this regard that later in its Section devoted to the ELD, the Notice mentions links between standing criteria under provisions of the ELD and EIAD, based on a similarity in wording. We would add that the Advocate General Opinions in both *Gert Folk* and *Protect* also suggest specifically an interrelationship between the notions of standing under 9(2) and 9(3).<sup>43</sup>
29. Returning to other rights, we must observe that we find the ultimate analysis that leads to the statement (para. 37) “that it is necessary to distinguish between NGOs and individuals”, in terms of having a broad right to protect the environment likely too strong. Although it is clear that NGOs have a special role to play,<sup>44</sup> this statement, the discussion (in paras. 37-43) both in general and in terms of its analysis of *Brown Bears I*<sup>45</sup> and the area of nature protection could be understood to mean that individuals need not also have rights to protect the environment which national courts must uphold. We see no basis for this in the Convention,<sup>46</sup> and in actual practice it may indeed be vital that individuals be accorded access rights to ensure the environment is adequately protected and EU

<sup>37</sup> Case C-72/95

<sup>38</sup> Case C-243/15

<sup>39</sup> Guide at 173

<sup>40</sup> For the clearest statement in this regard, see C-58 (Bulgaria)

<sup>41</sup> See pp 190-199

<sup>42</sup> Namely Section 3.2.3, at pp. 28-29

<sup>43</sup> Thus in *Gert Folk*, AG Bobek concludes in Pt. 94 of his Opinion that his considerations for his 9(3) analysis for Article 12(1)(a) were also applicable to his analysis for interpretation of limitations on a Member State’s discretion to determine what constitutes an impairment of a right per Article 12(1)(c), which is analogous to 9(2). AG Sharpston in her Opinion (Pt. 73) suggests transferring the standing criteria in 9(2) to 9(3).

<sup>44</sup> See to this effect the 7th, 13th and 17th recitals of the Convention; see also Advocate General Sharpston’s Opinion in *Protect* at point 82 and the numerous sources (including CJEU opinions, other Advocate General Opinions (notable that of AG Kokott in *Slovak Brown Bears II* and the European Court of Human Rights) cited therein

<sup>45</sup> Case C-240/09

<sup>46</sup> See to that effect European Union, ACCC/C/200X/32 Part II; ECE/MP.PP/C.1/2017/7 (“C-32 (EU), Part II”) at. para. 93; Denmark ACCC/C/2016/18 at para. 29)

laws observed. In this regard we note the CJEU’s analysis in *Protect*, where the court took care to explain that the “effectiveness of the Water Framework Directive and its aim of protecting the environment...require that *individuals or*, where appropriate, a duly constituted environmental organisation be able to rely on it in legal proceedings.”<sup>47</sup>

30. We further find that the recognition of the role individuals can play under some circumstances can indeed be reconcilable with the special role that NGOs play, and do not find this would lead inexorably to a system of *actio popularis*, though we understand that leading scholars and practitioners may have differing views on this point.<sup>48</sup> It might require a slight adaptation in certain legal systems, but could largely be implemented in a manner that is respectful of different approaches to standing throughout the Member States. In the author’s view this does not entail – understood as a logical necessity<sup>49</sup> – that at least *one* individual in each and every situation shall have standing according to national law. But this is not the same as saying it is possible to exclude all individuals from having access to justice to protect the environment in general, as a block (or the inverse, that *only* NGOs have such rights)<sup>50</sup> As a precise explanation of our position on this involves a more in-depth analysis of the relationship between standing and scope, this issue is dealt with in greater detail in Section C.1 below.
31. What is more, the Communication goes on to acknowledge (para. 55) that an individual may have use rights related to the environment capable of being impaired, and seems to recognize generally in this section an expansive understanding of substantive rights based firmly in a number of CJEU decisions. Notable in this context is that both the Birds and Habitats directives refer to many possible uses of nature, including recreational pursuits (para. 57). This section and the views contained therein are further supported by the CJEU decision in *Gert Folk*,<sup>51</sup> which interpreted the term “public concerned” for purposes of Article 12 (and Article 13) of the ELD.
32. As Advocate General Bobek explained, three categories qualify as the “public concerned” under that Directive (those who are affected, those with an interest in the decision-making, and those who allege impairment of a right); this provision (and its subparts) is thus to be understood as “alternative to its application, but cumulative in terms of its implementation.”<sup>52</sup> Accordingly, each of these three categories of persons should be granted standing. And indeed, as Advocate General Bobek observed of the claimant at issue in that case, the holder of fishing rights, could be understood both as being affected and as simultaneously having a right capable of being impaired.<sup>53</sup> (As to the latter, AG Bobek emphasized that a holder of fishing rights should be considered as having a right capable of being impaired.)<sup>54</sup>
33. We note in this respect with concern that there is no mention of these use rights in the subsequent sections dealing with standing and scope.

<sup>47</sup> Case C-664/15, at pt. 34 (emphasis added)

<sup>48</sup> See the journal article of Prof. Jan Darpö, cited in fn. 3 *supra* at p. 393 and references cited therein

<sup>49</sup> As logicians commonly express the relationship: “*whenever a is true, b must also be true*”

<sup>50</sup> See e.g. Denmark ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, 29 April 2008 (“C-18 (Denmark)”), paras. 30-31

<sup>51</sup> Case C-529/15

<sup>52</sup> See the Opinion for Case C-529 at Pt.77

<sup>53</sup> *Ibid.* at Pts. 89-96

<sup>54</sup> *Ibid.* at Pts. 94-94

## B. On Section C.2 “Legal Standing”

34. At the outset we welcome the Communication’s statement that standing requirements must be interpreted in the light of the principles established in the case-law of the CJEU, even in the absence of an express access to justice provision in many pieces of EU secondary legislation (para. 59). We also think that this would be an excellent point to include what was expressly acknowledged in the Commission’s own Impact Assessment on Access to Justice, namely that “as the studies and evidence collected by DG-ENV shows, each time a Member State opened standing possibilities, there was no significant increase in environmental court cases.”<sup>55</sup>
35. We also think that the Notice must be updated to reflect not only that the CJEU has granted article 9(2) direct effect, meaning that members of the public concerned must be granted access to justice in accordance with that provision,<sup>56</sup> but also that it has found that article 9(3) in conjunction with article 47 of the Charter of Fundamental Rights (CFR) and directly applicable provisions of EU environmental law require that NGOs be given access to justice.<sup>57</sup> This means not only that courts must interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring proceedings,<sup>58</sup> but furthermore: Courts must disapply any such laws where a compliant interpretation is impossible. This holds even where “any conflicting provision of national legislation were adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.”<sup>59</sup>
36. Thus “any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are *the very essence of EU law*.”<sup>60</sup>

### 1. Specific activities subject to public participation requirements

37. For specific activities subject to public participation requirements, we appreciate the Notice’s reiteration of the judgment in *Kraaijeveld*,<sup>61</sup> that a decision, act or omission of a public authority impairing participation rights gives rise to an entitlement to seek judicial review (para. 66).
38. Moreover, we find it critically important that the Notice acknowledges (para. 68) that EU “secondary legislation [namely the IED, EIA, and Seveso III Directive] does not cover all decision-making processes covered by Article 6 – and by extension Article 9(2) [...] Member States are obliged to have in place a judicial review regime whenever Article 6 of the Convention foresees an obligation concerning

<sup>55</sup> See the Impact Assessment on Access to Justice, cited in fn 7 *supra*, at p. 45. This section goes on to observe that: “In particular, environmental cases are only a fraction of all administrative law cases; the German experience following the Trianel Judgment [...] also indicates no dramatic change in the courts workload following the opening of standing rules.”

<sup>56</sup> *Brown Bears II*, C-243/15

<sup>57</sup> *Protect*, C-664/15 at Pt.

<sup>58</sup> *Ibid* at 54

<sup>59</sup> *Ibid* at 56

<sup>60</sup> *Ibid* at 57, emphasis added

<sup>61</sup> Case C-72/95, Pt. 56; this was again reaffirmed in *Brown Bears II* with respect to screening procedures.

public participation.” This message must be conveyed to the Member States as clearly and unequivocally as possible, as many have long adhered to the view that such legislation fully covers Article 6 obligations. In this regard – while we note the Notice discusses *Brown Bears Case II* and suggests that the rationale of this case lends itself to be applied by analogy to decision-making processes in other sectors, such as water and waste (paras. 69-70) – we regret that the Notice did not more fully and precisely articulate a position here. See our comments concerning article 9, paragraph 2 vs. 3 above.

39. As the Notice itself recognizes,<sup>62</sup> the public consultation requirement in Article 6(3) of the Habitats Directive is in fact somewhat vague, and even experts in this area have had difficulties in interpreting the *Brown Bears II* judgment, and predicting its application with respect to Article 6(3) cases in their own jurisdictions, other provisions of the very same directive, to say nothing of its application in other sectors. The relevant provision of the Water Framework Directive at issue in the *Protect* case was even less clear.<sup>63</sup> Thus it seems that at least some of the confusion (discussed above) with regards to the question of whether article 9, paragraph 2 and/or paragraph 3 applies in any given case cannot be answered by merely saying that the former applies in cases where there are article 6 participation rights. This merely pushes the confusion back a level, since the very question of what falls in the scope of article 6, paragraph 1(b), poses not insignificant interpretative challenges. Accordingly, the Notice’s suggestions regarding water and waste in this context are of limited assistance. Admittedly, the situation has become a deal clearer since the Notice was issued, as the CJEU has reaffirmed *Brown Bears II* in the context of a water law case, namely *Protect*, and indicated that, where significant adverse effects cannot be excluded, the decision-making at issue would fall under article 6(1)(b), and therefore 9(2).<sup>64</sup>
40. Yet still, we note that authorities and courts in AT continued to refuse participation and access to justice rights in the area of nature protection after the *Brown Bears II* case was delivered, and even after this Notice was released.<sup>65</sup> This indicates that the Member States find it challenging to comply with EU law, including judgments from the CJEU. In some instances this has been the case even where the CJEU has made rather clear what is required from the Member States concerning access to justice in environmental matters.<sup>66</sup> Yet in other instances Member States have arguably denied access to justice because the issues are unclear or the CJEU has not addressed certain questions with sufficient depth, which can be a particular problem in the context of preliminary reference proceedings which are by their very nature more narrow and focused. Thus we must at this point again express our regret concerning the lack of a directive on access to justice, as well as the conservative approach taken in this Notice in relying only on CJEU case-law and drawing only careful inferences from such sources. Here, too, incorporation of ACCC findings which have touched on the subject of article 6(1)(b),<sup>67</sup> and might well address the issue at greater length in the future, could be most helpful.
41. Regarding article 9, paragraph 2 standing for individuals (Section 2.3.1), we note with concern that the use rights, outlined earlier in the Notice (at paras. 55-57) are not included here. For the reasons we discussed above, we find recognition and inclusion of these rights is needed at this point in the

<sup>62</sup> At fn. 67

<sup>63</sup> Note the comments of Advocate General Sharpston in her Opinion in *Protect* at pts. 101-102

<sup>64</sup> C-664/15 at Pts. 39-42, relying on C-243/15

<sup>65</sup> See e.g. the Austrian Supreme Administrative Court decision in VwGH 23.5.2017 Ra 2017/10/0058, 0059-4; this problem has since likely been addressed by the landmark ruling VwGH 19.2.2018 Ra Ra 2015/07/0074-6

<sup>66</sup> As the Darpö Report notes at p. 25, “it is noteworthy that quite a few of the Member States have not yet adapted their legislation to Janecek (Case C-237/07), despite the fact that five years have elapsed since the CJEU’s judgment.” These problems persist long after this report, and there are many such examples

<sup>67</sup> See e.g. Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006 (“C-8 (Armenia)”); United Kingdom ACCC/C/2008/27; ECE/MP.PP/C.1/2010/6/Add. 2, November 2010 (“C-27 (UK)”), United Kingdom ACCC/C/2010/45 and ACCC/C/2011/60; ECE/MP.PP/C.1/2013/12, 23 October 2013, Czechia, C-50 (Czechia)

Notice as well. We also find any such discussion could be significantly supported by discussion of Advocate General Bobek's Opinion in *Gert Folk*. As discussed above, AG Bobek explains that the discretion Member States have in determining what constitutes an impairment of a right is in fact limited, and must be construed to grant wide access to justice, despite the fact that reference to this objective was not repeated verbatim in Article 12(1) of the ELD. The margin of appreciation left to Member States in Article 12(1)(d) of the ELD – and by extension what constitutes the impairment of a right under national law – “cannot be interpreted as allowing for the block exclusion of entire groups of right holders...the reference to national law to determine what constitutes the ‘impairment of a right’ entitles Member States to introduce procedural and material conditions to define that concept.”

42. Yet defining conditions is quite different to introducing block exclusions of large groups of persons whose rights are particularly likely to be impaired.<sup>68</sup> Accordingly, the holder of fishing rights should be deemed as having rights capable of being impaired. Of interest is further that AG Bobek underscored his considerations regarding the interpretation of article 9(3) (and Article 12(1)(a) of the ELD), which weighed in favor of broader standing, were applicable also for interpreting what constitutes the impairment of a right (per Article 12(1)(c), which tracks also article 9(2)).
43. Moreover, as AG Bobek took care to explain – and the CJEU agreed<sup>69</sup> -- the standing requirements (those who are affected, those with an interest, and those who allege impairment of a right) under the ELD are to be evaluated *independently* and *cumulatively*. As others have observed, this approach is likely to have wider implications, considering also in particular the wording in Articles 1.2(e) and 11 of the EIAD.<sup>70</sup> We appreciate that the Notice – perhaps in recognition of such linkages – takes the extra step to make clear that the impermissibility of restricting legal standing established in CJEU case-law arising in the EIA context, applies also in all other article 9, paragraph 2 cases. Yet here again, it remains unclear what *else* falls within the scope of article 9, paragraph 2 (by virtue of falling in the scope of article 6).
44. We find the Notice's in-depth discussion of the recognition criteria for NGOs quite good. As a general editorial point, we recommend including specific reference in this section to articles 2, paragraph 5, and 3, paragraph 4 so that the reader knows precisely which provisions of the Convention are at issue. It should be added that these provisions are to be construed in light of the general obligations under articles 1, 3, and 9. There is also discussion of recognition criteria in the Implementation Guide,<sup>71</sup> and in ACCC findings,<sup>72</sup> all of which appears to not conflict with the observations made in this section, but rather could provide a source for further practical guidance.
45. We appreciate in particular the Notice's acknowledgement that in some jurisdictions NGOs are granted recognition despite being charitable organizations and not being membership-based, and that, where granted this recognition, such foundations have contributed significantly to the development of CJEU-case law (para. 80). We also appreciate the Notice's caution with regards to other unduly restrictive criteria, and that Member States must take into account the CJEU's

<sup>68</sup> See Pts. 94-95 of Bobek's Opinion in C-529/15

<sup>69</sup> See paras. 45-50 of C-529/15

<sup>70</sup> Darpö Article at p. 393

<sup>71</sup> See Guide at pp. 57-58 and 66-67

<sup>72</sup> See e.g. Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add. 5, 14 March 2005; Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014 (“C-31 (Germany)”)

interpretation in *Djurgården*<sup>73</sup> (para. 81). We think both of these paragraphs would be an excellent context for including reference to Member States illustrating best practices in this regard.<sup>74</sup>

46. Particularly laudable, too, is the Notice’s recognition of the special challenges that can arise in the transboundary context and tentative solutions to avoid non-discrimination in this regard. We note, however, that even under the proposed solutions, challenges might possibly still arise in cases where the foreign NGO is based in a country for which there are no recognition criteria at all, due to relaxed legal standards on standing. Accordingly, it could be difficult for an NGO based in FR or IT, where there are no recognition criteria, to obtain recognition in DE, where there are.
47. We would add that article 3, paragraph 9 prohibits not merely discrimination against foreign NGOs, but provides rather for rights, including access to justice, “in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.” Accordingly, while the primary concern and indeed most likely constellation would involve discrimination against foreign NGOs, article 3, paragraph 9 should prohibit reverse discrimination as well, that is, where a domestic NGO is accorded less recognition than a foreign NGO. Even under the proposed solution in this section, it is not clear that reverse discrimination would be prevented. An AT-based NGO with a specific membership and voting structure might thus be accorded greater access to justice rights in DE than a domestic NGO with precisely the same structure. Finally, we note that the EIAD itself is problematic with regards to opportunities for foreign NGOs, in that any rights for the foreign public (concerned), including NGOs, are dependent on state action taken under Article 9 of the directive. Where potentially affected states choose not to take affirmative steps, the directive may license a situation in which participatory and related access to justice rights are only accorded to the domestic public (concerned).
48. With regards to other associations, organizations and groups, we note that, as in the case for individuals cited above, some mention of use rights here would be appropriate. However, we appreciate that the Notice recognizes the benefits of standing for non-recognized organizations, associations, and groups, particularly as a means to facilitate the merger of claims. Although wholly at odds with established facts and statistics, a number of Member States have refused to live up to their obligations to provide access to justice on the basis of claimed fears of opening a “floodgate” of litigation. Further discussion in the Notice quelling such fears using facts and discussion of workable mechanisms to facilitate the merger of claims, including class actions, in some greater detail, would be most helpful in this section. We would strongly recommend illustrating such a discussion with reference to best practices in certain Member States.<sup>75</sup>
49. Concerning the issue of prior participation, discussed at paras. 85-86, we appreciate the Notice’s reiteration that this should not be used as an additional means to restrict standing, and its reference to the Guide and *Djurgården* in particular. We also appreciate the statement that this case-law should apply in the ELD context also (para. 89). Yet the CJEU in *Protect* has indicated that procedural rules by which a potential party loses any claim to party status to participate in the administrative procedure for adopting a decision, including the linked right to judicial review, by a failure to timely intervene does not *a priori* run afoul of article 9(3) and 9(4) in conjunction with Article 47 CFR.<sup>76</sup> Any

<sup>73</sup> Case C-263/08

<sup>74</sup> We would point out that there is a pending case before the ACCC (ACCC/C/2015/137 (Germany)), which concerns a failure to recognize foundations such as WWF, or others with certain membership structures like Greenpeace, with a resulting loss of access to justice rights.

<sup>75</sup> Again there are many useful citations and statistics in the Commission’s own Impact Assessment to this effects, cited to at fn 7 *supra*

<sup>76</sup> *Protect*, Case C-664/15 at Pt. 101

such rules and their application is to be reviewed on a case-by-case basis. This is discussed at greater length *infra*.

## 2. Other subject-matter

50. The Section devoted to standing for “other subject-matter”, reveals the drawbacks of relying almost exclusively on CJEU case-law and the need for regular updating of any guidance documents, as there was at the time of the Notice’s publication essentially only a single CJEU case on point, namely *Brown Bears I*. By contrast, the ACCC had considered more than a dozen<sup>77</sup> article 9, paragraph 3 cases up to MOP5 in 2014 alone. Several further cases were considered in the intersessional period since then, and all but one have been since endorsed by the MOP according to standard practice. All of these cases have concerned challenges in numerous sectors, to a number of acts and omissions having diverse legal characters. Inclusion of such cases, and more discussion of the Implementation Guide, could resolve or at least shed light on a number of the challenges outlined below. Also, as observed above, two significant CJEU decisions, namely *Protect* and *Gert Folk* were also published since the Notice’s release. The former case resolves a number of shortcomings in the Notice regarding NGO standing neatly and decisively, and the latter is also extremely instructive in this context, not only with respect to individuals but also organizations. Both discuss the relationship(s) between 9(2) and 9(3) at length.
51. That being said, we appreciate the Notice’s recognition of the fact that article 9, paragraph 3 of the Convention is broader than paragraph 2 both with respect to the intended beneficiary of legal standing and in covering also acts and omissions of private persons, not only those of public authorities (para. 92).
52. We would add that article 9, paragraph 3 has also a significantly broader scope of application in that it covers national laws “relating to the environment”, as opposed to the article 9, paragraph 2, which is confined to decisions, acts, or omissions relating to specific activities listed in either annex I or having a “significant effect on the environment.”<sup>78</sup> Although the full wording of article 9, paragraph 3 is included in this section (paragraph 91), this third aspect concerning the scope of this provision’s application should be added to this paragraph (92). In this respect we are compelled to add that the determination of what falls in the scope of article 9, paragraph 3 is “not limited to environmental laws, e.g., laws that explicitly include the term environment or their title or provisions.”<sup>79</sup> The “decisive issue is if the provision in question somehow relates to the environment.”<sup>80</sup> Again as an editorial point: It should be added that the scope of article 9, paragraph 3 should be interpreted in light of the Convention and its purpose, and in particular article 1, as well as article 2, paragraph 3, which defines “environmental information” under the Convention.
53. We are also concerned about what could be implied from the Notice’s observation that article 9, paragraph 3 makes no reference to access criteria or provide for legal standing *de lege* for NGOs (para. 92, see also para. 107, second sentence). We fear this could be used as a means to continue

<sup>77</sup> Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006; C-8 (Armenia)); Belgium ACCC/C/2005/11, ECE/MP.PP.C.1/2006/4/Add.2, 28 July 2006; C-18 (Denmark); United Kingdom ACCC/C/2008/23; ECE/MP.PP/C.1/2010/6/Add.1, October 2010; Austria ACCC/C/2008/26; ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011; C-27 (UK); C-31 (Germany); European Union ACCC/C/2008/32 (Part I); ECE/ECE/MP.PP/C.1/2011/4/Add.1, May 2011; C-48 (Austria); C-50 (Czechia); C-58 (Bulgaria); Armenia ACCC/C/2011/62; ECE/MP.PP.C.1/2013/4, 11 January 2013; Austria ACCC/C/2011/63; ECE/MP.PP.C.1/2014/3, 13 January 2014

<sup>78</sup> This follows from the express wording of these provisions, but see also Darpö at p. 27

<sup>79</sup> See United Kingdom ACCC/C/2013/85 and ACCC/C/2013/86; ECE/MP.PP/C.1/2016/10, 29. November 2016 (henceforth “C-85-86 (UK), paras. 71-72 and references cited therein

<sup>80</sup> See the Aarhus Implementation Guide

to restrict or even backslide/reduce existing rights for NGOs in this context, particularly for those unaware of the subsequent CJEU case law which addresses this very point. It seems to us when reading the subsequent sections (paras. 93-107) that this is not the intent of the Notice. Yet, particularly in light of the fact that neither expert, up-to-date familiarity with access to justice issues nor EU environmental law, nor even a readiness to uphold the rule of law can be presumed of all authorities, courts, and practitioners in the Member States, we think further discussion of both the *Gert Folk* and *Protect* cases should be inserted (ideally at para. 92) to make the Notice's intention crystal-clear.

54. Accordingly, the statement that “Article 9(3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals,” needs to be qualified. It is no longer merely “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.” (Para. 93<sup>81</sup>). Far more, rules that cannot be interpreted in conformity *must be disapplied by courts*. This is a very significant distinction indeed, one necessary to ensure the direct effect and full observance of obligations stemming from EU law.
55. Further, the reaffirmation (in para. 95) that “Member States are obliged to provide for legal standing to ensure access to an effective remedy for the protection of procedural and substantive rights conferred by EU environmental law even if the EU environmental legislation at stake does not contain specific provisions on the matter”<sup>82</sup> can now be significantly strengthened by *Protect*, which says that duly recognized NGOs must be afforded access to justice “to challenge before a court a decision taken following an administrative procedure that may be contrary to EU environmental law.”
56. Notably this statement was not qualified by the term “procedural” or “substantive rights”, but covers broadly “a decision”, which must be understood as encompassing both procedural and substantive aspects. With this in mind we nonetheless find the Notice (paras. 96-100) offers some helpful input concerning standing to protect procedural rights. As indicated above, at points it seems there is some blurring between article 9, paragraphs 2 and 3. Though upon careful inspection one can see that this discussion falls under the section devoted to article 9, paragraph 3, it might be useful to simply insert a sentence clarifying that these rights, including in contexts which provide participatory rights, such as for plans, programmes, etc., are envisaged as falling under article 9, paragraph 3, if that is in fact the case. Alternatively, if this is seen as falling potentially under either article 9, paragraph 2 or 3, then this too, should be clarified.
57. The explanation of substantive rights in this section (para. 101) is, however, problematic in multiple respects. First, this paragraph states that legal standing must be granted to both individuals and environmental NGOs to protect human health via EU environmental legislation. Yet the Notice appears to suggest that only individuals and their associations (that is, those which derive their rights from individuals) have such rights (see paras. 49-51). It is not clear from reading the Notice whether environmental NGOs can derive their rights from these individual rights, or if they have another source, i.e., that such rights to protect human health can be subsumed under an environmental NGO's general rights to protect the environment. Clarification here would be useful. Second, this paragraph (101) suggests that both individuals and NGOs should have property rights. As to NGOs, if such rights pertain, then again this should be added to the earlier sections (see paras. 53-54). Finally, as suggested above, we are convinced that there is no basis in the Convention to support the notion that only NGOs are entitled to protect the environment in general terms, and think such an approach could mean that the objectives of EU environmental law remain unfulfilled.

<sup>81</sup> Citing Case C-240/90, *Brown Bears II*, at paras. 45 and 49, emphasis added

<sup>82</sup> We note, moreover, that this statement is in keeping with the Implementation Guide at p. 197, and C-18 (Denmark)

58. We appreciate that the Communication recognizes the problem of the impairment of rights doctrine, (paras. 103-107), and that, moreover, such problems can arise also in jurisdictions which follow the “sufficient interest” doctrine. We welcome the statement that “Member States may adopt criteria that individuals and NGOs must fulfil in order to obtain legal standing, but these criteria must not make it impossible or excessively difficult to exercise substantive and procedural rights conferred by EU law.”
59. However, we regret that the Communication does not make it unconditionally clear that it is not acceptable to limit access to justice for NGOs on the basis of the impairment of rights/sufficient interest doctrine, and that for individuals such criteria are to be interpreted as providing wide access to justice that does not block entire categories from having such access. The Communication (at para. 107) says that “considering the role of environmental NGOs in protecting general environmental interests such as the quality of air and biodiversity, Member States which apply the impairment of rights doctrine need to do so in such a way as to ensure that environmental NGOs are given legal standing to contest decisions, acts, and omissions which concern this role.” Yet this point is made too vaguely to be of much use to practitioners. Yet again, *Protect* is unequivocal: recognized NGOs must be given access to justice. And *Gert Folk* also addresses this with respect to individuals and other holders of use rights as well.
60. In the *Protect* case the “duly recognized” NGO that needed to be afforded access to justice under article 9, paragraph 3 was one that fulfilled the national standing criteria implementing article 9, paragraph 2. As Advocate General Sharpston elaborated: The flexibility Member States enjoy in granting the right to administrative or judicial remedy in Article 9(3) of the Aarhus Convention may be granted in terms of only “those members of the public who ‘meet the criteria, if any, laid down in its national law’ is limited. Criteria may not be too strict that they effectively bar all or almost all environmental organisations from bringing challenges; access to such procedures should be the presumption, not the exception; and any such criteria should be consistent with the objectives of the Convention.<sup>83</sup> In Sharpston’s view, the most natural reading of the “criteria” phrase “is a *renvoi* to the alternative procedural requirements of ‘having a sufficient interest’ or ‘maintaining the impairment of a right’ in Article 9(2).”<sup>84</sup> Accordingly she found the observations she made in a case<sup>85</sup> based on an earlier version of the EIA Directive were transposable to the 9(3) context, and thus “[e]nvironmental organisations promoting environmental protection and meeting objectively justified, transparent and non-discriminatory requirements facilitating access to justice under national law must be, in my view, entitled to rely on Article 9(3) of the Aarhus Convention.”<sup>86</sup>
61. As noted above, Advocate General Bobek similarly transposed his considerations concerning standing from one context to another in *Gert Folk* – though it that case from rather the other direction, as he determined the considerations warranting a more expansive view of standing rights under provisions of the ELD which had to be interpreted in light of article 9, paragraph 3 informed also his consideration of those provisions which more closely track a part of article 9(2) (specifically, Article 12(1)(c), which discusses “impairments of rights”). He explained further that national provisions regulating access to justice (such as those defining what constitutes “a sufficient interest” and “impairment of a right”) “cannot deprive access to review procedures from those persons who have been standing under the criteria autonomously laid down in Article 12(1), to which Article 13(1)

<sup>83</sup> See AG Sharpston’s Opinion at 71-73; see also the Implementation Guide at 198, to which Sharpston cites, and the ACCC cases cited therein (namely C-11 (Belgium), C-18 (Denmark), and C-58 (Bulgaria))

<sup>84</sup> Ibid. at 73

<sup>85</sup> Namely *Djurgården*

<sup>86</sup> Sharpston’s Opinion at 73

refers.”<sup>87</sup> Such autonomous criteria are drafted in “broad terms, namely “persons adversely affected or likely to be affected” who “should have access to procedures for review of the competent authority’s decisions, acts or failure to act.”

62. Noting the absence of any reference to national law in this description, AG Bobek found that “the notion of persons ‘affected or likely to be affected’ should be given an autonomous and uniform interpretation at the EU level, taking into account the context of the provision and the objective pursued...in contrast to the situations of (a sufficient interest or impairment of a right), being affected depends on the existence of a *factual concern with regard to the specific situation of a natural or legal person.*”<sup>88</sup>
63. This is a significantly different and broader than test than that arising under the impairment of rights doctrine, even under the more expansive interpretation of that doctrine which Advocate Bobek suggests is needed. It will allow a much larger pool of claimants to achieve standing in environmental cases. Thus for example not only holders of property rights should be accorded standing under this test, but tenants and workers in the affected areas, as well as those who might be affected or concerned, also in terms of worries and perceptions, depending on the activity at issue. This “affected/likely to be affected” test is, moreover, one which, in our view, sits well with the requirements of the Aarhus Convention.<sup>89</sup> As the ACCC has said, “Article 2, paragraph 5, of the Convention should include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity, but also those who have a *mere factual interest* (for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable).”<sup>90</sup> And notably this pertains to article 2, paragraph 5, namely the “public concerned,” which is logically a subset of/or at least subsumable under the even broader category of “the public” per article 2, paragraph 4, for which access to review under article 9, paragraph 3 is to be provided.
64. Some years ago, the ACCC observed that article 9, paragraph 3 “does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories.”<sup>91</sup> Accordingly, a “strict application of this principle in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right. The requirement of infringement of subjective rights would in many cases rule out the opportunity for environmental NGOs to access review procedures, since they engage in public interest litigation.”<sup>92</sup>
65. Considering the significant recent developments in the CJEU case law in this area, particularly in *Gert Folk* and *Protect* and their consistent and deliberate emphasis on the obligations that EU law imposes on Member States (as opposed to the “only” the rights which arise therefrom), it seems to us that access to justice in environmental matters *as a matter of EU law*, is similarly not limited to any such categories as public or private interests or objective or subjective rights.
66. Again we recognize that this is a complex area of law subject to continuous development. However, we think further explication is needed in such a guidance document as this Notice, and that any future guidance should be supported by examples of best practices from Member States, particularly from

<sup>87</sup> Bobek’s Opinion at 82

<sup>88</sup> Bobek’s Opinion at 79, emphasis added.

<sup>89</sup> See to this effect the ACCC’s clear exposition in ACCC/C/2013/91; ECE/MP.PP/C.1/2017/14, 24 July 2017 at pars. 74-75

<sup>90</sup> Ibid. at para. 74, emphasis added

<sup>91</sup> C-31 (Germany) at para. 94

<sup>92</sup> Ibid. at para. 95; see also Darpö Report at pp. 31-32

those which have moved away from, or have never had, strict rules concerning standing, and include statistics demonstrating that this has not resulted in a glut of litigation, but has resulted in better projects which better meet the goals of EU environmental law, and greater public acceptance.

67. As a final note, we observe that, while standing for NGOs is often provided for legislatively, that for individuals is often a matter of judicial interpretation in evaluating the operative procedural provisions.<sup>93</sup> In that respect the judiciary enjoys discretion, and problems can arise when they fail to evaluate all relevant considerations – focusing, i.e., merely on the claimant’s distance from a given project or nuisance. There is evidence from some countries (SE, e.g.), that this may be a problem.

### C. On Section C.3 “Scope of Judicial Review”

68. Our comments concerning the scope of judicial review can roughly be categorized as those dealing with the relationship between standing and scope, and issues relating to the scope of the Convention in general; and the issue of the standard of review or intensity of scrutiny applied in judicial review. For the reasons set out below, we believe the issue of preclusion merits separate treatment.

#### 1. The relationship between standing and scope, and the scope of the Convention in general

69. Our first overarching concern about this section is that it conflates the concept of standing with that of the scope of review<sup>94</sup> in a manner that we find is consistent with neither the text nor spirit of the Convention.<sup>95</sup> This approach will, moreover, have negative impacts on the effectiveness of judicial control of the implementation of EU law at the national level, in contravention of Article 19 TEU.<sup>96</sup>
70. In the context of decisions, acts and omissions related to activities that fall within the scope of article 6, article 2, paragraph 5 and article 9, paragraph 2(a) and (b) permit some discretion as to the range of subjects, that is *who* can challenge decisions, acts or omissions. But we see no basis in the Convention for allowing further criteria that restrict access to the review procedure by *inter alia*, limiting the scope arguments which the applicant can use to challenge the decision.<sup>97</sup> Rather, once an applicant has the key necessary to unlock the gate to court by achieving standing, this applicant should be able to at the same time challenge the substantive and procedural legality of any decision, act or omission.

<sup>93</sup> Ibid. at 31

<sup>94</sup> This conflation is understandably attributable to an attempt to accommodate the strict impairment of rights doctrine followed in some jurisdictions, which limits not only the range of subjects who can sue, but also regulates the range of arguments that can then be brought forward

<sup>95</sup> See the Preamble, and articles 1, 3, and 9 of the Convention

<sup>96</sup> See Darpö Report, p. 36

<sup>97</sup> See C-31 (Germany), e.g.; see also C-48 (Austria)

71. A pure textual analysis<sup>98</sup> of article 9, paragraph 2, indicates that the clauses without a subject in subparagraphs (a) and (b), namely “having a sufficient interest” or alternatively “maintaining impairment of a right” can only modify the noun phrase that directly precedes them, which is “members of the public concerned.” This means that having a sufficient interest/maintaining impairment of a right applies to the standing requirements for who has access to courts in the first place. Accordingly, there is no possible interpretation under which having a sufficient interest/maintaining impairment of a right can modify or in any way restrict the following phrase “the substantive and procedural legality of *any* decision, act or omission.”<sup>99</sup> Rather this phrase can only be interpreted as being restricted by the text immediately thereafter, namely: “subject to the provisions of article 6...” Further limitations of the scope of review on the basis of i.e., the impairment of rights doctrine thus runs counter to the express wording of these provisions.
72. This is perhaps in practice not in all cases a significant problem for NGOs in this context, as the CJEU in *Trianel*<sup>100</sup> has recognized their rights to plead and invoke any provision of EU environmental law,<sup>101</sup> and this has been reaffirmed in *Brown Bears II* and *Protect* and the Notice’s interpretation of the *de lege* standing would seem in line with this. Yet we must insist that this approach is nevertheless problematic.
73. Specifically, an individual applicant who has fulfilled standing requirements to obtain a key to the gate of court should thereafter be able to challenge the substantive and procedural legality of any decision, act or omission.<sup>102</sup> By way of example, an individual who can obtain standing by virtue of showing damage to property or endangerment of health in connection to a mining project should then also be able to challenge an administrative body’s permit for the project on the basis of violations of objective laws governing water quality. Yet in some jurisdictions (DE, e.g.) this is not permitted. Moreover, in many such cases a recognized NGO neither has the time nor resources to challenge such violations of these objective laws, meaning that an individual’s inability to bring such claims will result in ineffective judicial control concerning the implementation of EU law, specifically that the aims and obligations of EU laws relating to the environment will not be enforced.
74. Logically, recognizing a right for individuals to raise such claims need not lead to a system of *actio popularis*. If the showing of an impairment of right, e.g., is still a condition for “getting a foot in the door to court” in the first place, then it can certainly occur that there is a case where no individual can bring a legal challenge, i.e., it does not hold that there is at least one individual in each and every situation who has standing. Thus for example consider factory A, which emits water pollution which violates objective standards governing water quality yet no neighbor or other individual with protected rights (such as health or property, including use rights) can remotely show even being affected or likely to be affected (taking into account all proper considerations, distance alone not being enough). In such a case, there is no individual who can mount a legal challenge. By contrast, consider factory B, which emits similar pollution. A nearby neighbor whose drinking water is being affected could bring a legal challenge (their health and property being endangered). If the question of scope is disentangled from that of standing in the way we suggest, then this neighbor could at least conceivably simultaneously bring a claim for the violation of general water quality standards.

<sup>98</sup> What follows explains the universally-accepted rules of the English grammar among linguists; an analysis of the Russian-language version of the Convention yields the same results; we expect but have not yet collected evidence that the same pertains as to the French-language version

<sup>99</sup> Article 9, paragraph 2, emphasis added

<sup>100</sup> Case C-115/09, (Bund für Umwelt und Naturschutz)

<sup>101</sup> That being said, for a long time thereafter, NGOs in CZ were only permitted to put forward arguments based on procedural violations as a direct consequence of the impairment of rights doctrine as interpreted in that country

<sup>102</sup> See, e.g. C-48 at para. 66

75. Similar problems arise from the Notice's treatment of subject-matter falling under article 9, paragraph 3. The most natural reading by far is that the phrase "criteria, if any, laid down in national law" modifies the phrase "members of the public", and thus pertains only to potential restrictions on the subject, that is *who* has standing to sue.<sup>103</sup> The phrase "criteria..." should not modify the phrase "acts or omissions...which contravene provisions of national law relating to the environment". So in a manner analogous to the situation described above with respect to article 9, paragraph 2, it should be that access to justice can only possibly be delimited on the basis that the individual (or NGO) is unable to prove that they are affected in any way (by having rights capable of being impaired or otherwise). Once standing is established, they should be able to challenge the procedural or substantive legality of acts or omissions by private parties and public authorities which contravene provisions of national law relating to the environment.<sup>104</sup> Nothing less. So i.e., individuals who live or work near an industrial plant where an accident occurs, who are affected, should be able to also bring claims based on violations of objective laws relating to the environment.
76. At this point we are compelled to point out we have a serious reservation about the interpretation of article 9, paragraph 3 at the present time. It seems to us, in light of the foregoing, that article 9, paragraph 3 is sufficiently precise and unconditional with respect to the scope of acts and omissions to which it applies and arguments which can be used to challenge such. Hence this aspect of this provision should, even by itself, be directly applicable.
77. At any event, the Notice suggests that for NGOs limitations on the scope of arguments can be overcome on the basis of "a broad right to protect the environment and invoke environmental obligations before national courts." But it seems much of the support for this recognition comes from importing CJEU case-law from article 9, paragraph 2 context into the article 9, paragraph 3 context, and/or blurring the two considerably. This is of limited aid to practitioners.
78. Here we note the Notice (at para. 120) is a key example of where clearer guidance from the Commission is needed. In particular, it should be elaborated upon as to which provisions of EU law, precisely, can give rise to actionable rights and interests. This would be, moreover, a good section to clarify the effect of EU law, specifically recognizing that, at a minimum, NGOs should have standing to enforce both rules of national law implementing EU environmental law and EU rules that have direct effect, even where EU law is not or is badly transposed. All of the above references, in particular *Brown Bears II*, *Protect*, and *Gert Folk* should be included so as to clarify the full magnitude of what falls in the scope of these access to justice provisions.

## 2. Standard of review

79. The remainder of the Notice's discussion of intensity of scrutiny/standard of review (at paras. 127-153), illustrates the benefits of a greater use of non-CJEU resources, namely the Implementation Guide. This section is clearly written and addresses the relevant points in quite some detail, using the Guide and CJEU case-law to provide a comprehensive review of these issues. Though certainly more could be said about this area of law (which is likely to take on increased importance if standing and other scope of review issues allow more cases to be brought forth and actually considered on their

<sup>103</sup> C-11 (Belgium) at para. 36

<sup>104</sup> This analysis is also supported by the Implementation Guide, which discusses the object of what can be reviewed as simply "acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment." See p. 197; see also C-11 (Belgium), C-18 (Denmark). By contrast all discussion of "criteria" in this provision is linked only to the question of "who can ask for review", that is, standing. See p. 198. As to the need to be able to challenge procedural and substantive legality, see p. 199

merits), it might be wise to at least add the discussion in *Protect* at this point as a reminder that courts must also satisfy themselves, that significant adverse effects (including but not limited to the EIAD, nature protection, and water law context) can be excluded), which would seem to encompass both factual and legal aspects.

#### D. On the Issue of Preclusion

- 80.** On the particular issue of preclusion, we think it prudent to diverge from the general approach we have taken to commenting on the Commission’s Notice in which we have tracked carefully and in order of presentation the Notice’s provisions one by one. Preclusion is dealt with in the Notice under the section devoted to scope issues, which makes sense considering the seminal CJEU case-law on point<sup>105</sup> to the date of the Notice’s issuance. However, in actual practice in many countries preclusion relates to both standing (thus barring potential claimants or “who” can bring a lawsuit under certain circumstances, such as a failure to timely intervene in the administrative procedure) and scope (barring potential claims that can be raised or the “what” that can be argued *inter alia* on the grounds that such claims themselves were not timely raised). Moreover, preclusion can raise article 9, paragraph 4 issues as well, as suggested by the Notice’s own discussion regarding time-limits. Finally, there is new relevant CJEU case-law which addresses preclusion as a potential article 9, paragraph 3 standing criterium. In light of all of these factors, we think this issue merits treatment beyond the specific sub-section dealing with scope issues.
- 81.** First, while we appreciate that the Notice states that a strict application of preclusion may not prevent access to justice in either the article 9, paragraph 2 or 3 context, it does seem already from the case-law cited in the Notice that Member States may lay down procedural rules to render claims submitted abusively or in bad faith inadmissible (see para. 122).
- 82.** Second, the CJEU has since in the *Protect* judgment<sup>106</sup> gone on to clarify that, in its view, certain forms of preclusion rules which could result in the loss of party status in the administrative procedure and related access to justice rights for a failure to submit an application for party status or submit objections during the course of the administrative procedure itself would not *a priori* run afoul of articles 9, paragraphs 3 and 4, and could even in some cases serve legitimate interests. Such rules must however be clearly formulated, fair, and subject to judicial review. The fairness and permissibility of such rules are furthermore to be evaluated on a case-by-case basis, taking into account all relevant circumstances of the case and national law at issue. If the national court finds that the procedural rule *as applied* in the case before it is impermissible according to the criteria developed by the CJEU, the national court is bound to disapply it.<sup>107</sup>
- 83.** We would point out that the ACCC has taken a not entirely dissimilar approach, observing that while the “Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a *general requirement* for standing would not be in line with the Convention”, if “NGOs were to develop a practice to deliberately opt not to participate during public participation procedures, though having the opportunity to do so, but instead to limit themselves to using administrative or

<sup>105</sup> Namely Case C-137/14 *Commission v. Germany*

<sup>106</sup> Case C-664/15

<sup>107</sup> *Ibid.* at paras. 95-101

judicial review procedures to challenge the decision once taken, that could undermine the objectives of the Convention.”<sup>108</sup>

84. There is, moreover, one other major issue with respect to preclusion in both the article 9, paragraph 2 and 3 contexts that we would like to highlight: The original rationale for rejecting preclusion as a bar to access to justice should, it seems to us, apply with equal or likely even greater force in rejecting other limitations on the scope of review discussed above, particularly the issue of the permissible complaint arguments. It is claimed that preclusion may not be allowed because the object which can form the basis for a claim has to be the procedural and substantive legality of decisions,<sup>109</sup> acts and omissions – nothing less. Requiring prior participation could thus impermissibly limit the scope of this review. Such considerations, in our view, weigh heavily against certain restrictions on the scope of review on the basis of the impairment of rights doctrine. Thus, while there might conceivably be *as applied* in some circumstances legitimate reasons for judicial economy and procedural fairness to restrict claims for failures to raise them in a timely fashion, such considerations do not seem to pertain with respect to restrictions arising through the impairment of rights doctrine; to the contrary, to allow i.e. individuals to bring forth allegations concerning violations of objective environmental laws in conjunction with impairments of their subjective rights would seem to serve the interests of procedural economy quite effectively indeed.

E. On the Application of Article 9, paragraph 4 to procedures under Article 9, paragraph 3

85. The ACCC has provided some very useful guidance in regard to the application of article 9, paragraph 4 to procedures which fall under article 9, paragraph 3, explaining that, given compliance with the Convention must be assessed as a whole, “if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4.”<sup>110</sup> That being said it would of course “be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.”<sup>111</sup>

86. Yet it must be stressed that “for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public,<sup>112</sup> enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4.”<sup>112</sup> Accordingly, a situation where, e.g. the definition of the violation or breach at issue does not cover all the kinds of violations that could be challenged via a different route, or where there are time restrictions related to violations that can be challenged, or where the remedies are more restrictive in one case than another, would not meet the standard of being “a fully adequate alternative” to another procedure. The consequence of that determination is that the requirements of article 9, paragraph 4 as outlined below must apply to that *other* procedure as well.

<sup>108</sup> C-76 (Bulgaria) at para. 68, emphasis added

<sup>109</sup> The “decisions” part pertains only to article 9, paragraph 2 of course

<sup>110</sup> C-85-86 (UK) at para. 78

<sup>111</sup> Ibid.

<sup>112</sup> Ibid. at para. 79. Thus this must be carefully borne in mind when considering the sections pertaining to standing outlined above

## F. On The Lack of a Section on “Fair and Equitable” Procedures

- 87.** Before we move on to other aspects (effectiveness, costs, etc.) which fall under article 9, paragraph 4 of the Convention, we would like to bring special attention to a considerable gap in the Notice. Article 9, paragraph 4 requires in addition, that procedures referred to in paragraphs 1, 2 and 3 be “fair” and “equitable”. Yet there is no mention of this in the Notice.
- 88.** As the Implementation Guide explains, “[f]air procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest...that they must apply equally to all persons, regardless of economic or social position...and it requires that the public be fully informed about the review procedure, as well as informed about the outcome of review.”<sup>113</sup> Though some of these aspects (i.e. those relating to non-discrimination) may be touched upon elsewhere, like in the discussion on effective remedies, we think it important that a section dedicated to fairness and equity be included.
- 89.** By way of illustration, we note that there is no mention in the Notice of the need to provide sufficient grounds, or a real explanation as to the outcome of the review. As indicated above, standing for individuals is largely determined by judicial interpretation, in which case it is of the utmost importance that judges give due weight to all relevant considerations. It is then vital that the record be sufficiently detailed, stating grounds for this consideration so as to enable appeal of the denial of standing. There is evidence that the outcomes of standing determinations are not sufficiently detailed (i.e., in SE), despite provisions of national law which one could suppose would address such deficiencies. Accordingly, we believe this issue should be directly addressed in the Notice. One could consider adding it to Section C.4 on “Effective Remedies”, but we think it also warrants treatment in a new section requiring that procedures be fair.
- 90.** Another issue related to fairness and equity we think should be addressed here is the issue of time-limits and the Notice’s discussion of *Stadt Wiener Neustadt*,<sup>114</sup> which is dealt with in Section 6. Time-limits have been used (i.e., in the UK), as a means to bar otherwise meritorious claims, even where the claimant neither knew, nor should have known of the violation giving rise to the complaint. This issue should be moved and/or elaborated upon in a new fairness and equity section, using in particular the Guide,<sup>115</sup> ACCC findings and recommendations,<sup>116</sup> as well as CJEU case-law,<sup>117</sup> to explicate the relevant details. The comments in Section D above concerning preclusion also pertain to this issue, and could be integrated into such a new section.
- 91.** Finally, we note with respect to the requirement that procedures be “equitable” per article 9, paragraph 4 that the Guide states that equitable procedures “are those which avoid the application of the law in an unnecessarily harsh and technical manner.” This provision should also be taken into account when interpreting restrictive rules on standing and scope, discussed above. At this point we find the references by Advocate Generals Sharpston<sup>118</sup> and Kokott<sup>119</sup> to Kafka – made in relation to perversely formalistic standing criteria – cut to the heart of the problem in many Member States.

<sup>113</sup> See Guide at p. 201

<sup>114</sup> Case C-348/15

<sup>115</sup> Ibid. at 201-202

<sup>116</sup> United Kingdom ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3, 24 August 2011; paras. 143-144

<sup>117</sup> Uniplex (UK) Ltd v NHS Business Services Authority, Case C-406/08, e.g.

<sup>118</sup> In C-664/15

<sup>119</sup> In C-243/15

## G. On Section C.4 “Effective Remedies”

92. While we appreciate that this section contains many detailed descriptions of the sort of procedural mechanisms needed for effective remedies, we regret that there is no direct discussion ensuring that the interpretation of the rules relating to standing and scope be interpreted in such a way as to permit review of decisions, acts and omissions falling under article 9, paragraph 2 and/or 3. In a number of Member States the adherence to a strict view of the impairment of rights doctrine has led to the result that certain decisions, acts and omissions are unreviewable and/or meritorious complaint arguments cannot be brought forth, as outlined above. This is clearly a problem, too, in terms of effective remedies per article 9, paragraph 4 of the Convention, as well as Article 47 of the CFR. As AG Sharpston has said, it is “like a Ferrari with its doors locked shut, a system of protection is of little practical help if it is totally inaccessible for certain categories of action.”<sup>120</sup>
93. Furthermore, even where some steps have been taken to permit some members of the public concerned certain limited rights – like a basic annulment right to challenge a negative EIA screening decision – the fact that these members of the public concerned (as opposed to others, who were parties) were excluded from prior participation in the procedure and could thus have no impact on that procedure itself, and who have only a very limited time to become acquainted with the files in order to mount a legal challenge that has even a reasonable chance of success, raises the question of whether such a right fulfils either the principle of effectiveness or the principle of equivalence, or article 9, paragraph 4 of the Convention.
94. It seems to us, moreover, that the CJEU in the *Brown Bears II* decision went some ways towards answering this latter question. At any event, it is clearly an article 9, paragraph 4 case. As such, its omission in the sections dealing with remedies is most problematic.
95. We appreciate the Notice expressly addresses the issue of interim measures, but we suggest more could be said here as this is a huge problem in a number of Member States. Indeed, our own brevity on this point should in no way suggest that this is a marginal issue: It is in many Member States *the* central problem, which undercuts what could in principle be otherwise good and robust laws. Rather we will not comment at length at this point because it seems the Notice itself seems to recognize the gravity of this problem. To put the matter succinctly: There can be no justice where after years of litigation an NGO seeking to protect the environment “wins on paper” but the highway has already been built, the forest cut down. In this respect the ACCC’s findings are again quite helpful.<sup>121</sup>

<sup>120</sup> Sharpston’ Opinion in C-664/15 at 75, citing Trianel at point 77

<sup>121</sup> See e.g. C-76 (Bulgaria), paras. 69-78

## H. On Section C.5 “Costs”

96. We find this section – similar to the earlier section on article 9, paragraph 3 – illustrates the drawbacks of relying on a conservative approach based on CJEU case-law, of which there is relatively little. In addition, the CJEU’s most recent case on this topic, case C-470/16, requires national courts to differentiate the costs associated with arguments related to public participation provisions from those associated with other provisions of national or EU environmental law. This reasoning fails to give adequate weight to the predictability of costs for prospective applicants and goes against the objective of the widest possible access to justice in environmental matters. We think elaboration based on the Guide and ACCC findings, and using best practices would be of tremendous help to practitioners.
97. In terms of the legal limitations in this section: At points there seems to be a blurring of the criteria that, according to the CJEU “must” be taken into account and those which only “may” be taken into account. For example, the Notice (at para. 187) lists subjective elements which *must* be taken into account – including “the financial situation of the person concerned” and “the importance of what is at stake for the claimant and for the protection of the environment”, along with those which *may* be taken into account, such as “whether the claimant has a reasonable prospect of success” and “the potential frivolous nature of the claim at its various stages”. This could well lead to considerable confusion for practitioners.
98. Finally, while we appreciate that the Notice acknowledges in one sentence (para. 183) that “the cost of evidence and experts’ fees” is an issue related to the consideration of whether costs are prohibitive, in light of our earlier comments and the problems identified in the EIR reports for AT and DE, we think this issue merits a more detailed, engaged and forward-looking approach.

## I. On Section C.6 “Time Limits, Timeliness and the Efficiency of Procedures”

99. As indicated above, we feel that the issue of time limits should be included in an entirely new and separate section devoted to fairness and equitable issues. If this issue is to also remain in this section, then we strongly recommend adding a sentence to clarify that this is truly a separate point to the timeliness of court procedures. As written, this section (in particular paras. 197-198) could be read to suggest that the timeliness of court procedures is dependent on claimants bringing timely complaints and/or that delays or deficiencies in this regard can be attributed to the claimants, whereas this particular article 9, paragraph 4 issue really concerns the expediency of the court and administrative procedures, the handling of the complaint, once taken up. In this regard, while we would point out the desirability of expedient procedures, we have concerns that too short review procedures could have negative impacts on the quality of judicial review.
100. At any event, the CJEU’s opinion in *Protect*, discussed *supra*, that rules of preclusion according to which a potential party might lose such status as a party to the decision-making administrative proceedings and, as a result, also lose certain rights to judicial appeal, do not necessarily fall afoul of article 9, paragraph 4, should be included here. It should however be emphasized, as the Court took care to explain, that such rules must be transparent and fair,

not just on their face but also as to application, and that they must be assessed on a case-by-case basis.

101. Finally, we are concerned regarding the bald statement that the requirement that procedures be timely is not sufficiently clear and unconditional to be directly applicable. Should there be support for this statement, it should be included.

## **CONCLUDING REMARKS**

102. Justice and Environment is deeply committed to achieving the full implementation of access to justice rights in environmental matters within the Member States. Pursuant to our mandate and mission, we aim with the above comments to highlight both the achievements and the shortcomings in the Commission's Notice.
103. Our comments reflect not only our knowledge of the applicable EU law and the Aarhus Convention, but also more than a decade of experience as to how these provisions are actually implemented (or not) at the Member State level. While we believe that major achievements in implementation have occurred, we have clear evidence that significant gaps remain.
104. We hope that the Notice can help to close these gaps, and can work against certain negative trends in terms of environmental democracy occurring in some Member States. In this regard, we hope that our comments can aid the Commission, Member States, stakeholders, and the public at large in ensuring that the third pillar of the Convention is finally implemented.

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*The following organizations would like to signal their support for these comments:*



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