

Public Toolkit on Access to Justice

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The Conditions of Legal Standing in Environmental Matters

I. Access to justice concerning requests for access to environmental information

It is significant that, under both the Aarhus Convention and the Environmental Information Directive there are no standing requirements linked to citizenship, residence or centre of activities. Article 6 of the Environmental Information Directive states that "any applicant" for access to environmental information must have access to a review procedure. The term "applicant" is defined very simply in Article 2(5) of the Directive, as "*any natural or legal person requesting environmental information.*"

II. Access to justice concerning public participation rights

The Commission Notice defines standing as "*the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant regarding the legality of a decision, act or omission of a public authority*".¹ The central question to be answered is accordingly which natural and legal persons have such an entitlement under EU law.

First, it should be noted that neither the Aarhus Convention nor EU law prevents Member States from allowing everyone to challenge decisions related to specific activities without distinction.² Some EU Member States come close to this, for example the right to *actio popularis* in Portugal³ and Latvia.⁴ Nevertheless, most Member States have rules restricting standing to certain categories of persons. Therefore, it is important to understand when restrictions to standing comply with the Aarhus Convention and EU law, and when such restrictions go beyond what is allowed.

As a minimum, Article 9(2) AC requires standing to be granted to persons and NGOs meeting the following criteria: They must be a member of the "public concerned", which is defined in Article 2(5) AC and they must either have "a sufficient interest" or maintain "impairment of a right".

It should be noted that these criteria are replicated word for word in the EIA Directive, the IED and are referred to in the Seveso III Directive.

Public concerned

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

¹ Commission Notice, para. 58.

² Aarhus Convention Implementation Guide, page 194.

³ See Aragão, A. "Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Portugal", available at: http://ec.europa.eu/environment/aarhus/access_studies.htm.

⁴ Aarhus Convention Implementation Guide, page 195.

According to Article 9(2), the "public concerned", provided they meet further criteria discussed below, have the right to challenge the acts and omissions referred to in section 2 above. The term is defined in Article 2(5) AC. According to the Implementation Guide, it "*refers to a subset of the public at large who have a special relationship to a particular decision-making procedure*" by virtue of the fact that they are affected or likely to be affected by, or have an interest in, the decision to be taken.⁵

The Aarhus Committee has confirmed that the question of whether a person has been affected or is likely to be affected depends on the nature and size of the activity in question. For example "*the construction and operation of a nuclear power plant may affect more people within the country and in neighboring countries than the construction of a tanning plant or a slaughterhouse.*"⁶ Indeed, the Implementation Guide suggests that the public concerned may be as many as several hundred thousand people across several countries for the construction of nuclear power plants. This was the subject of the Committee's findings against the UK concerning the construction of nuclear power station, Hinkley Point C. The Committee first clarified that, "*the public may be concerned either because of the possible effects of the normal or routine operation of the activity in question or because of the possible effects in the case of an accident or other exceptional incident, or both.*"⁷ It also pointed out that this is the case even where the risk of an accident occurring is very small.⁸ In addition, the activity in question, "*may not only impact the measurable factors, such as the property or health of the public concerned, but also less measurable aspects, like their quality of life.*"⁹ Therefore, when determining the public concerned, the magnitude of effects of an accident must be taken into account, including possible range of adverse effects and the perceptions and worries of persons living within the possible range.¹⁰ The Committee therefore recommended that, in identifying the public concerned by the decision-making on ultra-hazardous activities, the UK should take into account the precautionary principle and the potential effects if an accident were indeed to occur, even if the risk thereof is small.¹¹

Regarding whether a person has an interest, the Aarhus Committee has confirmed that, "*whether members of the public have an interest in the decision-making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity.*"¹² For example, tenants whose social and environmental rights are impaired by a specific activity should be considered as coming within the definition of 'the public concerned', despite their property rights being unaffected.

In addition, the Implementation Guide notes that Article 2(5) makes no distinction between a factual and a legal interest and accords them the same status.¹³ This was confirmed by the Aarhus Committee in its decision against the UK regarding Hinkley Power Plant C: "*the notion of having an interest in the environmental decision-making should include not only members of the public whose legal interest or*

⁵ Aarhus Convention Implementation Guide, page 57.

⁶ ACCC/C/2010/50 (Czech Republic), para 66.

⁷ ACCC/C/2013/91 (United Kingdom), ECE/MP.PP/C.1/2017/14, para 73.

⁸ Ibid, para 75.

⁹ Ibid, para 73.

¹⁰ Ibid, para. 75.

¹¹ Decision VI/8k of the Meeting of the Parties, ECE/MP.PP/2017/2/Add.1, para. 8(b).

¹² ACCC/C/2010/50 (Czech Republic), para. 66

¹³ Aarhus Convention Implementation Guide, page 57.

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). It may also include, as is the case in many jurisdictions, persons who have expressed an interest in a given case without having stated any specific reason for their interest."¹⁴

*The Implementation Guide further states that, "[b]ecause article 9, paragraph 2, is the mechanism for enforcing rights under article 6 however,...it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access to justice provisions in article 9, paragraph 2."*¹⁵ This is only logical because a person that participates in a public participation procedure under Article 6 AC has clearly shown "interest" and should therefore also be considered to form part of the "public concerned" and have access to the courts under Article 9(2) AC.

Sufficient interest or impairment of a right

Article 9(2): What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

If the status of public concerned can be demonstrated, there may still be a requirement under national law that the party wishing to challenge a decision, act or omission relating to a specific activity can demonstrate either sufficient interest or impairment of a right. Article 9(2) states, "*What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.*" Thus, the State Parties' discretion in defining the criteria for standing is constrained by the requirement of giving the public concerned wide access to justice within the scope of the Convention.¹⁶ According to the Aarhus Committee, "*[t]his means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under article 1, 3 and 9 of the Convention.*"¹⁷

Notably, Article 3(9) AC provides that the public shall have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities. This Requirement shall be discussed in more detail in the context of NGOs as members of the public concerned.

¹⁴ ACCC/C/2013/91 (United Kingdom), para 74.

¹⁵ Aarhus Convention Implementation Guide, page 58.

¹⁶ ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 33.

¹⁷ ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para. 61 and ACCC/C/2010/50 (Czech Republic), para 75.

Sufficient interest

Under an interest-based approach, Member States may impose general requirements regarding the interest of the applicant.¹⁸ However, these requirements must not effectively bar access to justice. To illustrate this, the Aarhus Committee has held that a general requirement that *“the decision affects him adversely and is subject to appeal”* is permissible, as long as it is not interpreted in a way that excludes individuals *“who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit decision.”*¹⁹ In addition, the Aarhus Committee specified that the applicable criteria must not depend on one isolated factor, in this case distance from the permitted activity.²⁰ It follows that Member States must consider all relevant aspects of a specific act/omission that could affect the interest of an applicant and not limit it to only certain isolated factors, be it distance to an activity or another aspect.

Impairment of a right

The Commission's Notice on Access to Justice in Environmental Matters rightly identifies that the application of standing criteria which relate to the impairment of a right, *“has presented challenges because environmental protection usually serves the general public interest and does not usually aim at expressly conferring rights on the individual.”*²¹ The Commission notes that criteria relating to a sufficient interest are generally less problematic.

Indeed, the application of criteria which follows a rights based approach has given rise to a number of Aarhus Committee findings and CJEU case-law.

Case ACCC/C/2010/48 concerned a communication submitted by an NGO, Ökobüro, against, among other things, the Austrian standing rules which apply to individuals who wish to challenge permits subject to the EIA Directive and (what is now) the IED. The Austrian system follows a rights based approach for individuals and Ökobüro objected to the fact that only “neighbours” may challenge the permitting procedures to the extent that the activities affect their private well-being or their property. The Aarhus Committee considered whether the definition of “neighbours” in the relevant Austrian law was consistent with the objective of giving wide access to justice. It found that the definition should not limit persons who are temporarily in the vicinity of the proposed project, such as tenants or workers. Although it did not have the necessary evidence to adopt a finding on this question, the Committee found that Communication raised serious concern as to how the Austrian law on standing may be interpreted and applied and urged the Courts to interpret the provision in accordance with the objectives of the Convention.²² In case ACCC/C/2010/50, the Aarhus Committee noted that, *“if Czech courts systematically interpret section 65 of the Administrative Justice Code in such a way that the “rights” that have been “created, nullified or infringed” by the administrative procedure refer only to property rights and do not include any other possible rights or interests of the public relating to the*

¹⁸ ACCC/C/2005/11 (Belgium), para. 40, ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 31, ACCC/C/2013/81(Sweden), ECE/MP.PP/C.1/2017/4, para. 85.

¹⁹ ACCC/C/2013/81(Sweden), paras 86-87. Although this communication was decided on the basis of Article 9(3) AC, it is equally applicable to the context of Article 9(2) AC.

²⁰ Ibid, para. 101.

²¹ Commission Notice, para 102.

²² ACCC/C/2010/48 (Austria), para. 63.

*environment (including those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention”.*²³

In the context of the EIA Directive, the CJEU has recognised that "*Member States have a significant discretion to determine what constitutes ‘sufficient interest’ or ‘impairment of a right’*".²⁴ Nevertheless, that discretion is qualified by the need to ensure respect for the objective of ensuring wide access to justice for the public concerned.²⁵ In addition, the provisions on legal standing should not be interpreted restrictively.²⁶

The rights based approach has traditionally also been applied in Germany. As discussed in more detail in the context of scope of review in section 3.1 above, in *Trianel*²⁷, the Court found that it was consistent with (what is now) Article 11 of the EIA Directive that the standing of individuals is limited to the public law rights that have been impaired, while this is not the case for NGOs (the particular case of NGOs is discussed in more detail in section 4.6 below). However, the Court of Justice has in some instances drawn a line where it considers national standing rules to be overly restrictive. As also discussed in more detail in section 3.1 above, in *Altrip*²⁸ the Court of Justice considered the German requirement that, for the relevant court to recognise impairment of a right in order to challenge a decision on the basis of a procedural defect, the applicant had to prove that the contested decision would have been different without the procedural defect invoked. The Court found that, Member States could only maintain such a system if the national court could establish "*without in any way making the burden of proof of causality fall on the applicant [...] that the contested decision would not have been different without the procedural defect invoked by that applicant.*"²⁹ This was not the case in Germany, where the burden of proof was on the applicant. This was confirmed by the Court of Justice in *European Commission v Germany*.³⁰

It is regrettable that both the CJEU and the Aarhus Committee have not gone further in restricting the Member States' discretion to afford standing to individuals on the basis of impairment of a right. The risk is that standing is not provided to persons whose rights are likely to be impaired. Thus, Member States should take a more expansive approach to the rights that are capable of being impaired by decisions and failures to act with respect to specific activities. The Commission makes reference to such an approach in its Notice on Access to Justice, which states: "*EU environmental law does not establish a general right to a healthy and intact environment for every individual. However, a natural or legal person may have obtained the right to use the environment for a specific economic or non-profit activity. An example could be an allocated and acquired fishing right in specific waters. This may give rise to the need to challenge any decision, act or omission which impacts that specifically allocated right to use the environment.*"³¹

²³ ACCC/C/2010/50 (Czech Republic), para. 76.

²⁴ C-115/09 *Trianel*, para 55; C-72/12, *Gemeinde Altrip*, para 50; and C-570/13 *Gruber*, para 18.

²⁵ C-570/13 *Gruber*, para 39

²⁶ *Ibid* para 40.

²⁷ C-115/09, *Trianel*

²⁸ C-72/12, *Gemeinde Altrip*

²⁹ C-72/12 *Gemeinde Altrip*, para. 52.

³⁰ C-137/14 *European Commission v Germany*, para. 60.

³¹ Commission Notice, para 55.

Indeed, as the Commission Notice acknowledges, the Birds Directive and the Habitats Directive in particular "*refer to a broad range of possible uses of nature, including recreational pursuits (such as hunting), research and education. For these different uses, it is reasonable to suppose that, besides interests, issues concerning rights could also come to the fore.*"³²

Advocate General Bobek seems to support such an approach in his opinion on *Gert Folk*.³³ When considering the standing criteria in the Environmental Liability Directive (discussed in Chapter 3, section 3.2.1), he emphasised that a holder of fishing rights should be considered as having a right capable of being impaired.

Prior participation in the decision-making process

As mentioned above, according to the Implementation Guide, prior participation in the decision-making process leading to the adoption of a decision on a specific activity indicates that a person is a member of the public concerned. However, the inverse situation, that to have standing to challenge a decision a person must have participated in the decision-making process, is too restrictive to comply with Article 9(2) AC. In any case, as a matter of EU law, Member States may not restrict standing to those members of the public concerned who participated in the decision-making process leading to the adoption of the contested decision. In *Djurgården*, in the context of the access to justice provisions of the EIA Directive, the Court of Justice held that, "*participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.*"

³⁴ The Aarhus Committee concurred, stating that: "*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.*"³⁵

Standing for NGOs - NGOs as the public concerned

The definition of "the public concerned" in Article 2(5) AC includes NGOs promoting environmental protection provided they meet any requirements under national law. According to the Aarhus Committee, "*[w]hether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including, but not limited to, the provisions of its statutes and its activities.*"³⁶ Environmental protection is understood as any purpose consistent with the "implied definition of environment found in article 2, paragraph 3" of the Convention.³⁷ In this respect, the Committee has stated that the German requirement for NGOs to demonstrate that the challenged decision affects the NGO's objectives, as defined in its by-laws, is compatible with the Convention.³⁸

³² Ibid, para 56.

³³ AG Bobek opinion on case C-529/15, *Folk*, ECLI:EU:C:2017:419, para 77. For further discussion of this point, please see "Comments on the Commission's Notice on Access to Justice in Environmental Matters", Justice & Environment, March 2018.

³⁴ C-263/08 *Djurgården*, para. 38.

³⁵ ACCC/C/2012/76 (Bulgaria), ECE/MP.PP/C.1/2016/3, para. 68. See also Report of the Compliance Committee to the sixth Meeting of the Parties on compliance by Armenia, ECE/MP.PP/2017/33, paras. 58-59.

³⁶ ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 81.

³⁷ Aarhus Convention Implementation Guide, page 57.

³⁸ ACCC/C/2008/31 (Germany), para. 72.

State Parties to the Convention may then define further requirements, which must be satisfied by NGOs in order to have standing. For example, in Germany there is a requirement that for NGOs to be recognised as members of the public concerned, they must be set up in the legal form of an association, which effectively requires them to be membership organisations.³⁹ The Commission Notice on Access to Justice cites other examples, including the requirements to demonstrate the independent or non-profit-making character of the organisation, or a minimum duration of existence.⁴⁰

But how much discretion do governments have in setting such requirements? The Aarhus Committee has stated that any requirements must not be inconsistent with the principles of the Convention, meaning that they should be "*clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.*"⁴¹ The Implementation Guide develops this principle, stating that such discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation⁴² and the clear requirement of article 3 (4) AC, to provide "appropriate recognition" for NGOs.⁴³ This means that, "*Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention's principles, such as non-discrimination and the avoidance of technical and financial barriers.*"⁴⁴ The Implementation Guide suggests some examples of further requirements that would not be consistent with the Convention, for example a requirement for NGOs to have been active in a specific country for a certain number of years, for the reason that it may discriminate against foreign NGOs in breach of Article 3(9) AC.⁴⁵

In *Djurgarden*, the Court of Justice found that a Swedish standing requirement for NGOs to have at least 2,000 members went beyond the limits of the State's discretion because it effectively barred all but two NGOs in Sweden from the courts. The Court held that: "*While it is true that Article 10a of Directive 85/337 [now Article 11 of the EIA Directive], by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organization which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice', and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent*

³⁹ This requirement is currently the subject of a communication to the ACCC made by WWF, an environmental NGO that does not meet this requirement and is therefore refused standing under Article 9(2) - ACCC/C/2016/137 (Germany)

⁴⁰ Commission Notice, para 80.

⁴¹ ACCC/C/2009/43 (Armenia), para. 81.

⁴² This role was explicitly recognised by the ACCC in its findings on communication ACCC/C/2004/05 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, when it found that "Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public.

⁴³ Aarhus Convention Implementation Guide, page 58.

⁴⁴ Ibid.

⁴⁵ Ibid.

courts"⁴⁶. "The number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope"⁴⁷.

The Commission Notice notes that these considerations apply to all requirements which NGOs must meet to be considered members of the public concerned.⁴⁸

Sufficient Interest or impairment of right - *de lege* standing for NGOs

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

NGOs that meet the criteria in Article 2(5) AC and any national requirements discussed above automatically have standing under Article 9(2) AC and the EU legislation that transposes it. This is because they are deemed to have sufficient interest or to have rights capable of being impaired so that they do not have to satisfy any further requirements. This is often referred to as *de lege* standing for NGOs.

The Aarhus Committee considered the Belgian rules on standing as applied to NGOs seeking to challenge decisions falling under Article 9(2) AC.⁴⁹ NGOs had previously been refused standing because the Belgian courts had applied the general criteria for standing, meaning that they had to show a direct, personal and legitimate interest as well as a "required quality". Therefore, the Aarhus Committee found that the criteria, as applied by the Belgian courts, was too restrictive to meet the requirements of the Convention. However, since the case law cited by the communicant pre-dated Belgian ratification of the Convention, the Committee found that there would only be a breach if the same reasoning continued in future case law.

In the *Trianel* case, the Court of Justice made it clear that, although the EIA Directive allows Member States to require individuals to demonstrate the impairment of an individual public law right to have standing, this cannot be required of NGOs recognised as the public concerned.⁵⁰ It also confirmed that when challenging a decision under the EIA Directive, NGOs may rely on infringements of EU law which protect the general interest. The CJEU has also recognised *de lege* standing for NGOs in the context of EU environmental legislation which does not contain specific provisions on access to justice. In *Slovak Bears II*⁵¹, the Court of Justice found that environmental organisations meeting the requirements of Article 2(5) to be recognised as a member of the public concerned, must be able to challenge a decision taken on the basis of the Habitats Directive not to carry out an appropriate assessment of the implications for a Natural 2000 site of a specific plan or project, as well as such an assessment to the extent that it is vitiated by errors. The Court held that this right derives from Article 47 CFR read in conjunction with Article 9(2) AC. As noted in the Commission Notice, this reasoning is capable of being

⁴⁶C-263/08, *Djurgarden*, para. 45.

⁴⁷ *Ibid*, para 47.

⁴⁸ Commission Notice, paragraph 77.

⁴⁹ ACCC/C/2005/11 (Belgium)

⁵⁰ C-115/09 *Trianel*, para 45. See also section 3.1 above.

⁵¹ C-243/15 *Lesoochránárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II)*.

applied to decisions falling within the scope of other EU environmental directives without access to justice provisions⁵² - this would include for instance decisions relating to water and waste management.

Non-discrimination against foreign NGOs

Article 3(9) AC: *"the public shall have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities."*

The consequence of Article 3(9) AC is that the conditions applied to NGOs to have *de lege* standing must not prevent or render it excessively difficult for a foreign NGO to obtain that status.⁵³ This is particularly important where a specific activity has a transboundary impact. There is no specific CJEU case law on this issue as of yet. The Aarhus Committee has adopted so far one finding of non-compliance with Article 3(9) of the Convention concerning a law of Turkmenistan which prohibited foreigners to be founders and members of a registered association, while at the same time preventing unregistered associations to work in Turkmenistan.⁵⁴ The combined effect of these provisions had been that foreign environmental NGOs could not be active in Turkmenistan. As mentioned above, the Implementation Guide moreover suggests that a requirement for environmental NGOs to have been active in a specific country for a certain number of years might not be consistent with Article 3(9) AC.⁵⁵ Also, even the requirement "to have been active" in itself might not comply, for example in countries that have permitted recently established NGOs to have standing. The provision should prevent Member States from requiring NGOs to have their centre of activities in a certain geographic location, or for NGOs to be established in accordance with specific national laws.

III. Access to justice concerning acts, decisions and omissions impacting on the environment

In accordance with Article 9(3) AC, the right is granted to *"members of the public [...] where they meet the criteria, if any, laid down in [...] national law"*.

Members of the public

Article 2(4) AC defines the "public" as *"one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups."* This definition encompasses both individuals and organizations, such as NGOs. As the Implementation Guide clarifies in this regard: *"[...] associations, organizations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad*

⁵² Commission Notice on Access to Justice, para. 70.

⁵³ Commission Notice on Access to Justice, paras 82 and 83.

⁵⁴ ACCC/C/2005/5 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, paras. 16 and 21. While the specific issue raised in this communication has been addressed in the meanwhile, given concerns that Turkmenistan had reintroduced equivalent restrictions through other acts, review of the implementation on this requirement continues based on a request of the Meeting of the Parties under file no. ACCC/M/2017/2 (Turkmenistan).

⁵⁵ Aarhus Convention Implementation Guide, page 58.

access to its rights.”⁵⁶ A common aspect of Articles 9(1), 9(2) and 9(3) AC is the non-discrimination obligation under Article 3(9) of the Convention. Accordingly, an individual or an association, organization or group shall be accorded standing without discrimination as to citizenship, nationality or residence (or registered seat or effective centre of activities as regards legal persons). Nevertheless, individuals and entities based in another country must still comply with the standing criteria laid down in national law.

Criteria, if any, laid down in national law

While the phrasing “criteria, if any” allows the Parties a certain discretion as to who has standing, it can in no circumstance allow a Party to define criteria in such a way as to effectively exclude all or almost all members of the public. To that end, the Aarhus Committee has established a test to ascertain compliance with Article 9(3), as best summarized in its findings on communication ACCC/C/2008/31 (Germany): *“Unlike Article 9, paragraphs 1 and 2, Article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (actio popularis) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as Article 9, paragraph 3, should be read in conjunction with Articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (emphasis added).*⁵⁷

This general statement of the Committee applies to any kind of criteria that needs to be met by an individual or an organization seeking to challenge a specific act or omission. Such “criteria” can be distinguished from any provisions concerning the acts and omissions subject to challenge, for which there is no discretion (see section 1 above). So what are the criteria that can be imposed? In this regard, Article 9(2) AC is certainly instructive. For one, States may impose criteria based on having a sufficient interest or on the infringement of a right (see chapter 2, section 4]). Moreover, States may impose certain “formal” criteria to be met by NGOs (i.e. related to their constitution, experience etc.). Some of the relevant statements of the Aarhus Committee in this regard are discussed first to provide an idea of the criteria imposed by States, before turning to the implementation in EU law.

Sufficient interest (Interest based approach)

As discussed above, under an interest based approach, standing is granted to anyone who can show that the act or omission (sufficiently) affects his or her interests. Member States may impose general

⁵⁶ Implementation Guide, p. 55.

⁵⁷ ACCC/C/2008/31 (Germany), para. 92. See also ACCC/C/2005/11 (Belgium), paras. 34–36; ACCC/C/2006/18 (Denmark), paras. 29–30; ACCC/C/2008/32 (European Community) (Part I), paras. 77–80; ACCC/C/2010/48 (Austria), paras. 51 and 68–70; ACCC/C/2010/50 (Czech Republic), para. 85 and ACCC/C/2011/58 (Bulgaria), para. 65.

requirements to substantiate the applicant's interest in the measure being challenged.⁵⁸ However, such criteria must consider all relevant aspects of a specific act/omission that could affect the applicant's interest and must not be limited to certain isolated factors, be it a requirement for residence within a certain distance from an activity or similar.⁵⁹

Infringement of a right (Rights based approach)

As discussed above, under a rights based approach, access to court is granted if the act or omission in question has the potential to infringe the applicant's subjective rights. As highlighted by the Aarhus Committee in its findings on communication ACCC/C/2008/31 (Germany), a strict application of an impairment of rights approach would imply non-compliance with Article 9(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*".⁶⁰ The Aarhus Committee emphasized that such an approach almost always bars environmental NGOs from accessing review procedures, as their subjective rights are generally unaffected, given that they engage in litigation in order to protect the public interest in environmental protection.⁶¹ Rights-based systems will therefore usually require the adoption of specific standing provisions or the recognition by the courts that environmental NGOs possess specific rights in the field of environmental law and therefore must have standing where these rights are infringed. In Germany, these considerations have led to the introduction (and subsequent amendment) of the Environmental Appeals Act.⁶² Whether or not the Act in its current form covers all acts/omissions that can contravene national law relating to the environment, the approach of adopting a specific act that gives NGOs a separate legal basis for standing is certainly one useful approach to implementing Article 9(3) AC. The decisive challenge will be to cover all acts/omissions that can contravene national law relating to the environment.

Formal criteria for NGOs

A State may also impose express criteria for NGOs, comparable to those in Article 9(2) AC.⁶³ For example, the Aarhus Committee did not object to the requirements that members of an association demonstrate that their purpose is to promote nature conservation or environmental protection, that they have been active for three years in the Member State concerned and that they have at least 100 members or otherwise have "*support from the public*".⁶⁴ However, the Aarhus Committee will also scrutinize any such conditions on a case-by-case basis if the issue arises in a communication.⁶⁵

⁵⁸ ACCC/C/2005/11 (Belgium), para. 40, ACCC/C/2006/18 (Denmark), para. 31, ACCC/C/2013/81 (Sweden), para. 85.

⁵⁹ ACCC/C/2013/81 (Sweden), paras. 86-87.

⁶⁰ *ibid*, para. 94.

⁶¹ *Ibid*, para. 94

⁶² See the ACCC's Report to the Meeting of the Parties on compliance by Germany with its obligations under the Convention (ECE/MP.PP/2017/40) for a discussion of the implementation of Article 9.3 AC by the Environmental Appeals Act and recent amendments, available online at: <

https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_40_E.pdf>, paras. 31-65.

⁶³ Under Article 9(2) AC, Parties "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" to bring a challenge (based on Article 2(5) AC). This is comparable to Article 9(3) AC, which gives standing to associations, organizations and group which meet the criteria, if any, laid down in national law. A difference arises only from the fact that 9(2) AC concerns non-governmental organizations while 9(3) AC also encompasses associations and groups, so also for the latter any restrictions to their right to bring proceedings (i.e. criteria) must be justified.

⁶⁴ ACCC/C/2013/81 (Sweden), para. 85.

⁶⁵ See in this regard the documentation on the currently pending communication ACCC/C/2016/137 (Germany), which has been declared admissible at the 61st Committee meeting: <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2016137-germany.html>.

Implementation in EU law

Under EU law, **the right to access review procedures derive from two sources**. The first is where there is a specific access to justice provision in a directive. In the context of Article 9(3), there is currently only one example, the Environmental Liability Directive (ELD). The second is where EU environmental legislation bestows procedural and substantive rights on individuals and NGOs, which can be enforced in courts. In this area, the CJEU has provided guidance through its case law.

Standing in case of (imminent threat of) damage to protected species, land and water - Environmental Liability Directive (ELD)

Article 12(1) of the ELD gives natural or legal persons meeting one of the three alternative criteria the right to request the public authorities to take action against environmental damage. Article 13 ELD then gives these persons access to courts to challenge “decisions, acts and omissions of the competent authority” under the ELD. The persons referred to in paragraph 12(1) are natural or legal persons: “(a) affected or likely to be affected by environmental damage or
(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,
(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,”⁶⁶

Criteria (b) and (c) are, in their formulation, almost identical to the criteria for standing defined in the EIA Directive and Article 9(2) AC discussed in the previous chapter. The Commission Notice suggests that the case law on standing under these provisions should therefore be taken into account in interpreting the criteria in Article 12(1)(b) and (c) ELD.⁶⁷ Criterion (a), provides that “*the right to a review procedure for those persons affected or likely to be affected by environmental damage*”,⁶⁸ does not allow Member States the same margin of discretion as criteria (b) and (c). This was clarified by the CJEU in *Folk* when it held: “*Although the Member States have discretion to determine what constitutes a ‘sufficient interest’, a concept provided for in Article 12(1)(b) of Directive 2004/35, or ‘impairment of a right’, a concept laid down in Article 12(1)(c) of that directive, they do not have such discretion as regards the right to a review procedure for those persons affected or likely to be affected by environmental damage, as follows from Article 12(1)(a) of that directive.*”⁶⁹

The Court accordingly held that: “*An interpretation of national law which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage resulting in an increase in the mortality of fish, although those persons are directly affected by that damage, does not respect the scope of Articles 12 and 13 and is thus incompatible with that directive*” (emphasis added).⁷⁰

⁶⁶ Article 12(1)(a)-(c) ELD.

⁶⁷ Commission Notice, para. 89. See also Jan Darpö, “The EU Commission’s Notice on access to justice in environmental matters” (2017) *Journal of European Environmental and Planning Law* 373 at 382, available online at: <<http://jandarpö.se/articles-reports/>>.

⁶⁸ C-529/15 *Folk*, para. 47.

⁶⁹ *Ibid*, para. 47.

⁷⁰ *Ibid*, para. 49.

Under Article 12(1)(a) ELD, the only factor is, accordingly, the effect or likely effect of the environmental damage on the applicant. Member States are not permitted to impose any additional requirements. This is therefore to be distinguished from the situation under Article 11 of the EIA Directive and Article 9(2) AC because, under the ELD, Member States are not allowed to make the standing of persons conditional on them possessing a legal interest or a right that can be infringed.

Standing based on directly effective provisions of EU environmental law

The CJEU has identified a number of directly effective provisions of EU environmental law that are enforceable in national courts. Yet, in the absence of specific EU rules regulating access to justice in relation to these provisions, it is in principle left to the domestic legal systems of the Member States to lay down the detailed rules on standing.⁷¹ Nevertheless, there are clear limitations to Member States' procedural autonomy in defining standing criteria on the basis of the principle of effective judicial protection and Article 9(3) AC.

As the Commission's Notice states, "*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*".⁷² Examples of procedural and substantive rights that individuals and natural persons derive from EU environmental legislation have been listed in the previous section.

Therefore, the natural or legal persons holding rights conferred by EU environmental law must have standing to rely upon them before national courts. In this regard, the CJEU has held that "*it would be incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned*".⁷³ Taken together with the principle of effective judicial protection as reflected in article 4(3) TEU and article 19(1) TEU, the CJEU has held that individuals or, where appropriate, a duly constituted environmental organization must be able to rely on directives that have the aim of protecting the environment in legal proceedings. In a series of rulings, the CJEU held that NGOs and natural persons must have standing to challenge:

- air quality plans, or the lack thereof, in breach of the Air quality Directive (C-237/07 *Janecek* and C-404/13 *ClientEarth*);
- permits under the NEC Directive (*Stichting*⁷⁴); and
- derogations under the Habitats Directive (*Slovak Bears*⁷⁵)
- permits adopted under the Water Framework Directive (*Protect*⁷⁶).

For instance, in *ClientEarth* the CJEU held that: "[...] *natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent*

⁷¹ C-240/09 *Lesoochranárske zoskupenie*, (*Slovak Bears I*), para. 47. This is based on long-standing case law of the CJEU. See for instance, C-268/06 *Impact* [2008] ECR I-2483, paras. 44 and 45.

⁷² Notice, para. 95. This statement is based on the Implementation Guide, p. 197 and ACCC/C/2006/18 (Denmark).

⁷³ C-243/15 *Slovak Bears II*, para. 44; and C-664/15 *Protect*, para. 34.

⁷⁴ Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*.

⁷⁵ C-240/09 *Lesoochranárske zoskupenie*, (*Slovak Bears*).

⁷⁶ C-664/15 *Protect*

*authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies [with the Air Quality Directive] [...]*⁷⁷

Based on this statement, the Brussels first instance court issued an interim judgment on 17 December 2017 holding that any resident of an area or zone where air quality values are exceeded is to be considered as “*directly concerned*”.⁷⁸ This line of reasoning has the potential to apply to other directly effective provisions of EU environmental law that have not already been the subject of a preliminary reference before the CJEU.

In its case law, the CJEU does not further restrict this category of natural and legal persons who derive rights from EU environmental law. It has made clear that environmental organizations derive rights from EU environmental law,⁷⁹ as do individual complainants.⁸⁰ The category of persons who derive such rights is therefore very broad.

In two preliminary references that focused specifically on standing for NGOs before national courts, the Court clarified how these CJEU rulings concretely affect the procedural autonomy of Member States to set specific criteria for standing.

In the *Slovak Bears* case, the CJEU specifically relied on Article 9(3) AC and Article 47 CFR for the first time. It initially noted the lack of EU legislation implementing Article 9(3) AC across the EU⁸¹ and found that Article 9(3) was not sufficiently precise and unconditional to have direct effect. Despite these factors, it held that national procedural law must be interpreted, so far as possible, in a manner that is consistent with the objectives of Article 9(3) AC that is to provide standing to NGOs.

The Court held that: “*it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European environmental law*”.⁸²

Regarding the question of whether Article 9(3) AC has direct effect, the judgment is certainly questionable. The provision is precise and unconditional as regards the “*acts and omissions*” that can be challenged and concerning the basis for the challenge, i.e. “*national law relating to the environment*.” The Aarhus Committee has moreover confirmed that with regard to these elements, the AC does not give any discretion.⁸³ Moreover, the existence of a certain discretion to implement

⁷⁷ C-404/13 *ClientEarth*, para. 56.

⁷⁸ See <https://www.clientearth.org/preliminary-question-from-belgian-court-provides-opportunity-to-set-binding-precedent-on-the-right-of-citizens-and-ngos-to-enforce-air-quality-monitoring-rules/>.

⁷⁹ See for instance C-240/09, *Lesoochranárske zoskupenie*, (*Slovak Bears I*), para. 52 and C-664/15 *Protect*, paras. 45, 54, 87, 92 and 98 referring to “rights conferred by” EU law on NGOs.

⁸⁰ C-237/07, *Janecek* was a case brought by an individual living in the vicinity of an air quality measuring station.

⁸¹ C-240/09, *Lesoochranárske zoskupenie*, (*Slovak Bears*), paras. 40-41.

⁸² *Ibid*, para 51.

⁸³ ACCC/C/2008/32, (European Union), (Part II), para. 52.

the provision, as introduced by the reference to “national criteria”, has not previously prevented the Court from finding that a provision is sufficiently precise and unconditional to have direct effect. As already discussed above, the national court must then assess whether this discretion was adequately exercised.⁸⁴

Nevertheless, *Slovak Bears* confirmed that EU law requires national courts to interpret their national procedural law in accordance with Article 9(3) AC. This makes the findings of the Aarhus Committee directly relevant in determining the content of this EU law obligation.

The *Protect* judgment clarified that Article 9(3) of the Convention, “read in conjunction with Article 47 of the Charter of Fundamental Rights, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law.”⁸⁵ The Court has further held that the right to an effective remedy and a fair hearing under Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection.⁸⁶ 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 in compliance with Article 9(3) AC and Article 47 of the Charter but also that 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.”⁸⁷

Resulting degree of discretion for Member States to impose “criteria” for standing

Three clear conclusions can be drawn from the decisions of the Aarhus Committee and the CJEU:

1. Standing as the assumption, restrictions must be justified

As the Court has clarified in *Protect*, the right to an effective remedy under Article 47 CFR presupposes the ability to enter into judicial proceedings. This is similar to the recognition of the Aarhus Committee that access to justice should not be the exception but the rule. Accordingly, any “precondition” imposed on “natural or legal person directly concerned” constitutes a limitation to the right to an effective remedy and must be justified under the conditions of Article 52(1) of the Charter.⁸⁸ Such limitations must meet the formal criteria of Article 52(1) CFR, namely: (a) they must be provided for by law, (b) they respect the essence of that law, (c) they are necessary, subject to the principle of proportionality, and (d) they genuinely meet the objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others.⁸⁹ In *Protect*, the criterion concerned was the requirement that an NGO needed to file observations within a certain period of time in order not to lose its status as “party to the proceedings” and accordingly its right to obtain access to court. Because the NGO had been factually prevented from submitting comments as a “party to the proceedings” it had also been prevented from having access to justice. The Court found that this was an unacceptable restriction of the right to an effective remedy. While this case concerned an NGO and

⁸⁴ Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*, para. 97.

⁸⁵ C-664/15 *Protect*, para. 45.

⁸⁶ C-73/16 *Puškár*, EU:C:2017:725, para. 59 and C-664/15 *Protect*, para. 87.

⁸⁷ C-664/15 *Protect*, para. 56

⁸⁸ *Ibid*, para. 90.

⁸⁹ *Ibid*. para. 90 and, by analogy, C-73/16 *Puškár*, paras 61-71.

a very specific national rule, the requirement would equally apply with regard to any precondition on access to courts.

2. Criteria may not exclude categories of claimants (both NGOs and individuals)

Moreover, as the CJEU held in *Protect*, “Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of ‘members of the public’, a fortiori ‘the public concerned’, such as environmental organisations that satisfy the requirements laid down in Article 2(5) AC, were to be denied of any right to bring proceedings.”⁹⁰ As noted above, the term ‘members of the public’ is defined broadly. It also includes private persons, as well as “the public concerned”, which is defined as the “public affected or likely to be affected by, or having an interest in, the environmental decision-making”. Accordingly, private persons and, a fortiori, persons affected or likely to be affected or otherwise having an interest in the alleged breach are “categories of the members of the public”, which may not be denied of the right to bring proceedings. The judgment in *Protect* went on to analyse the situation of NGOs as one of these “categories of ‘members of the public’”. It found that criteria on standing imposed by national law “must not deprive environmental organisations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those organisations is to defend the public interest.”⁹¹ Accordingly, standing of environmental organizations may not be restricted to cases in which the individual interests or rights of its members are affected or violated. Rather, environmental organizations must be able to base their standing rights on defending the public interest. This is a fundamental point, in particular in Member States that have adopted a rights based approach to standing. It is very clear that a Member State is not in compliance with Article 9(3) of the Convention if “all NGOs acting solely for the purposes of promoting environmental protection are excluded” from obtaining redress,⁹² nor is it permissible to exclude all natural persons from challenging an act or omission.⁹³ Thus, when criteria are designed and imposed, they must not be so strict that it would effectively be impossible for these categories of the members of the public to contest acts or omissions falling under Article 9(3) AC.⁹⁴

3. Prior participation in a permit proceeding as a precondition for standing other than under Article 9(2) of the Aarhus Convention and the EIA and SEA Directives

In the *Protect* case the CJEU had to decide whether the NGO right of standing should be assessed in light of their right to and actual participation in a permit proceeding. The Court ruled that a requirement that a party must raise its objections in a timely manner during the administrative procedure, and no later than the oral phase, to not lose its status as “party to the proceedings”, and thus be able to challenge a decision, is not in principle contrary to Article 9(3) of the Aarhus Convention.⁹⁵ The Court then held, however, that in the specific case such a requirement could not be applied because the applicant’s right to become a party to the proceedings in the first place was not

⁹⁰ C-664/15 *Protect*, para. 46.

⁹¹ *Ibid*, para. 47.

⁹² ACCC/C/2005/11 (Belgium), paras. 35 and 39 and ACCC/C/2008/32 (European Union) (Part II), para. 73.

⁹³ ACCC/C/2008/32 (European Union) (Part II), para. 93.

⁹⁴ C-664/15 *Protect*, para. 48. Note that in this paragraph the Court refers to “environmental organizations” but, as mentioned above, the case more generally refers to “members of the public and, a fortiori, the public concerned” (para. 46), which are both categories that also include natural persons.

⁹⁵ C-664/15, *Protect*, para. 82.

adequately ensured.⁹⁶ Therefore, this requirement was not in compliance with Article 9(3) and 9(4) AC read in conjunction with Article 47 of the Charter.⁹⁷ As stated above, the Aarhus Committee has held that 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.*”⁹⁸ It is, therefore, doubtful whether such a requirement as recognized in the *Protect* case could ever comply with Article 9(3) AC.

⁹⁶ *Ibid*, paras. 95-96.

⁹⁷ *Ibid*, para. 101.

⁹⁸ ACCC/C/2011/58 (Bulgaria), para. 68. See also Committee’s report on ACCC/C/2004/8 (Armenia), paras. 58-59 (https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_33_E.pdf).