**Access to Courts in Environmental Matters**

**Legal Standing of NGOs**

**8 October 2013**

Alexandra Aragão

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**Part I – Introduction**

- **Part II – Law in the books (EU law on access to justice)**
- **Part III – Law in action (MS conditions for legal standing)**
- **Part IV – Implementing Aarhus**
- **Part V – The role of NGOs**
- **Part VI – Mandatory reference to the ECJ**

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**Part I - Introduction**

1. **Locus standi**
2. Public perception on access to justice and environment
3. NGO idiosyncrasy

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**Legal Standing – Locus Standi**

- Right to act before a Court/Forum and represent rights and/or interests.
Legal Standing – Locus Standi

Right to act before a Court/Forum and represent rights and/or interests.

Ability of a person to demonstrate to the court

Legal Standing – Locus Standi

Right to act before a Court/Forum and represent rights and/or interests.

Ability of a person to demonstrate to the court

sufficient connection to

the law/action/omission challenged

Legal Standing – Locus Standi

Right to act before a Court/Forum and represent rights and/or interests.

Ability of a person to demonstrate to the court

sufficient connection to

the law/action/omission challenged to support that person’s participation in the case.

... opposite to...

- Restrict *locus standi*
- Complex and opaque requirements for standing in court

- ‘Actio popularis’
- Anyone has the right to sue when they think that the law was not respected

2. Public perception on access to justice and environment
### Special Eurobarometer 195

**October 2004**

#### Q. 49: Who do you trust when it comes to environmental issues? (SHOW CARD – READ OUT – MAX. 3 ANSWERS POSSIBLE)

<table>
<thead>
<tr>
<th>PROPOSITIONS</th>
<th>EU15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental protection associations</td>
<td>48</td>
</tr>
<tr>
<td>Scientists</td>
<td>35</td>
</tr>
<tr>
<td>Consumer associations and others citizens’ organisations</td>
<td>23</td>
</tr>
<tr>
<td>Television</td>
<td>18</td>
</tr>
<tr>
<td>European Union</td>
<td>13</td>
</tr>
<tr>
<td>National government</td>
<td>12</td>
</tr>
<tr>
<td>Teachers at school or university</td>
<td>12</td>
</tr>
<tr>
<td>Regional/local government</td>
<td>11</td>
</tr>
<tr>
<td>Political parties standing for environment (Greens, etc.)</td>
<td>10</td>
</tr>
<tr>
<td>Newspapers</td>
<td>9</td>
</tr>
<tr>
<td>Family/neighbours/friends/colleagues</td>
<td>7</td>
</tr>
<tr>
<td>None of them (SPONTANEOUS)</td>
<td>7</td>
</tr>
<tr>
<td>DK</td>
<td>6</td>
</tr>
<tr>
<td>The radio</td>
<td>4</td>
</tr>
<tr>
<td>Trade Unions</td>
<td>2</td>
</tr>
<tr>
<td>Companies</td>
<td>1</td>
</tr>
</tbody>
</table>

#### Q. 47: In your opinion, which of the following would make it possible to most effectively solve environmental problems? (SHOW CARD – READ OUT – MAX. 3 ANSWERS POSSIBLE)

<table>
<thead>
<tr>
<th>PROPOSITIONS</th>
<th>EU15</th>
</tr>
</thead>
<tbody>
<tr>
<td>Making national/European Union regulations stricter, with heavy fines for offenders</td>
<td>48</td>
</tr>
<tr>
<td>Setting general environmental standards</td>
<td>45</td>
</tr>
<tr>
<td>Better enforcement of existing environmental legislation</td>
<td>43</td>
</tr>
<tr>
<td>Only caging those who cause environmental problems</td>
<td>36</td>
</tr>
<tr>
<td>Making environmental NGOs/associations seeking to protect the environment more visible in discussions about protecting the environment</td>
<td>24</td>
</tr>
<tr>
<td>Higher financial incentives to industry, commerce and to citizens</td>
<td>18</td>
</tr>
<tr>
<td>Making everyone pay more in taxes, prices, etc. to cover environmental costs</td>
<td>7</td>
</tr>
<tr>
<td>campuses, etc.</td>
<td></td>
</tr>
<tr>
<td>None of these (SPONTANEOUS)</td>
<td>9</td>
</tr>
</tbody>
</table>

#### Table: The environment is an issue beyond my control as an individual

| COUNTRIES | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 |
|-----------|----|-----|----|----|----|----|----|----|----|----------|------|----|----|-----|----|----|----|----|----|----|----|--------|------|----|----|-----|----|----|----|----|----|----|-----|-----|--------|------|
| DK        | 39 | 32  | 29 | 30 | 30 | 30 | 30 | 30 | 30 | 30       | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   |

#### Table: My actions can make a real difference to the environment

| COUNTRIES | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 |
|-----------|----|-----|----|----|----|----|----|----|----|----------|------|----|----|-----|----|----|----|----|----|----|----|--------|------|----|----|-----|----|----|----|----|----|----|-----|-----|--------|------|
| DK        | 39 | 32  | 29 | 30 | 30 | 30 | 30 | 30 | 30 | 30       | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   |

#### Table: None of these (SPONTANEOUS)

| COUNTRIES | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 | UK | DK | NLD | GR | IE | PT | ES | FI | NO | SE | UK TOTAL | EU27 |
|-----------|----|-----|----|----|----|----|----|----|----|----------|------|----|----|-----|----|----|----|----|----|----|----|--------|------|----|----|-----|----|----|----|----|----|----|-----|-----|--------|------|
| DK        | 39 | 32  | 29 | 30 | 30 | 30 | 30 | 30 | 30 | 30       | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   | 30 | 30 | 30  | 30 | 30 | 30 | 30 | 30 | 30 | 30     | 30   |
3. NGO idiosyncrasy

Atitudes towards legal remedies
(Some NGOs undervalue legal actions or at least are not keen at using legal remedies).
Preferred methods:
- campaigning,
- demonstrations,
- lobbying,
- direct negotiation,
- blockages,
- sabotage,
- etc..

Others

- Focus mainly on direct and active intervention on nature conservation, habitat restoration, pollution abatement.
- Act as experts producing opinions to be used in court (Technical Assistance NGO - TANGO)

Greenpeace victories

May 2013: Greenpeace applauds a decision from New Zealand fishing brand Sealord to remove a destructing fishing method from its supply chain of canned skipjack tuna by early 2014 and urges the wider industry to follow suit. Sealord’s announcement is of great significance to the international Greenpeace campaign for sustainable tuna fishing and means all the big Australasian tuna brands have committed to phase out FAD-caught tuna.

March 2013: The Supreme Court in Scotland denied Cairn Energy a permanent injunction against Greenpeace International following a Greenpeace UK protest at Cairn’s headquarters in July 2011.

• March 2013: VW have caved in to pressure from across the globe and announced they will meet and support climate targets. VW has now publicly agreed to live up to its promises to be the world’s greenest car company, setting an example for the rest of the industry.

• January 2013: The biggest global fashion brand based in Asia, Uniqlo, and its parent company Fast Retailing Group, today committed to eliminate all releases of hazardous chemicals throughout its entire global supply chain and products by 2020, in response to Greenpeace’s global Detox campaign.
December 2012: The world’s largest denim brand, Levi’s, committed to eliminate all releases of hazardous chemicals throughout its entire supply chain and products by 2020, following public pressure in response to Greenpeace’s global Detox campaign.

December 2012: One of Australia’s leading canned fish manufacturer, John West (Simplot) has pledged to stop using destructive fishing methods that needlessly kill sharks, rays, baby tuna and turtles. The commitment means that John West will phase out the use of highly destructive and wasteful Fish Aggregating Devices (FADs) used with purse seine nets by 2015.

December 2012: The government of South Korea has abandoned its plans to begin a “scientific” whaling operation, a significant step forward in global efforts to protect whale populations. The proposed hunt would have caught minke whales for commercial purposes under the thin veil of scientific research. More than 100,000 people from around the world sent messages in the last month to the South Korean prime minister, asking him to call off the hunt.

September 2012: Australian Federal Environment Minister, Tony Burke has announced a ban on the Margiris super trawler for up to two years and further scientific investigations before boats like this are approved. Burke acknowledged overwhelming public concern in reaching this significant decision. Congratulations to the thousands of passionate Australians, community and environmental groups and fishing groups who stopped the Margiris from destroying Australia’s oceans.

Greenpeace also congratulated the Gillard government for showing the courage to prevent the Abel Tasman super trawler fishing in Australia’s waters. Greenpeace hailed it as a victory for the Australian community which has united to reject this monster ship. The decision also sends a message to the global super-sized fishing fleets that world community opposition is growing to their unsustainable business model.

August 2012: World Intellectual Property Organization (WIPO) has denied the complaint by Neste Oil over Greenpeace spoof site. The WIPO panel declared that Greenpeace may use the domains www.nestepool.com and www.nestepoolreturns.com to criticize Neste Oil’s use of palm oil as biofuel. The WIPO panel confirmed that non-commercial criticism is part of the freedom of expression. According to the panel Greenpeace did not use the sites to unnecessarily tarnish Neste Oil. In similar cases even harsh criticism has not been considered as tarnishing. The Panel concluded that Greenpeace had been using the sites to raise legitimate environmental concerns for non-commercial purpose.

February 2012: The countless hours spent scouring legal documents, appearing in court and enduring what must have been trying exchanges with the federal Department of Fisheries and Oceans (DFO) by our awesome lawyers at Ecowjustice has all paid off. The long time legal case came to a close in a precedent setting victory for B.C.’s threatened and endangered resident killer whales. After years of facing threat after threat, and population declines, these iconic creatures certainly needed a win. The Federal Court of Appeal upheld the 2010 ruling that guaranteed the protection of killer whale habitat by law under the Species at Risk Act (SARA). The Appeal Court’s ruling was an uncommonly strong judgment, and a controversial one for DFO after the court awarded Greenpeace costs noting that the Minister of Fisheries and Oceans’ behaviour had been “worthy of rebuke.”

February 15, 2007: In a major blow to the UK government’s plans to reinvigorate nuclear power, the High Court rules their decision to back a programme of new nuclear power stations was unlawful on the basis that they had failed to adequately consult citizens and groups who oppose nuclear power as a dangerous distraction from real solutions to climate change.

Part I – Introduction

Part II – Law in the books (EU law on access to justice)

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Part IV - Implementing Aarhus

Part V – The role of NGOs

Part VI – Mandatory reference to the ECJ
PART II – Law in the books

**Part II – Law in the books: EU law on access to justice**
1. Fundamental provisions
2. Aarhus convention
3. EU directives
4. Proposal of a Directive on access to justice

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**EU law on access to justice**

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**1. Fundamental provisions**

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**Charter of Fundamental Rights of the European Union - Article 47(1)**

*Everyone* whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

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**EU Treaty Article 19(1)**

Member States shall provide remedies sufficient to ensure effective legal protection [*to everyone*] in the fields covered by Union law.
Article 15 of the Treaty on the functioning of the EU

1. In order to **promote good governance and ensure the participation of civil society**, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The Aarhus Convention

Preamble

“wide access to justice”

§ 5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and **wider access to justice** in environmental matters than required by this Convention.

Article 2 n.5 **DEFINITIONS**

“For the purposes of this Convention,

• ‘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”.

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NGOs shall be deemed to have an interest
... est reçu d’avoir un intérêt
... gilt als ein Interesse
... se considerará que tienen un interés
... si considera di avere un interesse
... deve ser considerada como tendo um interesse

Presumption
assumption based on reasonable evidence

JUDGMENT OF THE COURT on Case C-260/11, Edwards (11 April 2013)

«(...) members of the public and associations are naturally required to play an active role in defending the environment»

Article 9 ACCESS TO JUSTICE
• 1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
• In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
• Final decisions under this paragraph shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.

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

• 3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
• 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

• 5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 9
obligations on access to justice to...

1. ... protect access to information rights
2. ... protect public participation rights
3. ... uphold laws relating to the environment in general

... by NGOs

3. EU directives

1. Access to information
2. EIA, IPPC
3. Liability

DIRECTIVE 2003/4/EC of 28 January 2003 on public access to environmental information

Article 2 Definitions

• For the purposes of this Directive:
• 6. ‘Public’ shall mean one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.
Article 6 Access to justice

- 1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

- 2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

- 3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

Preamble

- Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including inter alia by promoting environmental education of the public.

DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice

PUBLIC

- 1. For the purposes of this Article, ‘the public’ shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.
- \( = \) Participation \( = \) EIA \( = \) IPPC
- (dir 2003/35) (dir 2011/92) (dir 2008/1)
### EIA directive - Article 10a §6
What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

### IPPC Directive – Article 15a §6
- What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

### Assessment of the effects of certain public and private projects on the environment = EIA
**DIRECTIVE 2011/92/EU (13 December 2011)**

### EIA DIRECTIVE (85/337+1996+2009)= 2011/92
**Preamble**
«Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.»

**Article 1(2) c)**
e) 'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

### Article 11
1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively;
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;
have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
• 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
• 3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.


Preamble
• Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including by promoting environmental education of the public.

Article 2º/14
• ‘the public’ means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

Article 2/15
• ‘the public concerned’ means the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, nongovernmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 16 Access to justice
• 1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive when:
  • (a) they have a sufficient interest; or
  • (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.
• 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.
3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a).

Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b).

Preamble

25) Persons adversely affected or likely to be adversely affected by environmental damage should be entitled to ask the competent authority to take action.

Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Non-governmental organisations promoting environmental protection should therefore also be given the opportunity to properly contribute to the effective implementation of this Directive.

Article 12 request for action

1. 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, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a 'sufficient interest' and 'impairment of a right' shall be determined by the Member States. To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

Article 13 Review procedures

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

4. Proposal for an EU directive on access to justice
Proposal for a
DIRECTIVE OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
on access to justice in environmental
matters
COM(2003) 624 final
24.10.2003

Preamble

• Entities active in the field of environmental protection which meet certain conditions should have access to environmental proceedings in order to challenge the procedural and substantive legality of administrative acts and omissions which contravene environmental law. The object of the review procedures brought by these entities must fall within the field of their statutory activities.

Article 2 Definitions

• "member of the public" means one or more natural or legal persons and in accordance with national law, associations, organisations or groups made up by these persons;
• "qualified entity" means any association, organisation or group, which has the objective to protect the environment and is recognised according to the procedure laid down in Article 9;

Article 4 Legal standing of members of the public

1. Member States shall ensure that members of the public have access to environmental proceedings, including interim relief, in order to challenge the procedural and substantive legality of administrative acts and administrative omissions in breach of environmental law where:
   (a) they have a sufficient interest, or
   (b) they maintain the impairment of a right, where the administrative procedural law requires this as a precondition.
Applications for interim relief shall not be subject to compliance with the procedure laid down in Article 6.
2. Member States shall determine, in accordance with the requirements of their law and with the objective of granting broad access to justice, what constitutes a sufficient interest and an impairment of a right for the purposes of paragraph 1.

RESULTS OF THE CONSULTATIONS WITH THE INTERESTED PARTIES
Two meetings took place with non-governmental organisations in May and September 2002. These meetings allowed to examine the ideas contained in the working documents that concern the directive and written comments were also sought for.
Non-governmental organisations maintained a totally opposite position from the one stated by Member States during the consultation procedure. Thus, non-governmental organisations wanted a more forward-looking proposal since from their point of view it constrains the field of application of the Århus Convention, mainly as far as the legal standing issue is concerned.
They expected a much broader provision and asked for a general legal standing without restrictions, known as "actio popularis". The Commission does not share this point of view since the "actio popularis" is not explicitly required by the Århus Convention and must be therefore left to Member States.
Article 8 Criteria for recognition of qualified entities

• In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group shall comply with the following criteria:
• (a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment;
• (b) it must have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives;
• (c) it must have been legally constituted and worked actively for environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which it is constituted, but not exceeding three years;
• (d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c).

Article 9 Procedure for recognition of qualified entities

1. Member States shall adopt a procedure to ensure an expeditious recognition of qualified entities where they meet the criteria set out in Article 8, either on a case by case basis (“ad hoc”), or under an advance recognition procedure. Where a Member State opts for an advance recognition procedure it shall ensure that there is also a possibility for an expeditious "ad hoc" recognition.

2. Member States shall determine the competent authority or authorities responsible for recognition.
3. Member States shall ensure that where a request for recognition has been rejected this decision can be reviewed in courts or another independent and impartial body established by law.
4. Member States shall lay down the detailed provisions of the recognition procedure.
**Part III – Law in action:** Conditions found in MS practice
1. Conditions relating to the person
2. Conditions relating to the case/procedure
3. Other obstacles on access to justice

**Legal standing**
Conditions found in MS practice

**National criteria of legal standing.**
Who can file a lawsuit?

<table>
<thead>
<tr>
<th>Subjective criteria</th>
<th>Objective criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criteria relating to the <strong>person</strong> claiming standing</td>
<td>Criteria relating to the <strong>case</strong> or the <strong>procedure</strong> where standing is claimed</td>
</tr>
</tbody>
</table>

1. **Conditions regarding the person**
   (non governmental organization)

**Conditions regarding the organization**

1. **Legal status**
   Association, foundation...
   Local activist groups without the statute of legal persons
   Partnerships: local activist groups that are not legal persons (2 or more persons agree to contribute to the achievement of a mutual objective established in a contact).
   Informal groups can be considered as NGOs if they can prove to represent a significant part of the local population (obtain signatures of local individuals) (in Austria, citizen’s groups of at least 200 persons)

- Legal status
- Character
  - Statutory goal
  - Time of activity
    - Number of members
    - Geographic area of operation
  - Formal and transparency requirements
    - Funding
    - Results and output
## Conditions regarding the organization

### 2. Character
- Non commercial
- Non profit
- Non political (party NGO - PANGO)
- Not struggle for political power
- Not trade unions
- Independent form public authorities (government operated NGO - GONGO)

### 3. Statutory goal
- Nature conservation
- Environmental protection
- Protection of a specific environmental aspect
- Health protection (as long as health can be impaired by the degradation of environmental conditions)
- Land use (as long as environmental impacts result from certain land uses)
- Human rights (as long as the right to a clean healthy and safe environment is a human right)

### 4. Time of activity
- 3 years...
- 5 years...

### 5. Number of members
- 2000
- At least 2

### 6. Geografic area of operation
- Big International NGO (BINGO)
- National (whole territory)
- Local (the same that is affected by the act)

### 7. Formal and transparency requirements
- Procedure to grant the status
- Register in a database
- Submit to (and pay) a financial audit
Conditions regarding the organization

8. Funding
Have account records audited
Be funded by membership fees (at least in part)
Not donor organized NGO (DONGO)
Spend most of the funds in nature conservation/environment protection

9. Results and output
Having contributed significatively for nature conservation
Merely environmental activities: environment protection (what about educational activities, training, expertise, advice, merchandising?)

Conditions regarding the case/procedure

2. Conditions regarding the case/procedure

1. Formalistic interpretation of *locus standi*

   NGOs only have standing where the law expressly says so: EIA, IPPC, environmental liability.

2. Must be a party

   - Must have participated during administrative procedure (=be a party)
   - A party is person who files an application for an administrative decision, or to whom the decision is addressed.
   - Notification of a violation (even of a crime) does not grant the quality of party.
### Conditions regarding the case/procedure

#### 3. Must be an environmental procedure/case
- If the development consent decision/permit is issued by a different Minister or administrative authority (not environmental) it is not considered to be an environmental procedure
- (Ex. Minister of agriculture or forestry and not the Minister of environment authorises raising wild pigs to free them in the forest for hunters)

#### 4. Limited typology of acts subject to review
- Development consent
- Environmental licence
- EIA
- Environmental agreement
- Building permit
- Waste management authorisation
- (In some MS) must have ‘environment’ in the name.

### Conditions regarding the case/procedure

#### 5. Scope of admissible arguments
- Impairment of procedural rights.
- NGOs cannot raise objections to the merits of the act or omission (namely claim that the development consent decision or permit breaches environmental laws like emission limits, prohibitions of activities in certain areas, etc) These are not “personal rights”. (art 9/3).
- NGOs can only claim infringement of procedural rights (access to information, enough time to express opinion, right to be heard during administrative proceedings)
  These are their only subjective rights (art 9/1 and 9/2)

#### Argument: The right to a favourable environment (life, health protection) can only belong to natural persons and not to legal persons who cannot breathe or drink.
- Counter-argument: But NGOs do have members and they can act to defend their members rights.

### Consequences...

**If NGOs have no substantive rights which can be harmed...**

1. Can never meet the conditions of suspensive effect;
2. Cannot ask for injunctive relief;
3. Must focus on the procedural errors of the administrative bodies, rather than on the essence of the dispute.
4. Can be accused of formalism and obstruction to justice.

**NGOs have substantive rights**

«La nomenclature des préjudices environnementaux»
Nomenclature of environmental damages (Laurent Neyret and Gilles Martin)

Environmental damages

To soil, air, water, species, and their functions

Damages to the environment

Collective damage

To ecological services: regulation, supply and cultural services

To the environmental protection mission

Individual damage

Nomenclature of environmental damages (Laurent Neyret and Gilles Martin, 2012)

Economic damage:

1. Costs arising from:
   - Prevention measures
   - Limitation measures
   - Reparation measures
   - Communication measures
   - Other costs (court fees, expert fees, etc)

2. Offences to goods
3. Losses of expected profit

Moral damage

1. Damage to the brand image or reputation
2. Loss of enjoyment

Nomenclature of environmental damages (Laurent Neyret and Gilles Martin)

Individual 1

Economic damage:

1. Costs arising from:
   - Prevention measures
   - Limitation measures
   - Reparation measures
   - Communication measures
   - Other costs (court fees, expert fees, etc)

2. Offences to goods
3. Losses of expected profit

Nomenclature of environmental damages (Laurent Neyret and Gilles Martin)

Individual 2

Moral damage

1. Damage to the brand image or reputation
2. Loss of enjoyment

Individual damage

Economic damage:

1. Costs arising from:
   - Prevention measures
   - Limitation measures
   - Reparation measures
   - Communication measures
   - Other costs (court fees, expert fees, etc)

2. Offences to goods
3. Losses of expected profit

Nomenclature of environmental damages (Laurent Neyret and Gilles Martin)

Damage to the environmental protection mission

- Offences to the collective (diffuse) interests protected by the public or private persons in charge of environmental protection.
- This damage comes from the destruction of efforts undertaken to accomplish the mission by a damage or an imminent threat to the environment.

3. Other obstacles on NGO access to justice
• Only certain remedies are available
• Namely, no injunctive relief in cases of threats of irreparable damage, no challenge of acts and omissions of private persons (horizontal review)
• No appeal to Highest Courts
• Access to Courts of cassation (that abolish decisions if there are severe legal errors)
• Higher costs
• Must pay a deposit or bond, when asking for injunctive relief, to cover any compensation for damage or loss caused by the injunctive relief
• Looser pays principle
• Uncertainty about costs can also be also prohibitive
• Shorter deadlines

Part I – Introduction
Part II – Law in the books (EU law on access to justice)
Part III – Law in action (MS conditions for legal standing)
Part IV – Implementing Aarhus
Part V – The role of NGOs
Part VI – Mandatory reference to the ECJ

PART IV - Implementing Aarhus:

1. Limits on MS conditions for legal standing

1. Limits on MS conditions for legal standing

Part IV – Implementing Aarhus
1. Limits on MS conditions for legal standing
2. Case law of the ECJ

Aim of the conditions
• To guarantee the effectivity of its [NGO] existence and activity – Djurgarden 2009, §47
Limits to the conditions

- Limit 1: equivalence principle (slovak bears 2011, § 48)
- Limit 2: effectivity principle (slovak bears 2011, §48)
- Limit 3: Not excessively difficult or impossible in practice (slovak bears 2011 §49)
- Limit 4: transparency - Conditions for legal standing must be transparent (displayed or communicated clearly and early in the procedure)

MS can establish reasonable conditions BUT the conditions cannot be such that are impossible to attain in practice and empty the contents of the rights conferred by the convention

<table>
<thead>
<tr>
<th>Number of members</th>
<th>• Ok, but not 2000 (must be a reasonable number considering the size of population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Previously constituted</td>
<td>• OK, but not 4 years before (must be a reasonable time)</td>
</tr>
<tr>
<td>Costs</td>
<td>• Ok, but not prohibitive</td>
</tr>
</tbody>
</table>

2. Case law of the ECJ on access to justice

- **Djurgården, Sweden**
  - ECJ C-263/08 ECJ2009
  - NGO: Djurgården-Lilla Vårlands Miljöskyddsförening
  - Appealing against: project to draw-off groundwater leaking into tunnel for power cables and infiltration of water into the ground

- **Brown bears, Slovakia**
  - ECJ C-240/09 ECJ 2011
  - NGO: Lesoochranárske zoskupenie VLK
  - Appealing against: administrative proceedings brought by various hunting associations requesting derogations to the system of protection for species (Brown bear), access to protected countryside areas and use of chemical substances in such areas

- **Trianel, Germany**
  - ECJ C-115/09 ECJ 2011
  - NGO: Bundesverband Umwelt und Naturschutz Deutschland Landesverband Nordrhein-Westfalen eV
  - Appealing against: authorisation granted to “Trianel Kohlekraftwerk GmbH & Co. KG” for the construction and operation of a coal-fired power station in Lünen.

**Djurgården**

Swedish Law reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

The Miljöskyddsförening appealed against that decision before the Environmental Appeal Chamber of the Svea Court of Appeal, but that appeal was held to be inadmissible on the ground that the Court of Appeal had not fulfilled the condition of having at least 2 000 members to be entitled to appeal against environmental judgments and decisions.
Questions raised by the national court

• Is it possible that «small, locally established environmental protection associations have a right to participate» in the decision-making procedures referred to in Article 6(4) in respect of projects which may have significant effects on the environment in the area where the association is active but do not have a right of appeal?»

ECJ conclusions

The law may set conditions of access to court by NGOs at the national level, namely:
1. The association must have «as its object the protection of nature and the environment» (46)
2. The association «must have a minimum number of members» (47)

Objective of conditions:
To ensure that the environmental protection association «does in fact exist and that it is active»(47)

Answer

• Must have both participation and appeal rights

• Why?

Court reasoning and justification

• Argument 1.
  «Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with» (50)

• Argument 2.
  There is the risk that «the associations entitled to bring an appeal [large NGOs] might not have the same interest in projects of limited size» (51)

Court reasoning 3

• Argument 3.
  «the large NGOs] «would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review» (51)
  Argument 4.
  «such a system [of filtration of cases by large NGOs] would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention». (51)

Conclusion 1

• (39) The members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.
  • (45) 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 courts
General conclusion

- The national rules must not pose the risk of rendering meaningless the 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 courts. (regardless of size)

Brown bears  Slovakia

C-240/09 ECJ2011

Slovak law

- (16) An association having legal personality is to be regarded as a ‘participant’ in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of ‘participant’ confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

Who is an applicant?

- Any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority.
- Any natural or legal person not appearing at the administrative proceedings but whose presence, as a party to the proceedings has been requested.

Question

- May an environmental protection association be a ‘party’ to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear? (37)

Previous question

- Direct applicability of aarhus
Reasoning

• A provision in an agreement concluded by the European Union (…) must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. (44)

Conclusion: Aarhus is not directly applicable

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

Argument 1

• However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.
• (…) the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence)
• and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness). (48)

Conclusion

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

Consequence

• “It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law”. (52)
Article 1 of Directive 2003/35 is worded as follows:

- Article 1 of Directive 2003/35 is worded as follows:
- “the public concerned” means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

German Law

- (23) Paragraph 61 of the Law on nature protection and countryside conservation (Bundesnaturschutzgesetz, BGBl. 2002 I, p. 1193) provides:
- ‘(1) Independently of any impairment of its own rights, a… recognised association may bring actions in accordance with the [VwGO] challenging 1. Exemptions from prohibitions and requirements intended to protect nature conservation areas, national parks and other protected areas established under Paragraph 33(2) and
- 2. Planning approval decisions concerning projects which entail an encroachment on nature and the countryside, together with planning permits, where public participation is provided for

Question

- (34) Does Article 10a of Directive 85/337 … require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?

Interpretation

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

Why?

- (53) In that regard, it should first of all be borne in mind that the Member States’ obligation under a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, to that effect, Case C-555/07 Küçükdeveci [2010] ECR I-365, paragraph 47 and the case-law cited).

In fact...

- (55) It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought.
**BUT**

- The same is not true, however, of the provisions laid down in the last two sentences of the third paragraph of Article 10a of Directive 85/337. (56)
- By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired, those provisions lay down rules which are precise and not subject to other conditions. (57)

**Conclusion 1**

- (...) Non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this. (59)

**Conclusion 2**

- EU Law (art 10A) “precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals”.

**Conclusion 3**

- Such a non-governmental organisation can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, as amended, on the infringement of the rules of national law flowing from Article 6 of Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.
Part V – Role of NGOs

1. Strong points
2. Risks

Access to justice: balancing the role of NGOs
A S/W analysis

JUDGMENT OF THE COURT on Case C-260/11, Edwards (11 April 2013)

«(...) members of the public and associations are naturally required to play an active role in defending the environment»

1. Strong points

Strong points
- 1. Nature does not have a voice
- 2. Altruist actions
- 3. Motivation to act beyond NIMBY cases
- 4. Independent from economic interests
- 5. Diffuse control
- 6. When there is no actio popularis private persons very often do not have the right to sue. Therefore, disregards of environmental laws could remain unpunished.
- 7. Professional guardians (watch dogs act quickly: suspension effect procedures, interim relief)
- 8. Scientific expertise and technical knowledge
2. Risks

- Unreasoned claims
- Unnecessary litigation
- Bad faith litigation
  - dilatory strategies to waste time
  - requests for injunction when the conditions are clearly not met
  - unfair trials based on fraudulent evidence
  - SLALULU (strategic litigation to avoid LULUs)
  - SL bananas

CONSEQUENCE:
- Overloading of courts
- More lengthy procedures

Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2013) 160 final

‘The EU Justice Scoreboard’

(A tool to promote effective justice and growth)
Role of the judge

- Not directly applicable, so the judge...
- Cannot simply set aside national law
- Cannot use the convention to integrate a lacunae
- But...
- Must interpret the national law ‘to the fullest extent possible’

Is there an act on access to justice for NGOs?

YES, but it is considered to be contrary to EU Law /Aarhus convention (>2000 members, national not regional NGO…)

OBSTACLE: It cannot be set aside by the court and replaced by the European regime of broad access (that would be direct effect)

SOLUTION: But it can and it must be interpreted in accordance with EU law/Aarhus convention (can have 2000 members in the future…)

NO, but there is an act on access to justice in general.
SOLUTION: it must be interpreted in accordance with the general objectives of EU law/convention.

Part VI – Mandatory reference to the ECJ

1. General rule on referencing to the ECJ
2. Exceptions
1. General rule on referencing to the ECJ

General rule
Any national judicial organ (court/tribunal...) against whose decisions there is no judicial remedy in domestic law, is under the obligation to refer to the ICJ wherever a question is raised in a pending case and the answer is necessary for the court to reach a decision.

2. Exceptions

Exceptions
- A Court may not refer a case to the ECJ if...
  - 1. Acte clair
    - 2. Acte aclairé
  - 3. Irrelevance

1. Acte clair
- Even the highest courts are not obliged to refer although the question has never been answered by the Court of Justice before, as long as the answer to that question is beyond all doubt.

1. Acte clair
- Even the highest courts are not obliged to refer although the question has never been answered by the Court of Justice before, as long as the answer to that question is beyond all doubt.
- The national court can declare that “the act is clear” provided that he convinced that the matter is equally obvious both to the courts of (all) other Member States and to the Court of Justice, considering that:
  - A) the interpretation of a provision of EU law involves a comparison of the different language versions of the provision concerned;
  - B) concepts used by EU law do not necessarily have the same meaning in the laws of all the Member States.

(Cilfit Case 283/81)
2. Acte aclairé

• Even the highest court is not under an obligation to refer if the question raised has already been answered in an earlier judgment by the Court of Justice.

3. Irrelevance

• Even the highest court is not under an obligation to refer if the national court believes that although the norm relied on by the parties is not clear, its interpretation or the validity is irrelevant considering that it is not applicable to the case

• (for reasons of timing, nature of the parties, object of the case, etc.)