

ERA Workshop for Judges :
National Judges and the Aarhus Acquis - focus on Access to
Justice

Dr Christina Olsen Lundh
Judge
Land- and environmental court, Vänersborg

3RD PILLAR OF THE AARHUS CONVENTION: ACCESS TO JUSTICE

Right to bring a legal challenge (legal standing)



With the support of the "Cooperation with National Judges in the field of Environmental Law" programme of the EU

My name is Christina Olsen Lundh and normally I work as a judge at the land- and environmental court of Vänersborg in Sweden. For the moment I'm on leave from the court, working with a governmental enquiry on species protection. I'm very happy to be here to day, among colleagues. My presentation will be about legal standing. The right to bring a legal challenge to court. Which is more or less, the right to get inside the court.

Right to bring a legal challenge (legal standing)

- Legal standing - locus standi
- Categories of legal standing rights
- Explicit provisions for legal standing under the EU substantive environmental law
- *Locus standi* for the environmental NGOs
- CJEU case law



Christina Olsen Lundh
2019

I will deal with the concept of legal standing, different categories of legal standing rights, the explicit provisions for legal standing under EU substantive environmental law, legal standing for environmental NGO:s and some case law from the EU court of justice. My basis, when trying to figure out what to say has been the Commission Notice on Access to Justice in Environmental Matters from 2017.

C(2017) 2616 final

 The Aarhus Convention		
Pillar I Access to information A 4&5	Pillar II Public participation A6-8	Pillar III Access to justice A9
A passive obligation; provide information on requested	Decision-making concerning activities in Annex I and activities which may have a significant effect on the environment	Denied information A 9 (1)
An active obligation; provide an adequate flow of information	Decision making concerning plans and programmes	Decision-making concerning specific activities (subject to public participation) 9 (2)
	Executive regulations and generally applicable legal instruments	Violation of provisions of the national law relating to the environment 9 (3) Including: Requests for action under the environmental liability rules Other subject-matter, including national implementing legislation

I know you've seen this several times yesterday. The three pillar structure of the Aarhus convention.

I'm only showing it to tell that for the next two hours, we will spend our time in the third pillar.

Access to Justice

- Is intrinsic to EU Environmental law
- Draws upon fundamental principles of EU law that are reflected in the provision of
 - The EU Treaties
 - The Aarhus convention
 - Secondary EU law
 - The case-law of the CJEU



Access to justice, is, as I'm also sure you heard yesterday, intrinsic to EU Environmental law.

It draws upon fundamental principles of EU law that are reflected

- in the provisions of the EU Treaties,
- in the The Aarhus convention,
- in secondary EU law and
- And in the case-law of the EU Court of Justice

Access to justice

The CJEU has held that

It is for the national court,

in order to ensure effective judicial protection in the fields covered by EU environmental law,

to interpret its national law in a way which,

to the fullest extent possible is consistent with objectives laid down in the Aarhus convention.



(Case C-240/09 Slovak Brown Bear)

It is also important to keep in mind that the EU court of justice has held that it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible is consistent with objectives laid down in the Aarhus convention.

Case C-240/09

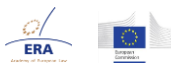
50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest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

Access to justice

National courts...

...are the ordinary courts for implementing EU law within the legal system of the member states.

...have the powers to review decisions that are incompatible with EU law and order compensation for the damage caused.



This also means that National courts...

...are the ordinary courts for implementing EU law within the legal system of the member states.

...have the powers to review decisions that are incompatible with EU law and order compensation for the damage caused.

In its *Opinion 1/09 (Unified Patent Litigation System)* of 8 March 2011, the EUCJ ruled that the ECPC (The European and Community Patents Court) would be illegitimate, because the prospective new Court would remove the prerogative of national courts to decide issues of EU law themselves. National courts are entrusted with the interpretation and application of EU law, and they are not entitled to delegate that function to an international tribunal:

The member States cannot confer the jurisdiction to resolve ... disputes [about patents] on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned.

(Opinion 1/09, OJ (2011) C2112, at paras 80, 81, 85.)

Brussels, 21.12.2016 C(2016) 8600 final COMMUNICATION FROM THE COMMISSION EU Law: Better Results through Better Application, p. 4:

"The Member States have the primary responsibility for transposing, applying and implementing EU law correctly. (Article 4(3) TEU, Articles 288(3) and Article 291(1) TFEU). They also have to provide sufficient remedies to ensure effective legal protection in the fields covered by EU law. This means that, where citizens' rights under EU law are affected at national level, the public have to be granted access to rapid and effective national redress mechanisms. These must comply with the principle of effective judicial protection set out in the Treaty (Article 19(1) second subparagraph TEU and Article 47 Charter of Fundamental Rights.). National courts are 'the common courts' for upholding EU law and contribute effectively to enforcing it in individual cases. They have the competence to uphold the actions of individuals seeking protection against national measures that are incompatible with EU law or financial compensation for the damage caused by such measures."

Access to Justice:

Legal standing - locus standi

“...justice is open to all, like the Ritz Hotel.”

- limits participation in court proceedings on formal grounds -



Access to justice is thus very important when it comes to implementing EU law. The national courts are important. There is where you get access to justice. This is also the place from where very much of the EU case law originates from. If there are no cases in national courts concerning EU law there will be no preliminary rulings. In order to get a court to assess your case – you need to have legal standing. Legal standing is the key to court. If you don't have legal standing you don't have access to justice. This also means that **Legal standing limits participation in court proceedings on formal grounds.**



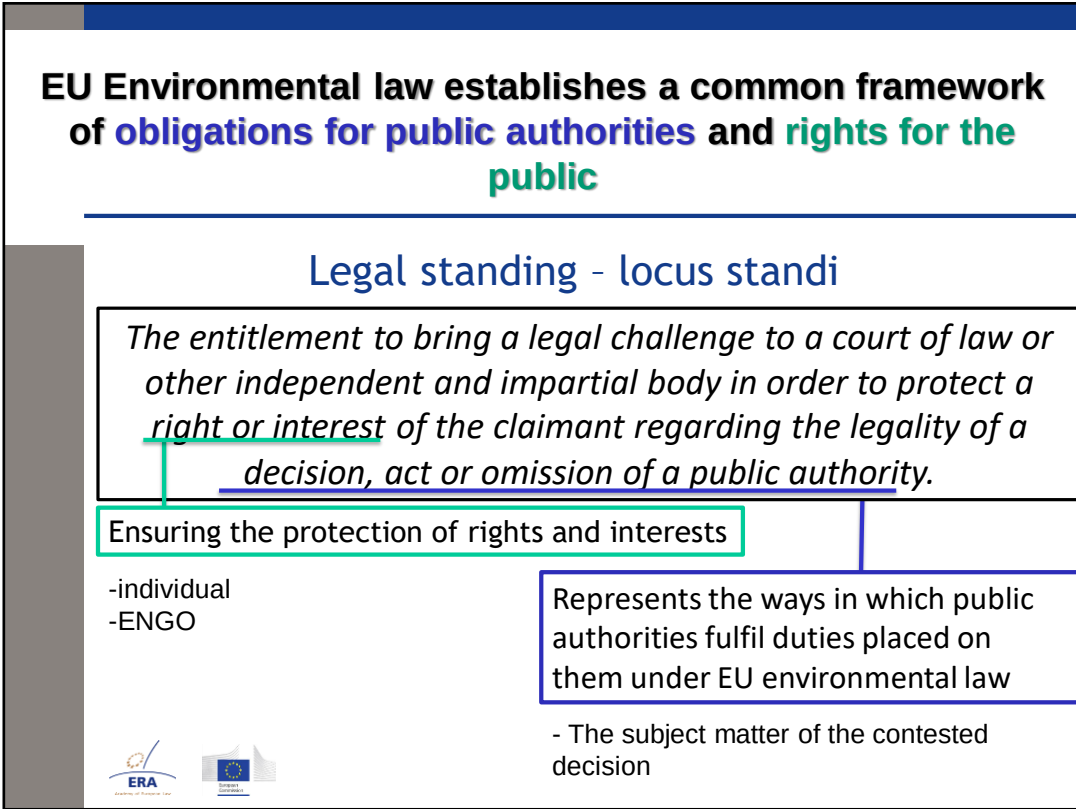
Locus standi is a “gatekeeper” tool. Still, it is only *one* parameter in the broader concept of “access to justice”. When it comes to access to justice there are other parameters, for example the burden of proof, costs, time issues. But without locus standi, you are still outside the gate.

Legal standing is fundamental.

Individuals or ENGO:s can only be heard by
a judge
if they have
the right to bring a challenge.



Another way to put it is that Individuals or Environmental NGO:s can only be heard by a judge if they have the right to bring a challenge. If they have legal standing.



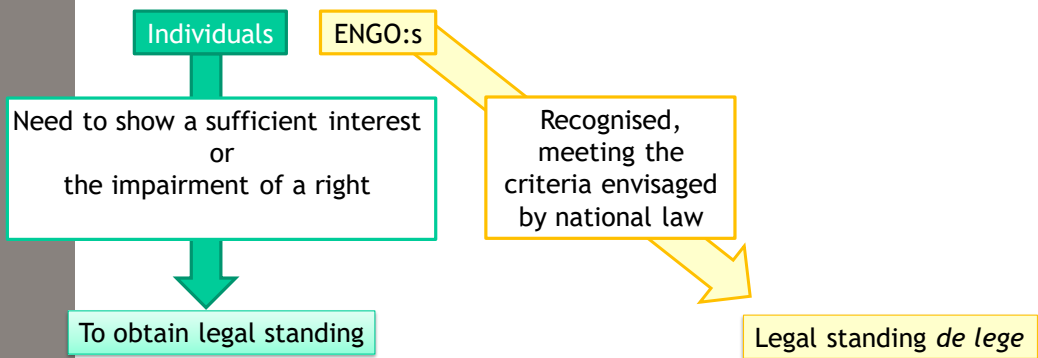
EU Environmental law establishes a common framework of **obligations for public authorities** and **rights for the public**.

Having that in mind: Legal standing can be defined 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.*

Decisions, acts and omissions represent the ways in which public authorities fulfil duties placed on them under EU environmental law, for example to ensure that certain installations operate under a permit.

Legal standing is a way to ensure the protection of rights and interests. Legal standing can vary depending on, inter alia, the subject matter of the contested decision, act or omission and whether the claimant is an individual or a recognised environmental NGO.

Legal standing - locus standi



Generally (but not always), individuals need to show sufficient interest OR the impairment of a right to obtain legal standing, recognised NGO:s meeting the criteria envisaged by national law have legal standing *de lege*. I will come back to what these things mean.

Basis for Legal standing - locus standi	
Subject matter of decisions, acts and omissions:	
1. Requests for environmental information and entitlement to receive information	
2. Specific activities that are subject to public participation requirements	
3. Requests for action under environmental liability rules	
Explicit legal standing rights in secondary EU environmental legislation	
4. Other subject matter, such as national implementing legislation, general regulatory acts, plans and programmes and derogations .	
legal standing depends on general principles as interpreted by the CJEU	
 	

When it comes to the subject matter, the following categories distinguishes between different situations that over the time have given rise to locus standi in CJEU case law.

- requests for **environmental information** and entitlement to receive information
- specific **activities that are subject to public participation requirements**,
- **requests for action** under environmental liability rules
- **other subject matter**, such as national implementing legislation, general regulatory acts, plans and programmes and derogations.

For the first three categories explicit legal standing rights can be found in secondary EU environmental legislation. For the last category, legal standing depends on general principles governing legal standing as interpreted by the CJEU .

Now, we will look into each one the legal basis, starting with requests for environmental information.

Here, one should also note the second slovak Brown Bear- case, where the CJEU establishes legal standing requirements for cases beyond EU secondary law on the basis of Article 47 of the Charter of Fundamental rights in conjunction with article 9(2) of the Aarhus Convention for decisons, acts and omissions for which the public participation provision of Article 6 in the Aarhus Convention applies. I will come back to this case.

1. Requests for **environmental information** and entitlement to receive information

Article 9.1

Any person who considers that his or her **request for environmental information has been ignored**, wrongfully refused or otherwise not dealt with (in accordance with article 4) shall have access **to a review procedure** before a **court of law** or **another independent and impartial body established by law**.

Legal
standing
right

Request for **environmental information** ignored/refused/not dealt with

What?

Access to **review procedure** before a **court of law** or **another**

Where?

independent and impartial body established by law

Who?

Any person



We start in the Aarhus convention. In article 9.1 we find a right to legal standing when a request for environmental information in accordance with article 4 has been ignored.

Thus; the right to a review based on the requirements of Article 9(1) of the Aarhus Convention is intended to protect the right to make an information request.

1. Requests for **environmental information** and entitlement to receive information

Any natural or legal person submitting an information request enjoys legal standing to challenge a decision, act or omission of the public authority responsible for dealing with that request. Rights to receive information through active dissemination may also entitle individuals and associations to bring legal challenges.

The Access to Environmental Information Directive, 2003/4/EC

EU environmental law confers rights on natural and legal persons to request environmental information!

Requirement of Article 9 (1) of the Aarhus Convention

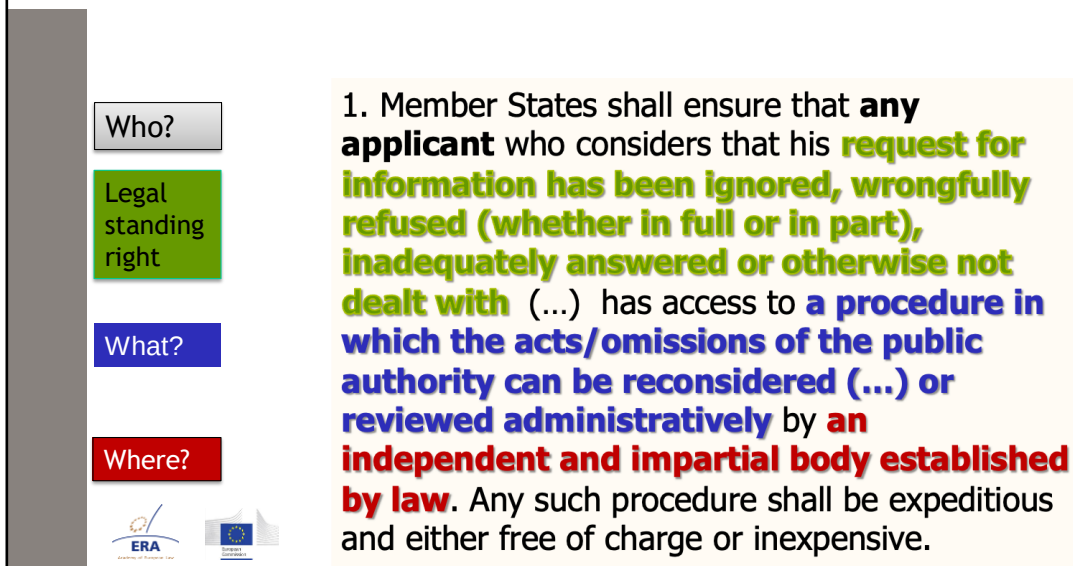


EU environmental law confers rights on natural and legal persons to request environmental information.

The right, to a review process, when having requested environmental information, which is a requirement of article 9 (1) in the Aarhus convention, are first of all found in the Access to Environmental Information Directive .

1. Requests for **environmental information** and entitlement to receive information

The Access to Environmental Information Directive, 2003/4/EC, **article 6**



The infographic features a vertical grey bar on the left with four colored boxes: 'Who?' (grey), 'Legal standing right' (green), 'What?' (blue), and 'Where?' (red). To the right, a yellow box contains the text of Article 6. At the bottom left, there are logos for the ERA (European Resource Agency) and the European Union.

Who?

Legal standing right

What?

Where?

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** (...) has access to **a procedure in which the acts/omissions of the public authority can be reconsidered (...) 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.

ERA
European Resource Agency

European Union

In Article 6 , this directive provides for a judicial review procedure to examine acts or omissions by public authorities in relation to requests for environmental information falling within the directive's scope.

The member states shall ensure that **any applicant** who considers that his....

....request for information has been ignored, wrongfully refused, inadequately answered or otherwise not dealt with...

...has access to a procedure in which the acts/omissions of the public authority can be reconsidered or reviewed administratively

... by an independent and impartial body established by law.

1. Requests for **environmental information** and entitlement to receive information

The Access to Environmental Information Directive, 2003/4/EC, **article 6**

Seveso III directive, Article 23

Member States shall ensure that:

Who?

What?

Legal standing right

(a) **any applicant requesting information** pursuant to points (b) or (c) of Article 14(2) or Article 22(1) of this Directive **is able to seek a review in accordance with Article 6 of Directive 2003/4/EC** (The Access to Environmental Information Directive), of **the acts or omissions of a competent authority in relation to such a request;**

There are also other directives with this expressed right to a review, for example the Seveso III directive, in which article 23 refers to article 6 in the Access to environmental information directive....

Article 23 states that the member states shall ensure that....

...any applicant requesting information pursuant to certain articles in this directive....

... is able to seek a review in accordance with article 6 of the access to environmental information directive...

... of the acts or omissions of a competent authority in relation to such a request.

1. Requests for environmental information and entitlement to receive information
The Access to Environmental Information Directive, 2003/4/EC, article 6
There is also a right to receive (not only to request) environmental information!
The rights of applicants for environmental information include the right to have the competent public authority correctly fulfil conditions related to the supply of information Case C-71/14 <i>East Sussex</i> p 56  

But it also confers rights to **receive** environmental information. In EU legislation these rights are found in the Access to Environmental Information as well as in several pieces of sectoral environmental information.

In the case *East Sussex* the CJEU made clear that....

the rights of applicants for environmental information **include** the right to have the competent public authority correctly fulfil conditions related to the **supply** of information

C-71/14

56 It should be recalled in this connection that the EU legislature, in adopting Directive 2003/4, intended to ensure the compatibility of EU law with the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest (judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 36 and the case-law cited). The existence of effective administrative and judicial review of the making of a charge for supplying such information is intrinsically linked to the realisation of that objective. Furthermore, that review must necessarily relate to whether the public authority has complied with the two conditions in Article 5(2) of that directive, identified in paragraph 29 above.

1. Requests for environmental information and entitlement to receive information	
The Access to Environmental Information Directive, 2003/4/EC, article 6	
There is also a right to receive (not only to request) environmental information!	
	Any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities,
	without that person having to state an interest.
	The existence of effective administrative and judicial review of the charge for supplying such information is intrinsically linked to the realisation of the directive's objective (to ensure compatibility EU law – Aarhus Convention).
	The review must necessarily relate to whether the public authority has complied with the two conditions in Article 5(2) of that directive.
  Case C-71/14 <i>East Sussex</i> , paragraph 56.	

In the case of East Sussex the court stated that :

Any natural or legal person in a Member State **has a right of access to environmental information** held by or on behalf of public authorities,
without that person having to state an interest.

The existence of effective **administrative and judicial review of the charge** for supplying such information **is intrinsically linked to the realisation of the directive's objective** (to ensure compatibility EU law – Aarhus Convention).
The review must necessarily relate to whether the public authority has complied with the two conditions in Article 5(2) of that directive.

C-71/14

56 It should be recalled in this connection that the EU legislature, in adopting Directive 2003/4, intended to ensure the compatibility of EU law with the Aarhus Convention by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest (judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 36 and the case-law cited). The existence of effective administrative and judicial review of the making of a charge for supplying such information is intrinsically linked to the realisation of that objective. Furthermore, that review must necessarily relate to whether the public authority has

complied with the two conditions in Article 5(2) of that directive, identified in paragraph 29 above.

1. Requests for environmental information and entitlement to receive information	
The Access to Environmental Information Directive, 2003/4/EC, article 6	
There is also a right to receive (not only to request) environmental information!	
	Conditions related to the supply of information
	Article 5
	Charges
	1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination in situ of the information requested shall be free of charge. 2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount. 3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived.

In article 5 we find conditions related to the supply of information: In the East Sussex-case the court related to article 5 (2). The two conditions here are 1) the cost must refer to supplying the requested environmental information and 2) the charge must not exceed a reasonable amount.

Enligt artikel 5.2 i direktiv 2003/4 får offentliga myndigheter ta ut avgifter för tillhandahållande av miljöinformation, under förutsättning att avgiftsbeloppet inte överstiger ett skäligt belopp.

29 Såsom framgår av punkterna 44 och 46 i generaladvokatens förslag till avgörande, föreskriver sagda bestämmelse att två villkor måste vara uppfyllda för att en avgift ska få tas ut. För det första får beräkningen av avgifter endast grunda sig på kostnader som hänför sig till "tillhandahållandet" av begärd miljöinformation. Om det första villkoret är uppfyllt, gäller för det andra att det totala avgiftsbeloppet inte får överstiga ett "skäligt belopp".

1. Requests for **environmental information** and entitlement to receive information

The Access to Environmental Information Directive, 2003/4/EC, **article 6**

The INSPIRE Directive (establishing an Infrastructure for Spatial Information in the EC), 2007/2/EC, article 11

The public is entitled to receive information through active dissemination by the competent public authorities

Article 12(1)(e) of the Bathing Water Directive, 2006/7/EC

requires the public to be informed whenever bathing is prohibited or advised against



The public is also entitled to receive environmental information through active dissemination by the competent public authorities.

(See for example Article 7 of the Access to Environmental Information Directive, 2003/4/EC, and Article 11 of the INSPIRE Directive, 2007/2/EC.). It is important that public authorities fulfil this obligations since it may, inter alia, be important for safeguarding the right to have one's health protected.

Article 8(3) of the Drinking Water Directive, 98/83/EEC, requires consumers to be promptly informed of health-endangering drinking water contamination.).

Article 7

Dissemination of environmental information

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;

(d) the reports on the state of the environment referred to in paragraph 3;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;

(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

3. Without prejudice to any specific reporting obligations laid down by Community legislation, Member States shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.

4. Without prejudice to any specific obligation laid down by Community legislation, Member States shall take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay.

5. The exceptions in Article 4(1) and (2) may apply in relation to the duties imposed by this Article.

6. Member States may satisfy the requirements of this Article by creating links to Internet sites where the information can be found.

Article 7

Dissemination of environmental information

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;

(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;

(d) the reports on the state of the environment referred to in paragraph 3;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;

(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

3. Without prejudice to any specific reporting obligations laid down by Community legislation, Member States shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.

4. Without prejudice to any specific obligation laid down by Community legislation, Member States shall take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay.

5. The exceptions in Article 4(1) and (2) may apply in relation to the duties imposed by this Article.

6. Member States may satisfy the requirements of this Article by creating links to Internet sites where the information can be found.

For example;

Article 12(1)(e) of the Bathing Water Directive, 2006/7/EC requires the public to be informed whenever bathing is prohibited or advised against; and

1. Requests for **environmental information** and entitlement to receive information

The Access to Environmental Information Directive, 2003/4/EC, **article 6**

Who?

Legal
standing
right

What?

Any natural or legal person submitting an information request enjoys legal standing to ***challenge a decision, act or omission of the public authority responsible for dealing with that request. Rights to receive information through active dissemination may also entitle individuals and associations to bring legal challenges.***



Thus, we have to extend the legal standing right a little bit more than the wording in article 6 of the Access to Environmental Information Directive, 2003/4/EC, in such a way that it may also include rights to **receive** information through active dissemination.

Basis for Legal standing - locus standi

Subject matter of decisions, acts and omissions:

1. Requests for **environmental information** and entitlement to receive information ✓

2. Specific activities that are subject to **public participation** requirements

3. **Requests for action** under environmental liability rules

Explicit legal standing rights in secondary EU environmental legislation

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

legal standing depends on general principles as interpreted by the CJEU



Now, we move on specific activities that are subject to public participation requirements.

2. Specific activities that are subject to **public participation** requirements

Aarhus convention Article 9.2

Who?	The public concerned (and ENGOs)
Specific requirements for standing	with sufficient interest/maintaining impairment of a right , where national law requires this as a precondition
What?	shall have access to a review process
Where?	in court or tribunal
Legal standing right	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.



And take the starting point in Aarhus article 9.2 which tells us that ... members of the public concerned...

...but not all members of the public concerned – 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...

Here we thus have some **specific requirements** for standing.

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. Concerning the legal standing right, article 9.2 thus refers to article 6.

Thus, there are some concepts and specific requirements we need to take a closer look at. Who is a part of the "public concerned"? Who, in the public concerned, has a sufficient interest or are maintaining an impairment of a right and what kind of decisions, acts or omissions are subject to article 6? In article 6 of the Aarhus convention is where we find the public participation requirements. Important here is that the reference is to ANY decision, act or omission subject to the provision of article 6. It is not about whether your right to participation has been infringed in any way. As long as **the decision** is subject to article 6, article 9 (2) is applicable. The you may challenge both

the substantive and procedural legality of that decision.

2. Specific activities that are subject to **public participation** requirements

Public concerned in the Aarhus Convention

The Public:

Article 2(4)

‘one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups’

Public concerned:

Article 2(5)

‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’



‘The public’ is defined in article 2 (4) as *‘one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups’*.

“The public concerned” is then defined in article 2 (5) of the convention as *‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making’* .

I

Sufficient interest/maintaining impairment of a right

Article 9

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

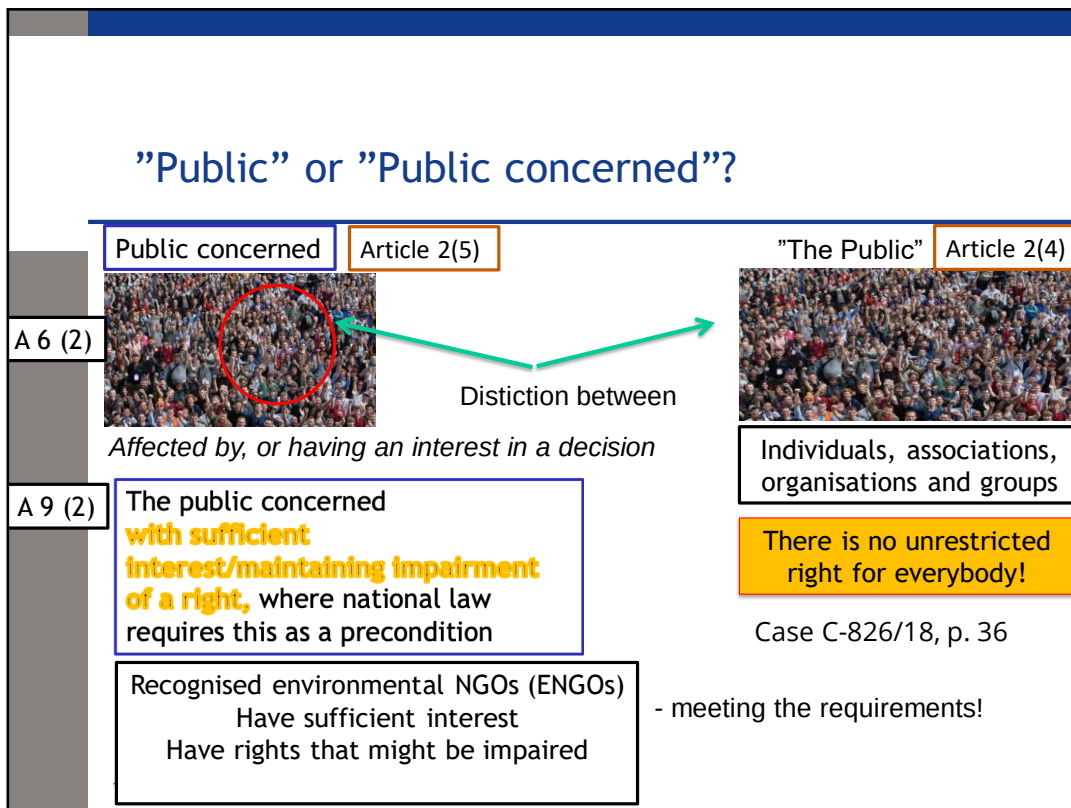
To this end, the interest of any non-governmental organization meeting the requirements shall be deemed sufficient having a sufficient interest and that such organizations shall also be deemed to have rights capable of being impaired.

- meeting the requirements!?



Article 9 explains, that 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.

It also states that to this end, the interest of any non-governmental organization meeting the requirements shall be deemed sufficient having a sufficient interest and that such organizations shall also be deemed to have rights capable of being impaired. And so we have one more thing to take a closer look into, namely, how do you know if a non governmental organization meets the requirements?



The public. Or the public concerned. Note the distinction!

Neither Article 9(2) of the Aarhus Convention nor the provisions of EU secondary legislation grant unconditional access to justice to the members of the public.

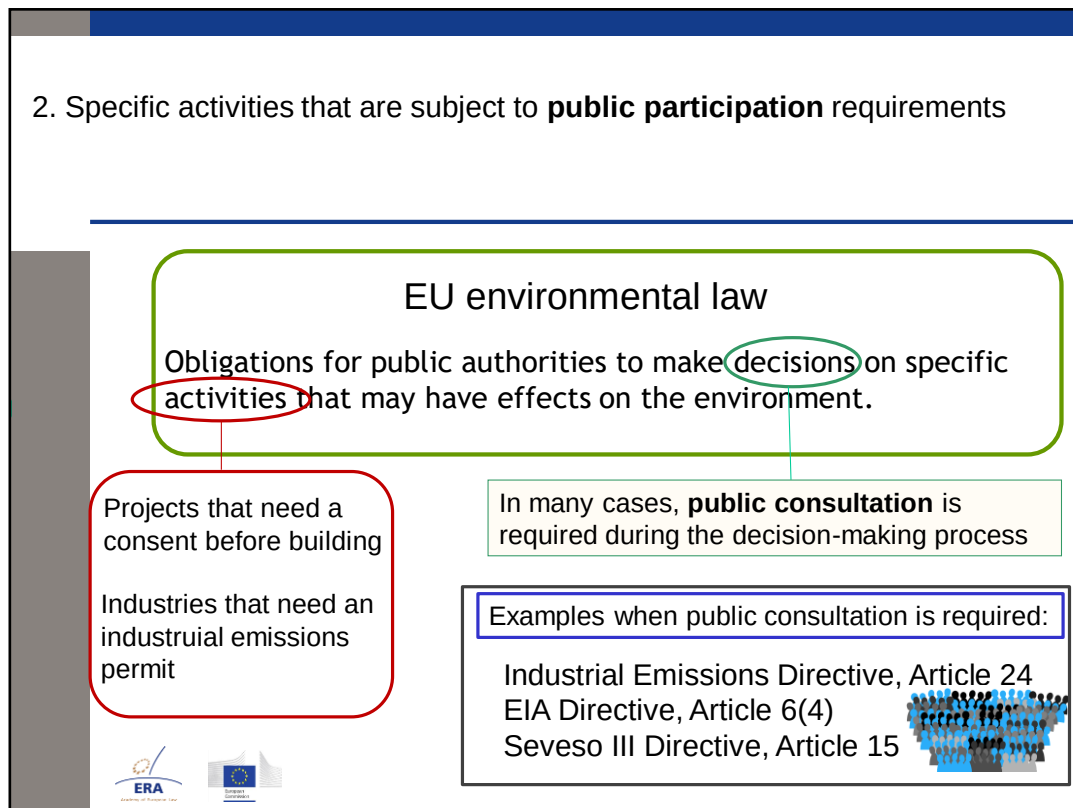
As mentioned before, both the Aarhus Convention and the EU secondary legislation derived from it, differentiates in legal standing rights between...

Individuals, associations, organisations and groups and Recognised environmental NGOs.

It is **the public concerned** that benefits from the right to public participation provision in Article 6(2) but being a part of the public concerned is not enough to have standing according to article 9 (2). You also need to have a sufficient interest or maintaining the impairment of a right.

For now, I just want you to keep in mind that there is a difference between "the public", "the public concerned" and "public concerned with sufficient interest or maintain an impairment of a right".

Also bear in mind that "the public" includes *their associations, organisations or groups*



Now, let's turn to the EU environmental legislation concerning specific activities subject to public participation requirements.

It contains a significant number of obligations that require public authorities to make decisions on specific activities that may have effects on the environment. For example, a proposed motorway will require a consent decision by a public authority before building can start.

Industries requires a decision on an industrial emissions permit before it can commence operating. In many cases EU secondary environmental legislation **requires public consultation** during the decision-making process

Examples are Article 24 of the Industrial Emissions Directive,(2010/75/EU,) Article 6(4) of the Environmental Impact Assessment Directive, 2011/92/EU, and Article 15 of the Seveso III Directive 2012/18/EU.

(There is a vaguer public consultation requirement in Article 6(3) of the Habitats Directive, 92/43/EEC, which, however, has to be read in conjunction with Article 6(1)(b) of the Aarhus Convention, see Case C-243/15 *LZ II*, paragraph 45.).)

Examples when public consultation is required: IED, article 24

Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), Article 24

1. Member States shall ensure that **the public concerned** are given **early and effective opportunities to participate** in the following procedures:
 - (a) **the granting of a permit** for new installations;
 - (b) **the granting of a permit** for any substantial change;
 - (...)



The public participation provision in the IED, requires that the public concerned are given early and effective opportunities to participate in the procedures for the granting of a permit for new installations and the granting of a permit for an substantial change.

Examples when public consultation is required: EIA Directive, Article 6 (4)

DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Article 6(4)

The public concerned shall be given **early and effective opportunities to participate** in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities **before the decision on the request for development consent** is taken.



The public participation provision in the EIA directive says, in short, that the public concerned shall be given early and effective opportunities to participate... before the decision in the request for development consent is taken...

Examples when public consultation is required: Seveso III Directive, Article 15

DIRECTIVE 2012/18/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, Article 15

Public consultation and participation in decision-making

1. Member States shall ensure that **the public concerned** is given an **early opportunity to give its opinion on specific individual projects** relating to:
(...)

4. Member States shall ensure that **the public concerned** is entitled to **express comments and opinions to the competent authority before a decision is taken on a specific individual project as referred to in paragraph 1**, and that the results of the consultations held pursuant to paragraph 1 are duly taken into account in the taking of a decision.



And the Seveso III directive prescribes on public participation that the public concerned must be given an early opportunity to give it opinion in specific individual projects and to express comments and opinions to the competent authority before a decision is taken.

2. Specific activities that are subject to **public participation** requirements

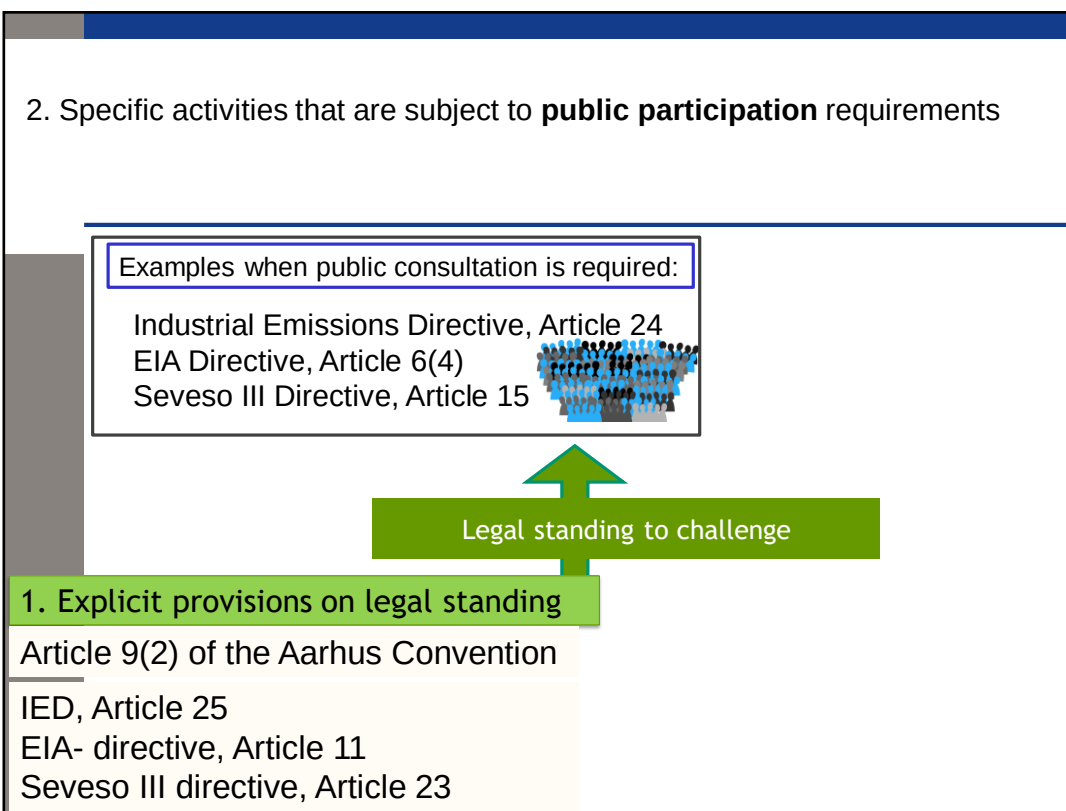
Examples when public consultation is required:

Industrial Emissions Directive, Article 24
EIA Directive, Article 6(4)
Seveso III Directive, Article 15



In these three directives we find rules on mandatory consultation. We have some activities that are subject to public participation. How about the Aarhus right in article 9 (2) to challenge these decisions? Is it implemented?

(There is a vaguer public consultation requirement in Article 6(3) of the Habitats Directive, 92/43/EEC, which, however, has to be read in conjunction with Article 6(1)(b) of the Aarhus Convention, see Case C-243/15 *LZ II*, paragraph 45.).)



Legal standing to challenge decisions, acts and omissions concerning specific activities that are subject to public participation requirements can be based on express provisions on legal standing.

Based on the wording of article 9 (2) in the Aarhus directive, we have provisions in those three directives we just looked into, protecting legal standing on basis of public participation. And the wording of the provision on legal standing is more or less the same in the IED and EIA- directives while the Seveso directive refers directly to the EIA directive. Therefore we have a look at the EIA-directive.

EIA Directive, Article 11

The EIA process cycle

Contain provisions based on the wording of Article 9(2):

IED, Article 25
EIA-directive, Article 11
Seveso III Directive, Article 23

Who?

1. Member States shall ensure that, in accordance with the relevant national legal system, **members of the public concerned**:

Specific requirements for standing

(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;

What?

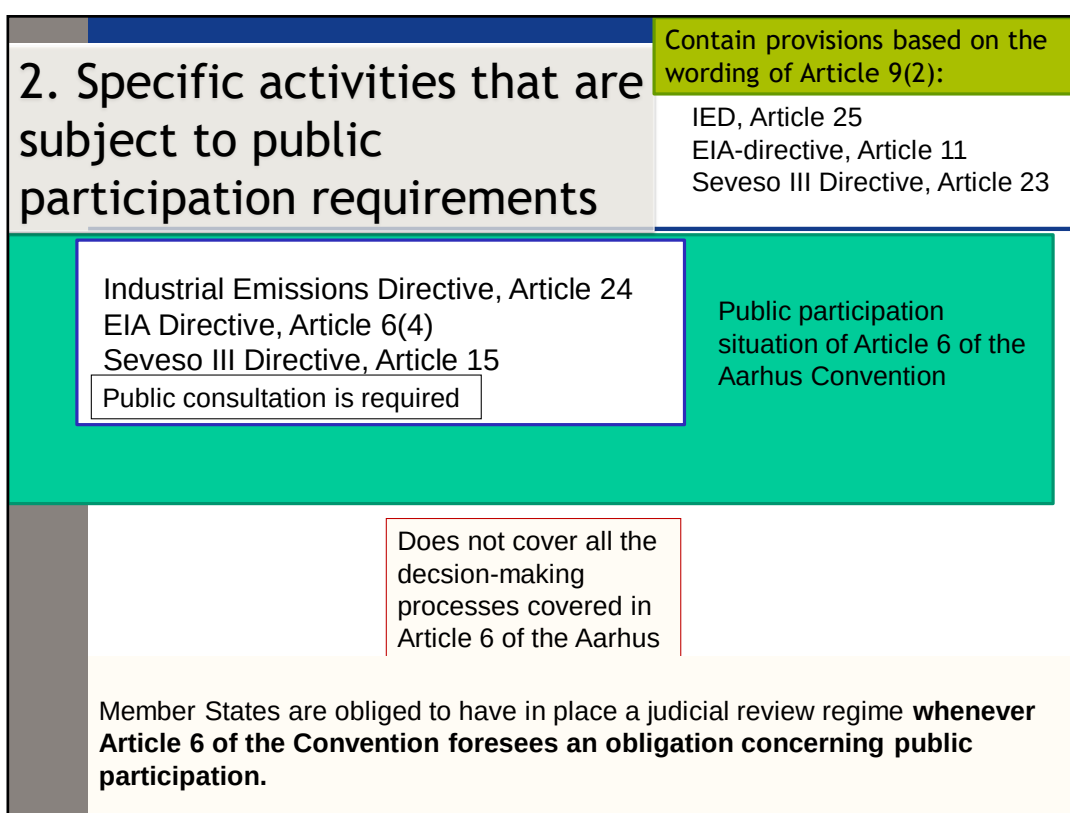
have **access to a review procedure** before **a court of law or another independent and impartial body established by law** to challenge the **substantive or procedural legality of decisions, acts or omissions subject to the public participation** provisions of this Directive. (For example, article 6)

Where?

Legal standing right

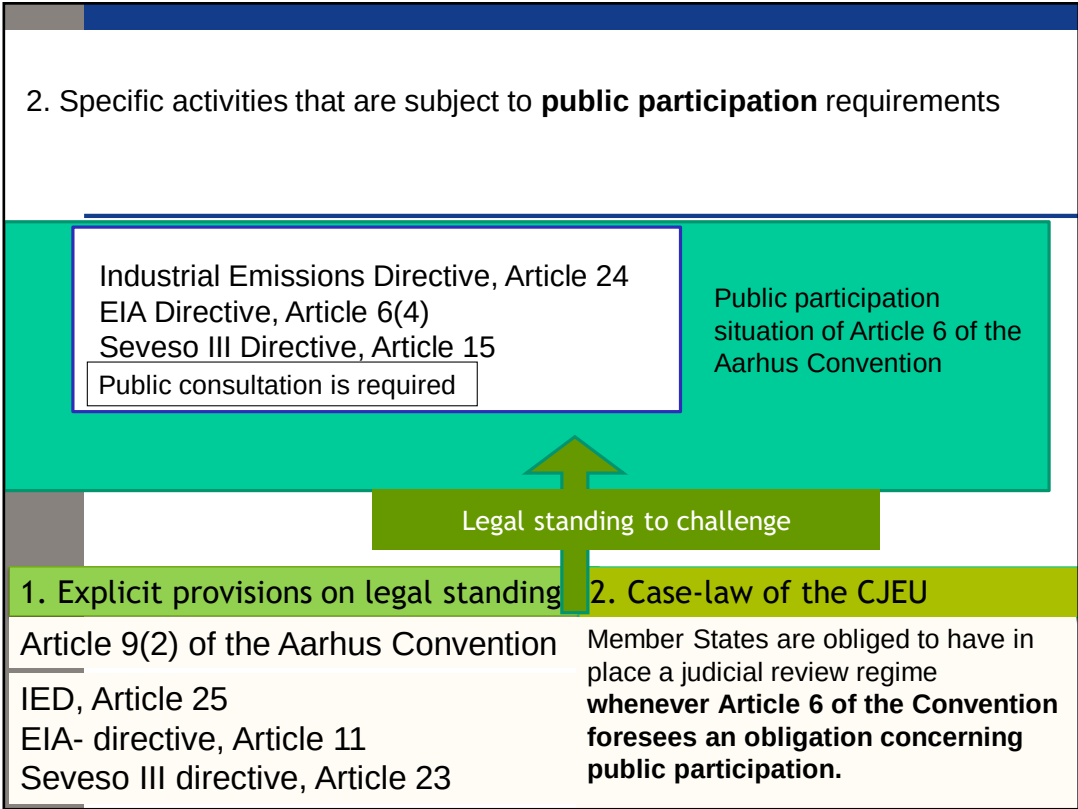
And as you can see, the wording is very close to article 9 (2) of the aarhus convention.

The ones who are entitled are members of the public concerned having a sufficient interest or maintaing the impairment of a right and the access to court should be about to challenge the substantive or procedural legality of a decsion, act or omission subject to public participation.



But, this three directives within the EU secondary legislation does not cover all decision-making processes covered by Article 6 in the Aarhus convention — and therefore not all of Article 9(2).

Since Article 9(2) refers to situations in which the public participation provisions of Article 6 of the Aarhus Convention apply, Member States are obliged to have in place a judicial review regime whenever **Article 6 of the Convention** foresees an obligation concerning public participation.



Here we have another base of legal standing, when there is no explicit provision in a directive. The case law of the CJEU. And we are going to take a closer look at what the EU court have stated, namely that Member States are obliged to have in place a judicial review regime **whenever Article 6 of the Convention foresees an obligation concerning public participation.**

The second Slovak Brown Bear;

C-243/15 Slovak Brown Bear / Lesoochránárske Zoskupenie VLK LZ (II)

The CJEU points out (p 65):

In the absence of EU rules governing the matter, **it is for the domestic legal system** of each Member State to lay down the detailed procedural rules governing actions for **safeguarding rights which individuals derive from EU law**

Member States are responsible for ensuring that **those rights are effectively protected in each case** and, in particular, for **ensuring compliance with the right to an effective remedy and to a fair hearing** enshrined in Article 47 of the Charter

C-268/06 *Impact*, p 44 and 45, *Lesoochránárske zoskupenie*, C-240/09, p 47, and *Star Storage and Others*, C-439/14 and C-488/14, p 46.

In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law,

the Member States being responsible for ensuring that those rights are effectively protected in each case and, in particular, for ensuring compliance with the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter (see, to that effect, judgments of 8 March 2011, *Lesoochránárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 47, and of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 46).

Lesoochránárske zoskupenie, C-240/09

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

Case C-268/06 *Impact*:

44 The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, in particular, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; *Unibet*, paragraph 39; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28).

45 The Member States, however, are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17; Case C-446/93 *SEIM* [1996] ECR I-73, paragraph 32; and Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 40).

Star Storage and Others, C-439/14

44 In particular, care must be taken to ensure that the effectiveness of Directives 89/665 and 92/13 are not undermined (see judgments of 18 June 2002, *HI*, C-92/00, EU:C:2002:379, paragraphs 58 and 59, and of 11 December 2014, *Croce Amica One Italia*, C-440/14, EU:C:2014:2435, paragraph 40) or the rights conferred on individuals by EU law (judgments of 12 December 2002, *Universale-Bau and Others*, C-470/99, EU:C:2002:746, paragraph 72, and of 28 January 2010, *Uniplex (UK)*, C-406/08, EU:C:2010:45, paragraph 49).

45 Furthermore, it must be recalled, as is clear from recital 36 of Directive 2007/66, and therefore Directives 89/665 and 92/13 that it amended and supplemented, that they seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.

The second Slovak Brown Bear;

C-243/15 Slovak Brown Bear / Lesoochránárske Zoskupenie VLK LZ (II)

The requirements of Article 9(2) of the Aarhus Convention in conjunction with Article 47 of the Charter of Fundamental Rights **might also apply to those areas of environmental law which do not contain specific access to justice requirements.**



In the second Slovak brown bear case the CJEU clarified that the requirements of Article 9(2) of the Aarhus Convention in conjunction with Article 47 of the Charter of Fundamental Rights might also apply to those areas of environmental law which do not contain specific access to justice requirements.

Indeed, while *LZ II* concerned the Habitats Directive, 92/43/EEC, the rationale behind the CJEU's interpretation lends itself to be applied by analogy to decision-making processes in other sectors of EU environmental law such as water and waste.

The Commission argues that the recent judgement in the *LZII* case made clear that these demands for access to justice come into play as soon as there is a demand for public participation in accordance with Article 6 Aarhus Convention, even when this is not clearly expressed in EU secondary legislation. Article 9(2) of that Convention, read in conjunction with Article 47 of the Charter, means specifically that whenever a decision-making procedure concerns an activity that might have a significant effect on the environment – for example, on nature conservation, waste and water management – the public concerned must have a possibility to request judicial review of the administrative position taken.

Standing rights, according to Article 9(2), belong to the “public concerned”, as defined in Article 2(5) Aarhus Convention and 1(2)(d) of the EIA Directive: “*the public affected or likely to be affected by, or having an interest in, the environmental decision-making*”. According

to the Notice, both the Convention and eu law allow for a differentiation of standing and do not require *actio popularis*.

Specific
requirements
for standing

Sufficient interest or impairment of a right

How to interpret and apply

"sufficient interest" or "impairment of a right"

?

*In the light of the obligation to grant a wide
access to justice in environmental matters*

!

Rights which may be impaired:

- **procedural rights** of the individual stemming from EU environmental law (e.g. public participation rights)
- **substantive rights** conferred on the individual (e.g. protection of human health, property rights).



In all of these cases with "public concerned" there have been a possibility for the member states to have "specific requirements for standing". So, how to interpret "sufficient interest" and "Impairment of a right"? What is this? What might be acceptable as a sufficient interest or impairment of a right? And how much discretion is there for the member states?

If we start with the discretion of the member states: this precondition has to be interpreted and applied in the light of **the obligation to grant a wide access to justice in environmental matters**.

Rights which may be impaired include **procedural rights of the individual** stemming from EU environmental law (e.g. public participation rights) as well as....

... substantive rights conferred on the individual (e.g. protection of human health, property rights).

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

Recognised ENGOs

legal standing de lege

Article 9(2) of the Aarhus Convention.

Article 11(3) of the EIA Directive

to challenge decisions, acts or omissions

by public authorities

*on specific activities subject to public participation
requirements under EU law.*

The pre-conditions "sufficient interest" or "impairment
of a right" are deemed to be fulfilled



Recognised ENGO:s has legal standing **de lege**....

.... it follows directly from article 9 (2) in the Aarhus and article 11(3) in the EIA directive.

.

They have legal standing to challenge decisions, acts or omissions by public authorities on specific activities subject to public participation requirements under EU law.

The pre-conditions; having "sufficient interest" or "impairment of a right" are deemed to be fulfilled;

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

Recognised ENGOs

Article 9(2) of the Aarhus Convention.

legal standing de lege

(...) **the interest of any non-governmental organization** meeting the requirements (...) shall be **deemed sufficient for the purpose of** subparagraph (a) [**having a sufficient interest**]. Such organizations shall **also be deemed to have rights capable of being impaired...**

The pre-conditions “sufficient interest” or “impairment of a right” are deemed to be fulfilled



it follows, as we have seen, from the wording of A 9(2) in the aarhus convention. **the interest of any non-governmental organization** meeting the requirements (...) shall be **deemed sufficient for the purpose of** subparagraph (a) [**having a sufficient interest**]. Such organizations shall **also be deemed to have rights capable of being impaired...**

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

Recognised ENGOs

legal standing de lege

Article 11(3) of the EIA Directive

3. (...) To that end, **the interest of any non-governmental organisation** meeting the requirements (...) **shall be deemed sufficient** for the purpose of point (a) of paragraph 1 of this Article [= **having a sufficient interest**].

The pre-conditions “sufficient interest” or “impairment of a right” are deemed to be fulfilled



In article 11 (3) of the EIA directive, the wording is very similar.

Specific
requirements
for standing

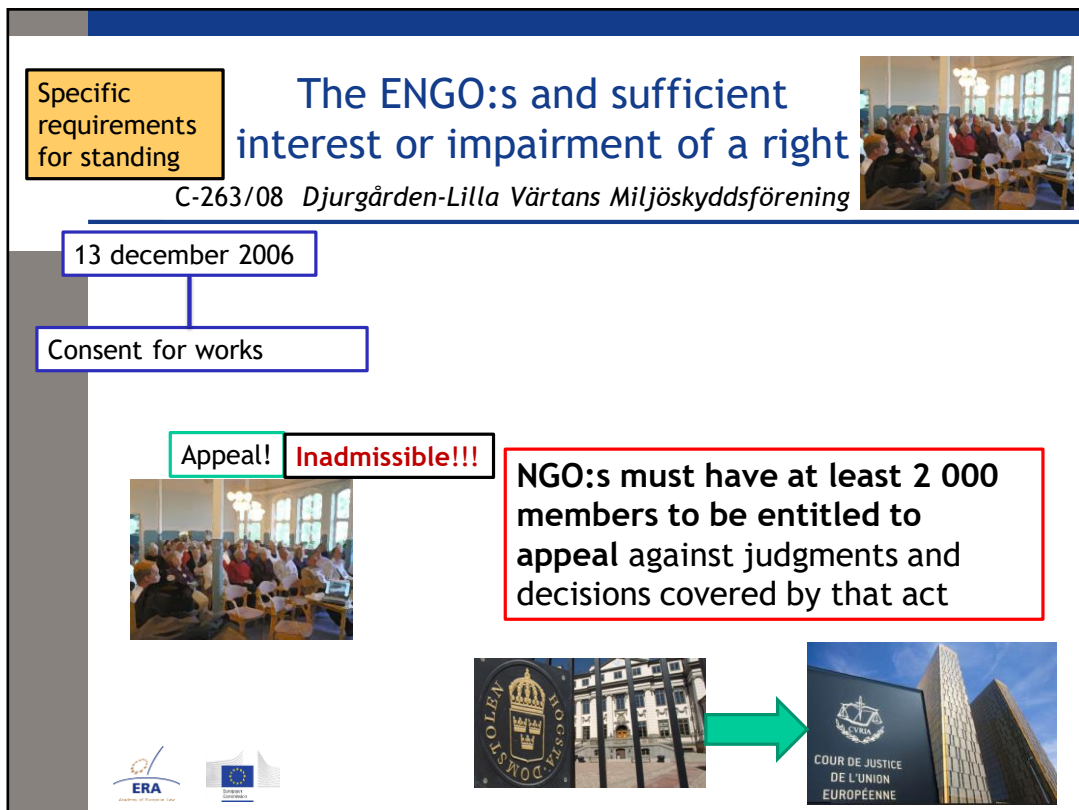
The ENGO:s and sufficient interest or impairment of a right

C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*



To some extent possibility for member states to determine conditions was clarified in the case C-263/08, *Djurgården - Lilla Värtans Miljöskyddsförening*.

Djurgården- Lilla Värtans miljöskyddsförening is a local ENGO in Stockholm, Sweden – and here it is!



The case in short was that consent to some works in Stockholm was given and the ENGO appealed before the Environmental Court of Appeal but the appeal was held to be inadmissible....

The reason for this was that the Miljöskyddsförening had not fulfilled the national conditions for ENGO:s to appeal.

According to the Environmental Act an ENGO must have at least 2 000 members to be entitled to appeal.

Djurgården- Lilla Värtans Miljöskyddsförening didn't fulfil that condition.

The ENGO brought an appeal before *Högsta domstolen* who turned to the CJEU with some questions.

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*



13 december 2006

Consent for works

Appeal!

Inadmissible!!!



NGO:s must have at least 2 000
members to be entitled to
appeal against judgments and
decisions covered by that act



And also, the ENGO had participated in the decision-making procedure -

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

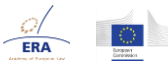
C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*



May Member States provide that small environmental protection associations (ex. < 2000 members)have no right of access to a review procedure?

Article **11** leaves to national legislatures the task of **determining the conditions** which may be required in order for an ENGO to have a right of appeal under the conditions set out above.

However!



One of these questions was if a member state may provide that associations with less than 2000 members have no right of access to a review procedure. The court first stated that article 11 leaves to national legislatures the task of determining the conditions which may be required...

However!

C-263/08 *Djurgården - Lilla Värtans Miljöskyddsförening*

45 **While it is true that Article 10a of Directive 85/337, 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 organisation 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 courts.

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening



May Member States provide that small environmental protection associations (ex. < 2000 members)have no right of access to a review procedure?

Article **11** leaves to national legislatures the task of **determining the conditions** which may be required in order for an ENGO to have a right of appeal under the conditions set out above.

The national rules thus established must,
1. Ensure ‘wide access to justice’ and,
2. Render effective the provisions of the Directive on judicial remedies.

The national rules thus established must,

1. Ensure ‘**wide access to justice**’ and,
2. **Render effective the provisions of the Directive on judicial remedies.**

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

45 While it is true that Article 10a of Directive 85/337, 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 organisation 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 courts.

Specific requirements for standing

The ENGO:s and sufficient interest or impairment of a right

C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*



National law may require that such an association has as its object the protection of nature and the environment.

The condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact **exist** and that it **is active**.

However, the **number of members required cannot be fixed** by national law **at such a level that it runs counter to the objectives** of the Directive and in particular the objective of **facilitating judicial review** of projects which fall within its scope.




All in all the CJEU stated that....

National law may require that such an association has as its object the protection of nature and the environment....

The condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact **exist** and that it **is active**....

However, the **number of members required cannot be fixed** by national law **at such a level that it runs counter to the objectives** of the Directive and in particular the objective of **facilitating judicial review** of projects which fall within its scope.

In this context it might be mentioned that there were only two (2) ENGOs in Sweden at that time that fulfilled the requirement....

C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening

46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that

it does in fact exist and that it is active. **However**, 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.

Specific
requirements
for standing

The ENGO:s and sufficient interest or impairment of a right

C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening



Although it is for the Member States to make rules defining such requirements, they may not be framed in a way that makes it impossible for NGOs to exercise a right to go to court in order to protect the general interest. The national rules '*must [...] ensure wide access to justice*'



C-263/08 Djurgården - Lilla Värtans Miljöskyddsförening, p 45

The CJEU has clarified the extent of the requirements of national law that NGOs can be expected to fulfil to get this legal standing. It has stated that, although it is for the Member States to make rules defining such requirements, they may not be framed in a way that makes it impossible for NGOs to exercise a right to go to court in order to protect the general interest.

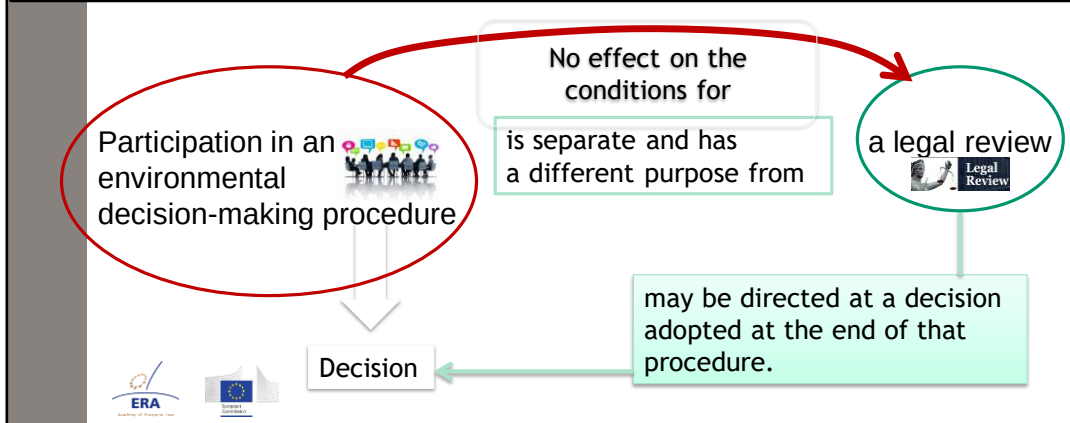
The national rules '*must [...] ensure wide access to justice*' (Case C-263/08 *Djurgården*, p 45).

The ENGO:s and sufficient interest or impairment of a right

C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening

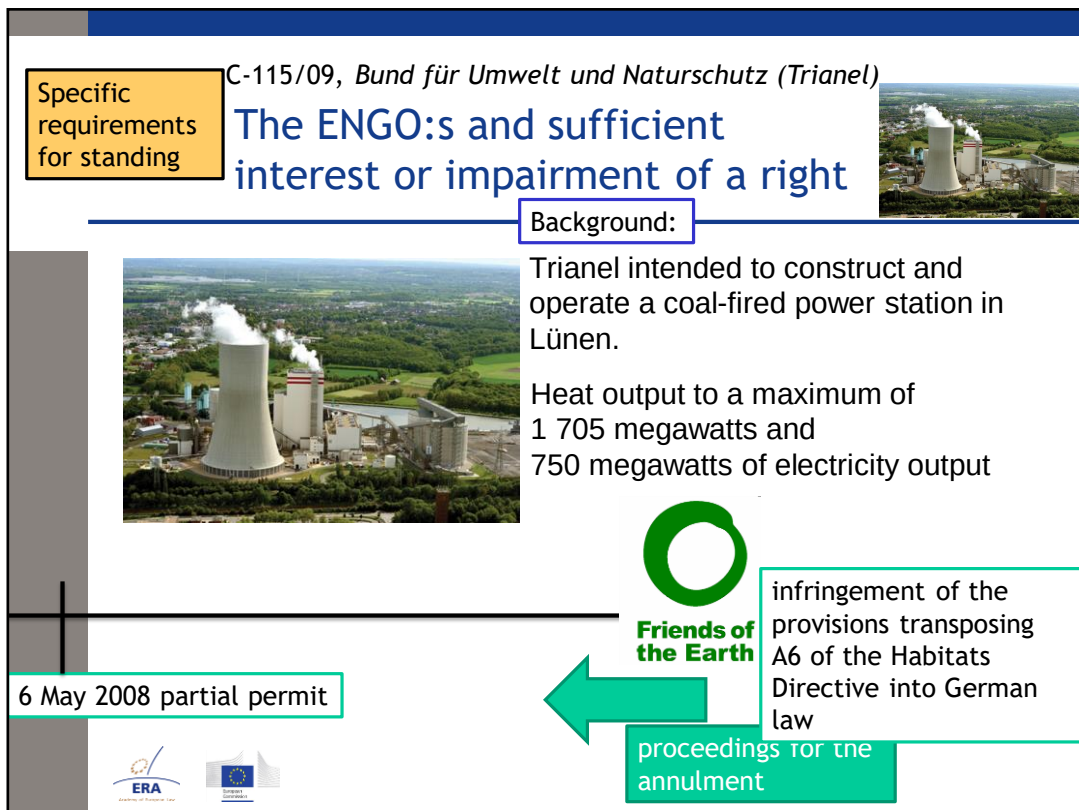


Members of the 'public concerned' must be able to have access to a review procedure to challenge the decision on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.



The court also stated that members of the 'public concerned' must be able to have access to a review procedure to challenge the decision 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.

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.



We also have the Trianel-case where a preliminary decision and partial permit for a project were issued. The preliminary decision stated that there were no legal objections to the project.

Friends of the Earth initiated proceedings for the annulment of those measures. The ENGO relied in particular on an infringement of the provisions transposing the Habitats directive into German law.

before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Nordrhein-Westfalen Land; 'the referring court'). Friends of the Earth relied, in particular, on an infringement of the provisions transposing into German law the Habitats Directive and, in particular, Article 6 thereof.

Specific
requirements
for standing

C-115/09, *Bund für Umwelt und Naturschutz (Trianel)*

The ENGO:s and sufficient interest or impairment of a right



German law:
An action challenging an administrative
measure will be admissible only if the
administrative measure affects the
claimant's rights, that is to say, his
individual public law rights.



**Friends of
the Earth**

infringement of the
provisions transposing
A6 of the Habitats
Directive into German
law

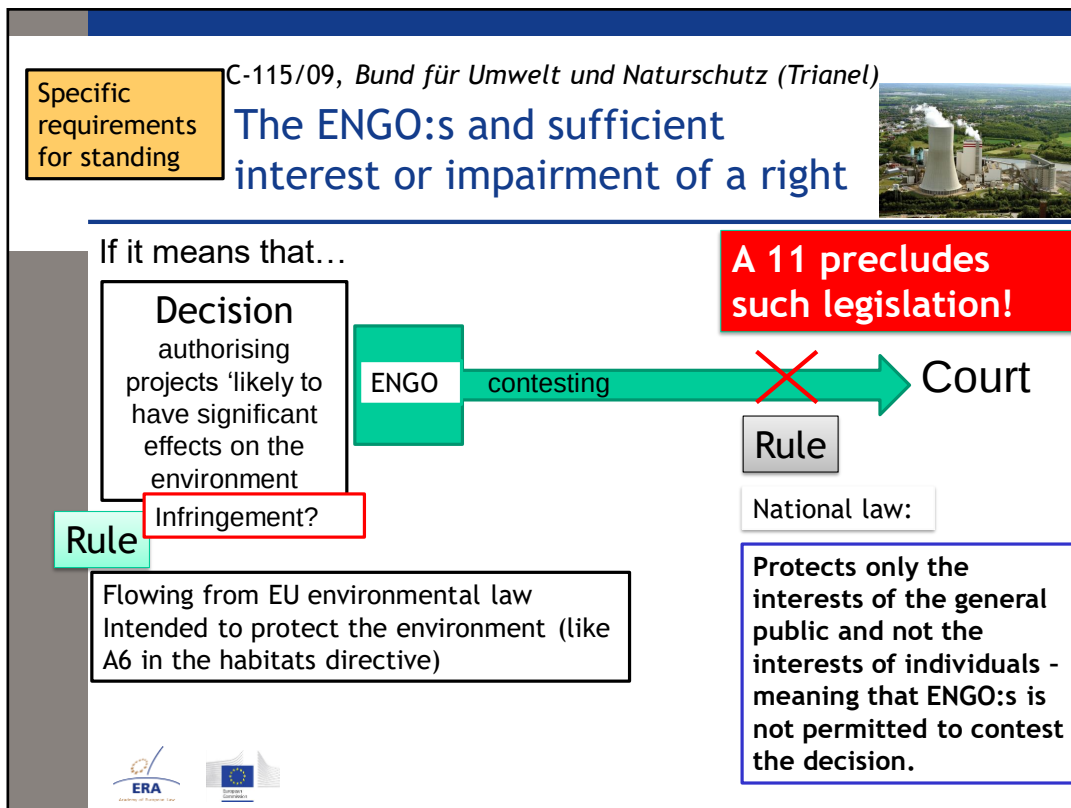
6 May 2008 partial permit



proceedings for the
annulment



According to German procedural law the ENGO did not have legal standing because the administrative measure did not affect the organisations individual public law rights.



The EU court of justice stated that Article 11 in the EIA-directive precludes legislation which does not permit ENGOs to go to court and to contest a decision on a project likely to have a significant effects on the environment when it concerns the infringement of a rule flowing from EU environmental law, intended to protect the environment, *only* on the ground that the rule protects only the interests of the general public and not the interests of individuals.

In other words: If there is a decision on a project likely to have significant effects on the environment which might infringe a rule flowing from EU environmental law, and an ENGO wants to contest this decision by going to court. And the national legislation does not permit ENGO:s to go to court, based only on the ground that the rule protects only the interests of the general public and not the interests of individuals. Then Article 11 precludes the legislation not permitting ENGOs to go to court.

The CJEU then stated: that if there is a rule.... Flowing from EU environmental law, intended to protect the environment....

and if a national rule protects only the interests of the general public and not the interests of individuals and that ENGOs are not permitted to contest the decision..... Article 11 precludes such legislation!

1. **Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, 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.

Article 11 precludes legislation which does not permit ENGOs to go to court.....

...to contest a decision on a project likely to have a significant effects on the environment....

on the infringement of a rule flowing from EU environmental law, intended to protect the environment, only on the ground that the rule protects only the interests of the general public and not the interests of individuals.

1. Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, 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.

Specific
requirements
for standing

C-115/09, *Bund für Umwelt und Naturschutz (Trianel)*

The ENGO:s and sufficient interest or impairment of a right



The CJEU in short:

It is for the Member States to define what constitutes the
impairment of a right!

However:

The wording of Article 11(3) of the EIA Directive and
the second paragraph of Article 9(2) of the Aarhus
Convention mean that this discretion is qualified by
**the need to respect the objective of ensuring wide
access to justice for the public concerned.**



C-115/09, *Bund für Umwelt und Naturschutz (Trianel)* p 44

In short: It is for the member states to define what constitutes the impairment of a right.

However, the wording of Article 11(3) of the EIA Directive and the second paragraph of Article 9(2) of the Aarhus Convention mean that this discretion is qualified by **the need to respect the objective of ensuring wide access to justice for the public concerned.**

I have a feeling of repeting myself. What is the key message? Ensuring wide access to justice.

Basis for Legal standing - locus standi

Subject matter of decisions, acts and omissions:

1. Requests for **environmental information** and entitlement to receive information ✓

2. Specific activities that are subject to **public participation** requirements ✓

3. **Requests for action** under environmental liability rules

Explicit legal standing rights in secondary EU environmental legislation

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

legal standing depends on general principles as interpreted by the CJEU



We are now leaving the area of "public participation... and move to requests for action under environmental liability rules.

3. Requests for action under environmental liability rules

The Environmental Liability Directive (ELD)



Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remedying** of environmental damage

Establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage.

Deals with "pure ecological damage"

Based on the powers and duties of public authorities
("administrative approach")



Civil liability system for "traditional damage" (damage to property, economic loss, personal injury)

We are now in the ELD directive, and we have still explicit EU rules.

The ELD-directive establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage.

As the ELD deals with "pure ecological damage" it is based on the powers and duties of public authorities (it has an "administrative approach" which differs from the civil liability system for damage)....

[Directive 2004/35/EC](#) of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remedying** of environmental damage (ELD) establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage. The polluter pays-principle is set out in the Treaty on the Functioning of the European Union (Article 191(2) TFEU).

As the ELD deals with the "pure ecological damage", it is based on the powers and duties of public authorities ("administrative approach") as distinct from a civil liability system for "traditional damage" (damage to property, economic loss, personal injury).

This is distinct from....

[Directive 2004/35/EC](#) of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remedying** of environmental damage (ELD) establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage. The polluter pays-principle is set out in the Treaty on the Functioning of the European Union (Article 191(2) TFEU).

As the ELD deals with the "pure ecological damage", it is based on the powers and duties of public authorities ("administrative approach") as distinct from a civil liability system for "traditional damage" (damage to property, economic loss, personal injury).

a civil liability system for "traditional damage" (damage to property, economic loss, personal injury).

[Directive 2004/35/EC](#) of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the **prevention** and **remedying** of environmental damage (ELD) establishes a framework based on the **polluter pays principle** to prevent and remedy environmental damage. The polluter pays-principle is set out in the Treaty on the Functioning of the European Union (Article 191(2) TFEU).

As the ELD deals with the "pure ecological damage", it is based on the powers and duties of public authorities ("administrative approach") as distinct from a civil liability system for "traditional damage" (damage to property, economic loss, personal injury).

3. Requests for action under environmental liability rules

The Environmental Liability Directive (ELD)



Encourage natural and legal persons to play a role in assisting competent authorities to address situations of environmental damage covered by environmental liability rules



The ELD, aims, amongst other things, to encourage natural and legal persons **to play a role** in assisting competent authorities to address situations of environmental damage covered by environmental liability rules.

(These rules include detailed provisions on '*remedial measures*' for environmental damage coming within the directive's scope, see Article 7 of the Environmental Liability Directive, 2004/35/EC.).

3. Requests for action under environmental liability rules

The Environmental Liability Directive (ELD)



Article 12 is about "request for action"

Who?

Natural or legal persons affected or likely to be affected by environmental damage/having a sufficient interest in environmental decision making relating to the damage /alleging the impairment of a right. + Certain NGOs

What?

submit any observations relating to instances of environmental damage/ imminent threat of such damage and **request the competent authority to take action.**

Legal
standing
right

The competent authority is **required to take a decision on the request for action**

A 13

And so; it allows natural or legal persons affected by such damage or having a sufficient interest in the damage or alleging the impairment of a right caused by the damage and certain NGO:s **to request action from the competent authority.**

It envisages that certain NGOs will be deemed to have a sufficient interest or rights capable of being impaired, so entitling them to request action.

to make submissions and requests to the competent national authority to take necessary measures.

The legal standing right means that - the competent authority is required to take a decision on the request for action (Article 12 of the Environmental Liability Directive, 2004/35/EC.) and if it doesn't; you can go to court! This is expressed in article 13.

3. Requests for action under environmental liability rules

The Environmental Liability Directive (ELD)



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.

Article 12(1)

Natural or legal persons affected or likely to be affected by environmental damage/having a **sufficient interest** in environmental decision making relating to the damage /alleging the **impairment of a right**.

+ Certain NGOs

Who?

Where?

What?

Legal
standing
right

Specific
require-
ments for
standing



The persons referred to in Article 12(1)- natural or legal persons affected or likely to be affected having a sufficient interest or alleging the impairment of a right plus certain NGO:s

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.

The similarity in wording, including what is said about environmental NGOs, indicates that the CJEU case-law on legal standing already described can be taken into account in interpreting the ELD.

3. Requests for action under environmental liability rules

Case C-529/15 Gert Folk,

The Environmental Liability Directive (ELD)



CJEU Holding fishing right not expressly referred to in A 12

Three categories **1** **2** **3** which may initiate the procedures referred to in Articles 12 and 13

Member States have discretion to determine what constitutes a 'sufficient interest', or 'impairment of a right', 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

Natural or legal persons **affected or likely to be affected** by environmental damage/having a **sufficient interest** in environmental decision making relating to the damage /alleging the **impairment of a right**.



In the case of Gert Folk, the EU court of justice stated, that Article 12 determines the categories of legal or natural persons who are entitled to submit **observations** on environmental damage. Those three categories are persons **affected or likely to be affected** by environmental damage, or **having a sufficient interest** in environmental decision-making relating to the damage, or **alleging the impairment of a right**, where administrative procedural law of a Member State requires this as a precondition. Thus, the wording of Article 12(1) enumerates **three categories** of natural or legal persons which, alternatively and independently considered, have standing. It establishes **three distinct categories** of persons which may initiate the procedures referred to in Articles 12 and 13 of the ELD directive.

The full and correct transposition of this directive requires that those three categories of persons **may submit observations** on environmental damage, that they have the **option to request that the competent authority take measures** under that directive, and, accordingly, **that they may initiate a procedure** before a court or tribunal or any other competent public body, in accordance with Articles 12 and 13 of that directive.

The Member States have discretion to determine what constitutes a 'sufficient interest' or 'impairment of a right'. **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

48 With regard to the wording of Article 12 of Directive 2004/35, it appears that persons holding fishing rights are able to come within the three categories defined in Article 12(1) of that directive. It is clear from the file before the Court that they cannot, under national law, initiate a review procedure within the meaning of Article 13 of that directive, concerning environmental damage within the meaning of Article 2(1)(b) of that directive. Accordingly, by excluding the benefit of a right to a review procedure from all persons holding fishing rights, national legislation deprives a very large number of individuals who may come within one of the three categories defined in Article 12 of Directive 2004/35 of that right to a review procedure.

49 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.

50 Having regard to the foregoing considerations, the answer to the second question is that Article 12 and 13 of Directive 2004/35 must be interpreted as precluding a provision of national law, such as that at issue in the case in the main proceedings, which does not entitle persons holding fishing rights to initiate a review procedure in relation to environmental damage within the meaning of Article 2(1)(b) of that directive.

The Austrian Government maintains that the fact that persons holding fishing rights are not expressly referred to in Paragraph 12(2) of the WRG, to which Article 11(1) of the B-UHG refers, falls under the discretion which it exercises under Articles 12 and 13 of Directive 2004/35.

44 It must be stated, in that regard, that Article 12 of that directive determines the categories of legal or natural persons who are entitled to submit observations on environmental damage. Those three categories are persons affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision-making relating to the damage, or alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

45 As the Advocate General stated in point 72 of his Opinion, the wording of Article 12(1) of Directive 2004/35 enumerates three categories of natural or legal persons which, alternatively and independently considered, have standing. It establishes three distinct categories of persons which may initiate the procedures referred to in Articles 12 and 13 of that directive.

46 The full and correct transposition of this directive requires that those three categories of persons may submit observations on environmental damage, that they have the option to request that the competent authority take measures under that directive, and, accordingly, that they may initiate a procedure before a court or tribunal or any other competent public body, in accordance with Articles 12 and 13 of that directive.

47 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.

48 With regard to the wording of Article 12 of Directive 2004/35, it appears that persons holding fishing rights are able to come within the three categories defined in Article 12(1) of that directive. It is clear from the file before the Court that they cannot, under national law, initiate a review procedure within the meaning of Article 13 of that directive, concerning environmental damage within the meaning of Article 2(1)(b) of that directive. Accordingly, by excluding the benefit of a right to a review procedure from all persons holding fishing rights, national legislation deprives a very large number of individuals who may come within one of the three categories defined in Article 12 of Directive 2004/35 of that right to a review procedure.

49 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.

50 Having regard to the foregoing considerations, the answer to the second question is that Article 12 and 13 of Directive 2004/35 must be interpreted as precluding a provision of national law, such as that at issue in the case in the main proceedings, which does not entitle persons holding fishing rights to initiate a review procedure in relation to environmental damage within the meaning of Article 2(1)(b) of that directive.

Basis for Legal standing - locus standi

Subject matter of decisions, acts and omissions:

1. Requests for **environmental information** and entitlement to receive information ✓

2. Specific activities that are subject to **public participation** requirements ✓

3. **Requests for action** under environmental liability rules ✓

Explicit legal standing rights in secondary EU environmental legislation

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

legal standing depends on general principles as interpreted by the CJEU



So far we have had explicit legal standing rights in secondary EU environmental legislation. Now we move on to other subject matter.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

Article 9(3) of the Aarhus Convention

Specific
require-
ments for
standing

Who?

What?

Legal
standing
right

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**.



Again, we start in article 9 (3) of the Aarhus convention.

Article 9(3) is broader than Article 9(2). To make it clearer, let us compare them.

4. Other subject matter, such as national implementing legislation, general regulatory acts, plans and programmes and derogations.

C-826/18 *Stichting Varkens in Nood*

A 9(2) of the Aarhus Convention

The public concerned (and ENGOS) with **sufficient interest/maintaining impairment of a right**, where national law requires this as a precondition shall have access to a **review process in court or tribunal** 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.**

A 9(3) of the Aarhus Convention

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 (and ENGOS)** 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.**

Broader!

While in article 9(2) the beneficiary of legal standing is the public concerned. In Article 9(3) it is '*the public*', which is by definition broader than the '*public concerned*'. So, in this aspect, article 9(3) is broader. As previously noted, the definition of '*the public*' includes environmental NGOs.

In the case *Stichting faRkes in Noud*, the court concludes that article 9(2) in the Aarhus convention **does not preclude that members of the 'public' have no access to justice in order to challenge a decision within the scope of Article 6.** And this is because article 9 (2) give rights to the public concerned with sufficient interests or maintaining impairment of a right, not only to "the public"

However, the court continues. Article 9(3) in the Aarhus convention precludes that "members of the public" are not being able to have access to justice for the purposes of relying on more extensive rights to participate in the decision-making procedure which may be conferred on them by the national environmental law of a Member State.

Artikel 9.2 i konventionen om tillgång till information, allmänhetens deltagande i beslutsprocesser och tillgång till rättslig prövning i miljöfrågor, som undertecknades i Århus (Danmark) den 25 juni 1998 och godkändes på Europeiska gemenskapens vägnar genom rådets beslut 2005/370/EG av den 17 februari 2005 ska tolkas så, att

den inte utgör hinder för att personer som tillhör den "allmänhet" som avses i artikel 2.4 i konventionen inte som sådana har tillgång till rättslig prövning för att bestrida ett beslut som omfattas av tillämpningsområdet för artikel 6 i konventionen. Däremot utgör artikel 9.3 i nämnda konvention hinder för att dessa personer inte kan få tillgång till rättslig prövning för att göra gällande de mer omfattande rättigheter att delta i beslutsprocessen som de eventuellt har tillerkänts enbart av en medlemsstats nationella miljölagstiftning.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

A 9(2) of the Aarhus Convention

The public concerned (and ENGOs) with **sufficient interest/maintaining impairment of a right**, where national law requires this as a precondition shall have access to a **review process** in **court or tribunal** 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**.

A 9(3) of the Aarhus Convention

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 (and ENGOs) 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.~~

Further, article 9 (3) makes no reference to impairment of a right or the sufficiency of an interest – but still the members of the public needs to meet the criteria, if national law lays down any.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

A 9(2) of the Aarhus Convention

The public concerned (and ENGOs)
with **sufficient**
interest/maintaining impairment

Legal standing *de lege* for ENGO:s

What constitutes a sufficient interest and impairment of a right... To this end, **the interest of any NGO meeting the requirements(...) shall be deemed sufficient** for the purpose of [having sufficient interest]. Such organizations shall also be deemed to have rights capable of being impaired...

A 9(3) of the Aarhus Convention

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 (and ENGOs) have access~~

Imply that contracting states retain discretion. Cannot allow those states to impose criteria so strict that it would be effectively impossible for environmental organisations to contest the actions or omissions that are the subject of that provision. (Case C-664/15, p. 48)

No legal standing *de lege* for ENGO:s

As you remember, article 9 (2) provided for a legal standing *de lege* for ENGO:s-

Article 9 (3) does not provide for legal standing *de lege* for environmental NGOs.

Although it implies that the states retain discretion as to the implementation of that provision, it cannot allow states to impose criteria so strict that it would be effectively impossible for environmental organisations to contest the actions or omissions that are the subject of that provision.

Även om formuleringen "eventuella kriterier i nationell rätt" i artikel 9.3 i Århuskonventionen innebär att de avtalsslutande staterna behåller ett utrymme för skönsmässig bedömning vid genomförandet av denna bestämmelse, får det nämligen inte medföra att de inför kriterier som är så strikta att det är faktiskt omöjligt för miljöorganisationer att få de handlingar eller underlåtenheter som omfattas av denna bestämmelse prövade.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

C-826/18 *Stichting Varkens in Nood*

A 9(2) of the Aarhus Convention

The public concerned (and ENGOs)
with **sufficient interest/maintaining impairment of a right**, where national law

Article 9(2) **precludes a rule that** only admit NGO:s (part of the 'public concerned') to challenge a decision **if they have participated in the procedure preparatory to the contested decision**.

This is the case also when that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure.

A 9(3) of the Aarhus Convention

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**

However, Article 9(3) **does not precludes a rule** that only admit NGO:s (part of the 'public concerned') to challenge a decision **if they have participated in the procedure preparatory to the contested decision**, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.

From Stichting faRkes in Noud it also follows that Article 9(2) **precludes a rule** that only admit NGO:s (part of the 'public concerned') to challenge a decision **if they have participated in the procedure preparatory to the contested decision**.

This is the case also when that condition does not apply where such organisations cannot reasonably be criticised for not having participated in that procedure.

However, Article 9(3) **does not** preclude the admissibility from being made subject to the participation of the applicant in the procedure preparatory to the contested decision, unless the applicant cannot reasonably be criticised, in the light of the circumstances of the case, for not having intervened in that procedure.

While article 9(3) bestow rights on the members of the public – all members of the public – it also allows the states to come up with certain criteria that also applies to ENGO:s, article 9(2) only bestow rights on the public **concerned**. But ENGO:s have standing de lege.

Artikel 9.2 i Århuskonventionen ska tolkas så, att den utgör hinder för att de överklaganden till domstol som den artikeln avser, vilka inges av icke-statliga organisationer som tillhör den "berörda allmänheten" enligt artikel 2.5 i den konventionen, endast kan tas upp till prövning om dessa organisationer har deltagit i

förfarandet för förberedande av det överklagade beslutet, även om det villkoret inte är tillämpligt när de inte rimligen kan klandras för att inte ha deltagit i nämnda förfarande.

Artikel 9.3 i nämnda konvention utgör däremot inte hinder för att det som villkor för att ett sådant överklagande som avses i den artikeln ska kunna tas upp till prövning krävs att klaganden har deltagit i förfarandet för förberedande av det överklagade beslutet, såvida det inte förhåller sig så att klaganden inte rimligen kan klandras för att inte ha deltagit i detta förfarande.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

A 9(2) of the Aarhus Convention

The public concerned (and ENGOs) with **sufficient interest/maintaining impairment of a right**, where national law requires this as a precondition shall have access to a **review process** in **court or tribunal** 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**.

A 9(3) of the Aarhus Convention

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 (and ENGOs)** 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**.

Broader!

Article 9 (2) refers to the challenging of **substantive and procedural** legality of **any decision, act or omission with public participation requirements**.

Article 9 (3) refers to **acts and omissions which contravene provision of national law relating to the environment**.

Article 9(3) also refers to acts and omissions by **private** persons, while Article 9(2) is limited to decisions, acts and omissions of **public authorities**.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

A 9(2) of the Aarhus Convention

The public concerned (and ENGOs) with **sufficient interest/maintaining impairment of a right**, where national law requires this as a precondition shall have access to a **review process** in **court or tribunal** 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**.

A 9(3) of the Aarhus Convention

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 (and ENGOs)** 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**.

In article 9 (2) the review process shall be in a court or tribunal. Article 9(3) leaves the contracting parties the choice between an administrative review procedure and a judicial review procedure.

The Slovak Brown Bear

C-240/09



People want
exception from
species protection
act

Authority

Aarhus Convention Article 9(3)

Lesoochránárske zoskupenie VLK
(Zoskupenie) (ENGO)

Najvyšší súd Slovenskej republiky

Stayed the proceedings and questions were referred to the Court of Justice, in particular on the direct effect of this provision of the Aarhus Convention

And here I think we really should take a closer look at a very important ruling in this context. The Slovak Brown Bear. I know you have already dealt with it – but we will consider it once again because it is so important. Basically it was about a Slovak environmental organisation (Zoskupenie) which was informed of the initiation of a number of administrative proceedings.

These administrative proceedings had been initiated by people who wanted an exception from the rules on protection of certain species such as the brown bear, they wanted access to protected countryside areas, or they wanted to use of chemical substances in such areas.

Zoskupenie applied to the Slovak Ministry of the Environment to become a "party" to the administrative proceedings. For this purpose, the organisation relied on the Aarhus Convention, in particular, Article 9(3).

As in many countries by this time – a proceeding like this was considered to only affect the applicant and the authority.

The Slovak court of final appeal (Najvyšší súd Slovenskej republiky) decided to stay the proceedings and refer questions to the Court of Justice, in particular on the direct effect of this provision of the Aarhus Convention.

The Slovak Brown Bear

C-240/09

The EUCJ:



In order to ensure effective judicial protection in the fields covered by EU environmental law:

1. EUCJ has jurisdiction to interpret the provisions of the Aarhus Convention
2. Article 9(3) of the Aarhus Convention has **no direct effect**.

Article 9(3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals, since it is subject to the adoption of subsequent measures by contracting parties.

The Court declares that it has jurisdiction to interpret the provisions of the Aarhus Convention. But since article 9 (3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals since it is subject to the adoption of subsequent measures by contracting parties. And without clear and precise obligations – there is no direct effect.

The Slovak Brown Bear

C-240/09



The Court (C-240/09)
"Slovak Brown Bear /LZ (I)"



It is for the national courts to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in A 9(3) of the Aarhus convention.

Article 9(3) intended to ensure effective environmental protection

It is inconceivable to interpret Article 9(3) in such a way as it makes it in practice impossible or excessively difficult to exercise rights conferred by EU law.

Never the less: the court stated that **it is for the national courts to interpret its national law** in a way which, **to the fullest extent possible**, is **consistent with the objectives** laid down in **A 9(3)** of the Aarhus convention.

The CJEU also held that the provisions of Article 9(3), although drafted in broad terms, are intended to ensure effective environmental protection (Case C-240/09 LZ I, paragraph 46)

'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' (Case C-240/09 LZ I, paragraph 49)

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

Article 19(1) TEU

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law

It is for the courts of the Member States to ensure judicial protection of a person's rights

under EU law,

C-243/15 *Lesoochránárske zoskupenie VLK (LZ II)*

C-348/16 *Sacko*

C-73/16 *Puškár*



Article 47(1) Charter of Fundamental Rights

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.

When dealing with the enforcement of environmental law the CJEU is not only guided by the obligations of the Aarhus Convention, but also by the principle of effectiveness of EU law and by the right to an effective remedy now guaranteed by Article 47 of the Charter of Fundamental Rights.

Article 19 (1) of the Treaty of the European Union states that *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*

Article 47(1) of the Charter of Fundamental Rights, which Member States are bound to respect when implementing EU law, confirms what is said in article 19 (1).

It provides that '*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*'.

In other words, which has been stressed by the Court: **the public is the guardian of the correct application of EU law, through access to the national court systems.**

This has been the case since Case 26/62 *Van Gend en Loose* when the court established the principle of direct effect of EU law AND stated that "The vigilance (attentiveness, alertness) of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 [now Articles 258 and 260 of the TFEU] to the diligence of the Commission and of the Member States" (p. 13).

It can also be recalled that Article 37 of the Charter provides for the integration of a high level of

environmental protection and the improvement of the quality of the environment into the policies of the Union.

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

Article 19(1) TEU

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law

Article 47(1) Charter of Fundamental Rights

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.

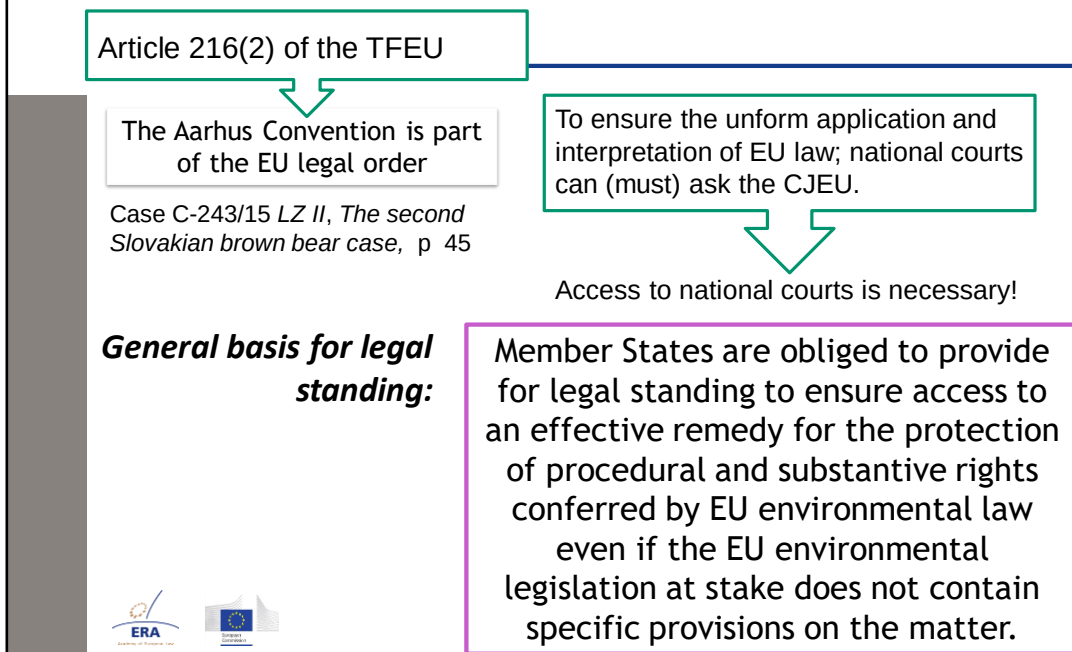
Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that an environmental organisation must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60. (C-664/15 *Protect*)



In the *Protect*-case the court concluded that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that an environmental organisation must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of the water framework directive .

(C-664/15 *Protect*)

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.



The requirements of the EU legal order, which are binding for the Member States in the implementation of Article 9(3) of the Convention, include the uniform application and interpretation of EU law.

A key mechanism for ensuring this is the possibility for — and sometimes the duty on — national courts to ask for a preliminary ruling. (Article 267 of the TFEU).

As I mentioned before; this necessitates access to the national courts – otherwise there would be no cases for the national courts in which they could ask the CJEU for interpretation.

In the light of all these considerations: The most important thing to remember is that **Member States are obliged to provide for legal standing to ensure access to an effective remedy for the protection of procedural and substantive rights conferred by EU environmental law even if the EU environmental legislation at stake does not contain specific provisions on the matter.**

In summary:

1. Requests for **environmental information** and entitlement to receive information

Any natural or legal person submitting an information request enjoys legal standing to challenge a decision, act or omission of the public authority responsible for dealing with that request. Rights to receive information through active dissemination may also entitle individuals and associations to bring legal challenges.



And now, some summing up.

In summary:

2. Specific activities that are subject to **public participation** requirements

Public participation requirements that apply to specific activities confer rights on those who are concerned and entitle them to ask for a judicial review of the decision, act or omission at stake.

For individuals, the precondition of needing to show the 'impairment of a right' or a sufficient interest in order to obtain legal standing to bring a challenge concerning a specific activity has to be interpreted and applied in the light of the obligation to grant a wide access to justice in environmental matters.

Rights which may be impaired include procedural rights of the individual stemming from EU environmental law as well as substantive rights conferred on the individual.

Recognised environmental NGOs enjoy legal standing de lege to challenge decisions, acts or omissions by public authorities on specific activities which are subject to public participation requirements under EU law.

In summary:

2. Specific activities that are subject to **public participation** requirements

The criteria that environmental NGOs have to fulfil to qualify for legal standing de lege must not be excessively difficult to satisfy and should take into account the interests of small and local NGOs.

The conditions to be fulfilled by environmental NGOs in order to obtain legal standing de lege must not be less favourable for foreign NGOs than for domestic ones.

While not enjoying legal standing de lege, other associations, organisations and groups may, subject to national law, enjoy legal standing on the same basis as individuals.

Member States may not restrict legal standing to challenge a decision of a public authority to those members of the public concerned who participated in the preceding administrative procedure to adopt that decision.



In summary:

3. **Requests for action** under environmental liability rules

The competent authority is required to take a decision on the request for action. Those entitled to make submissions and request action are also entitled to legally challenge the procedural and substantive legality of a competent authority's decision, act or failure to act on the basis of the submissions and the request

The similarity in wording, including with regard to the privileged entitlement of environmental NGOs, means that the CJEU case-law on legal standing can also be taken into account in interpreting the Environmental Liability Directive.



In summary:

4. Other subject matter, such as national **implementing legislation, general regulatory acts, plans and programmes** and **derogations**.

The general basis for legal standing to challenge decisions, acts and omissions of Member States in the fields covered by EU environmental law is laid down in national law, but has to be interpreted consistently with the requirements set out in Article 9(3) of the Aarhus Convention and Articles 19(1) TEU and 47 of the Charter of Fundamental Rights.

Legal standing must be provided to individuals and environmental NGOs to ensure respect for EU environmental procedural provisions, such as those laying down decision-making procedures involving public participation, for example in procedures concerning plans and programmes.

Member States need to ensure legal standing to challenge very broad categories of decisions, acts and omissions in order to ensure that an extensive set of substantive rights can be exercised.

Member States may adopt criteria that individuals and NGOs must fulfil in order to obtain legal standing, but these criteria must not make it impossible or excessively difficult to exercise substantive and procedural rights conferred by EU law.