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Locus standi for environmental organisations before the European Court of Justice – implications of the Århus Convention

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Forord

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Oslo, 10.02 2010

Therese Johansen

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1 Introduction

In the EU, Environmental Organisations ("EOs") and other Non-Governmental Organisations ("NGOs") acting in the public interest have been denied *locus standi* before the European Court of Justice (the "ECJ"). Has this changed now the Community has signed and ratified the Århus Convention?[1]

Unlike the ECJ's case law under Article 230 (4) EC, the Århus Convention (the "AC" or the "Convention") recognises the possibility of public interest litigation in environmental matters.[2] The purpose of this dissertation is to assess the potential significance of the Århus Convention in granting EOs *locus standi* before the ECJ. This topic is of particular interest following the adoption of Regulation 1367/2006[3] (the "Regulation"), which according to its Article 1 (1) has the objective of contributing towards implementation of the Convention. In the following, it will be examined to what extent the Regulation is being successful in implementing the rights to *locus standi* that stem from the Convention.[4]

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1 United Nations Economic Commissions for Europe (UN/ECE), Convention on Access to information, public participation in decision-making and access to justice in environmental matters (1998) 38 International Legal Materials 3.

2 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 241.

3 Regulation 1367/2006 of the European Parliament and Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13. The Regulation entered into force on 28 September 2006 and is to be applied as of 8 June 2007.

4 *Cf.* Article 1 of the Århus Convention. The objective of the Regulation is to contribute to implementing the obligations arising under the Århus Convention.

First, the ECJ's approach under Article 230 (4) to *locus standi* for private applicants will be discussed. Three issues are of particular interest in connection with *locus standi* for EOs: firstly, the possibility of the grant of procedural rights that may make an EO individually concerned; secondly, whether there is a general exception to the requirement for individual concern in environmental matters, as asserted in the *Greenpeace* case[5]; and thirdly, recent developments in the Court's case law regarding an exception based on efficient judicial protection.

The second chapter examines the potential significance of the Convention for granting EOs *locus standi* before the ECJ. In this respect, two questions will be discussed. Firstly, what rights are granted to EOs under the Convention; and secondly, what success is the Regulation having in implementing the rights of *locus standi* stemming from the Convention?[6] At this point, the Regulation's success in achieving full implementation of the Convention is far from certain. The European Parliament resolution[7] of May 2008 on the EU strategy for the third Meeting of the Parties to the Århus Convention admitted that the Convention's provisions regarding access to justice in environmental matters have not yet been fully transposed into Community law. The resolution urged the Commission to lead by example by rigorously implementing the Convention.[8] This dissertation contributes to

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5 Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651.

6 *Cf.* Article 1 of the Århus Convention. The objective of the Regulation is to contribute to implementing the obligations arising under the Århus Convention.

7 European Parliament resolution of 22 May 2008 on the EU strategy for the third Meeting of the Parties to the Århus Convention in Riga, Latvia, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0236+0+DOC+XML+V0//EN&language=EN (accessed 07.08.2008) para. 5.

8 European Parliament resolution of 22 May 2008 on the EU strategy for the third Meeting of the Parties to the Århus Convention in Riga, Latvia, available at

the ongoing debate about how to achieve full implementation of the Convention and thus secure EOs access to justice in environmental matters. This is approached through an analysis of the Convention and the Regulation and through a critical evaluation of the Court's case law in the light of important constitutional principles, such as the rule of law and the notion of effective judicial protection.

This dissertation does not, however, argue that private applicants in general should be granted *locus standi* in environmental matters. The focus here is on whether *locus standi* should be granted in respect of targeted representative actions concerning environmental matters that are brought by EOs or other NGOs fulfilling certain requirements.[9] Such actions will also be referred to as public interest litigation, which in this dissertation means a legal action brought in the general interest of protecting the environment in order to challenge decisions taken at Community level that are likely to have a substantial effect on the environment and that do not comply with EC environmental law. Furthermore, the terms EOs or NGOs refer to groups whose primary objective is the protection of the environment, whose membership is open to any persons supporting the objectives of the group and that actively pursue the promotion of environmental interests.[10]

At a more general level, rules on *locus standi* determine eligibility to bring a particular matter before the court for judicial review. Whether NGOs are granted *locus standi* before the courts, either in the individual Member States or in the EU, depends on the various legal systems' perception of the distinction between private and public interests, and even more on the extent

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http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0236+0+DOC+XML+V0//EN&language=EN (accessed 07.08.2008) para. 7

9 Cygan A 'Protecting the interests of civil society in Community decision-making – the limits of Article 230 EC' (2003) International & Comparative Law Quarterly 995.

10 Krämer, Ludwig 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 Journal of Environmental Law 1, 14.

to which the distinction is relevant to *locus standi*.[11] Further, rules of standing go to the core of a society's view of the role of judicial review in a constitutional community governed by the rule of law[12], as well as to the core of its view of the role of citizens in that society's constitutional and political framework.[13]

According to the traditional position on locus standi, NGOs are excluded from bringing actions before the courts to protect the public interest in a clean environment.[14] The rationale for this is that public authorities protect the public interest, while individuals (and their organisations) must demonstrate individual harm to be granted *locus standi*.[15]

The position in the EU is no different: private applicants are required to be directly and individually concerned by the challenged measure to be granted *locus standi* before the Community Courts.[16]

The problem is that the conventional view of government as representative of the public interest in environmental matters may not always ring true.[17] Environmental interests are, by their very nature, common, shared and non-economic. Accordingly, harm to environmental interests will

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[11] Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (2002, Kluwer Law International) 6.

[12] Skoghøy, Jens Edvin A 'Ny norsk sivilprosesslov - tvisteloven av 2005' [2006] Jussens Venner 269

[13] McLeod-Kilmurray, Heather 'Stichting Greenpeace and Environmental Public Interest Standing before the Community Judicature: Some lessons from the Federal Court of Canada' (1998) 1 The Cambridge Yearbook of European Legal Studies 269, 285.

[14] *Ibid.*, p 285.

[15] *Ibid.*, p 285.

[16] *Cf.* Article 230 (4) EC.

[17] McLeod-Kilmurray, Heather 'Stichting Greenpeace and Environmental Public Interest Standing before the Community Judicature: Some lessons from the Federal Court of Canada' (1998) 1 The Cambridge Yearbook of European Legal Studies 269, 285.

not necessarily be associated with harm to individual proprietary rights.[18] Applying a strict test of individual concern to environmental matters thus limits the right to locus standi based on considerations that are irrelevant to the environmental interests for which protection is being sought.[19]

The Convention[20], on the other hand, recognises the potentially important role of the public, and in particular NGOs, in enforcing environmental law, and provides for public interest litigation in environmental matters.[21] Before discussing the Convention and its impact on *locus standi* for EOs before the ECJ, we will examine how the ECJ so far has approached the question of *locus standi* under Article 230 (4) EC in respect of private applicants.

2 *Plaumann* and the ECJ's jurisprudence on *locus standi* for private applicants

The case law on the circumstances in which an NGO may be granted standing pursuant to Article 230 (4) EC was effectively summed up by the ECJ in *Federolio*.[22] According to the Court, there are at least four situations

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18 See Applicant's arguments in Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651, paras 17-19.

19 McLeod McLeod-Kilmurray, Heather 'Stichting Greenpeace and Environmental Public Interest Standing before the Community Judicature: Some lessons from the Federal Court of Canada' (1998) 1 The Cambridge Yearbook of European Legal Studies 269, 285.

20 United Nations Economic Commissions for Europe (UN/ECE), Convention on Access to information, public participation in decision-making and access to justice in environmental matters (1998) 38 International Legal Materials 3.

21 See the Preamble of the Århus Convention paragraphs 7, 8 and 18 and Article 9 of the Århus Convention.

22 See Case T-122/96 *Federolio v Commission* [1997] ECR II 1559. See especially para. 54, which states that the collective interests of the members of the organisation do not make the organisation individually concerned.

in which an organisation may be granted standing: Firstly, if the contested measure is addressed to the organisation itself; secondly, if the measure affects the organisation's own interests, in particular because its negotiating position has been affected; thirdly, if the members of the organisation are directly and individually concerned; and fourthly, if a legal provision expressly grants procedural powers to the organisation.[23]

The rules on *locus standi* for EOs are thus governed by the same strict criteria of direct and individual concern that apply to individuals.[24] This means that unless the contested measure is addressed to the organisation, the organisation needs to show direct and individual concern in order for its action to be admissible.

2.1 Direct concern

A measure is considered to be of 'direct concern' to the applicants if it is independently capable of directly affecting the legal position of the applicants and leaves the addressees of the measure no discretion regarding its implementation.[25] As stated by Advocate General (AG) Grand in his opinion on the *Alcon* case, only then will there be a "direct relationship of cause and effect between the measure and its possible effects on the person in question."[26]

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23 See Case T-122/96 *Federolio v Commission* [1997] ECR II 1559. See especially para. 54, which states that the collective interests of the members of the organisation do not make the organisation individually concerned.

24 Cf. Article 230 (4), "any natural or legal person."

25 Joined cases 41/70 to 44/70 *International Fruit v Commission* [1971] ECR 411, paragraphs 25 and 28.

26 Case 69/69 *Alcan Aluminium Raeren and others v Commission of the European Communities* [1970] ECR 385, at 397.

The question of direct concern does not in principle cause particular problems for public interest litigation.[27] The focus of the ECJ in cases of public interest litigation has been on whether or not NGOs can be considered individually concerned.

2.2 Individual concern – the *Plaumann* test and beyond

The meaning of 'individual concern' was first elaborated by the Court in *Plaumann*.[28] In *Plaumann*, the applicants attempted to attack a Commission decision not to authorise Germany partially to suspend customs duties on clementines imported from third countries.

In assessing whether the applicant was individually concerned, the Court adopted the test that has become the key for determining *locus standi* for private applicants under Article 230 (4) EC. The Court stated that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the persons addressed."[29]

The Court went on to say that "in the present case, the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised

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[27] Another issue is, however, the fact that many EC decisions relating to environmental matters form part of a decision hierarchy at both EC and Member State level and, as such, frequently do not concern the applicants directly. *Cf.* Rodenhoff, Vera 'The Århus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 355.

[28] Case C-25/62 *Plaumann* & Co v The EEC Commission [1964] CMLR 29.

[29] Case C-25/62 *Plaumann* & Co v The EEC Commission [1964] CMLR 29, para. 106.

by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee."[30] Especially this last part of the Court's reasoning has made it nearly impossible for private applicants to succeed, except in a very limited category of retrospective cases[31]

The problem with the test is its emphasis on the need for the applicant to be "differentiated from all other persons." This is especially problematic with regard to public interest litigation, which is the opposite of being 'individually concerned' in the meaning of the *Plaumann* test.

Another hurdle for public interest litigation is the Court's 'closed category test'. According to this test, a measure may be contested by private applicants if, rather than regulating abstract situations, it affects legal positions already in existence, so that the effect of the measure cannot be broadened further.[32] This represents a substantial barrier to public interest litigation, as damage to the environment is likely to affect a large group of people and the extent of the damage may be difficult to predict.

To sum up, the current case law represents an insurmountable hurdle to NGOs. The more persons affected by a measure, the less likely it is that the NGO will be considered individually concerned, and the greater damage to the environment, the more persons it is likely to affect. In the following we will take a closer look on the impact of the restrictive interpretation in

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30 Case C-25/62 *Plaumann* & Co v The EEC Commission [1964] CMLR 29, para. 107.

31 Craig, Paul 'Legality, Standing and Substantive Review in Community Law' (1994) 14 (4) OJLS 507, 509 and Ginter, Carrie 'Access to Justice in the European Court of Justice in Luxembourg' (2002) 4 (3) European Journal of Law Reform 381, 392.

32 Ginter, Carrie 'Access to Justice in the European Court of Justice in Luxembourg' (2002) 4 (3) European Journal of Law Reform 381, 393.

Plaumann [33] on subsequent environmental case law and the possibilities for public interest litigation before the Community Courts.[34]

2.3 The *Greenpeace* case and standing for environmental organisations

The ECJ has several times considered whether trade and other associations, established for the purposes of protecting their members' economic interests, can fulfil the criteria in Article 230 (4) EC. The problem, as seen in the early case of *Fediol* regarding Article 230 (4) EC,[35] is that the ECJ has not been willing to "accept the principle that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting *the general interest* of that category." [36] As a result, the association itself, or the association's members, must be directly or individually concerned.

The leading environmental case on the admissibility of public interest litigation is *Greenpeace*,[37] in which several individuals and three associations sought the annulment of a Commission decision granting Spain financial assistance for the construction of two power stations in the Canary Islands.

The basis for the decision under challenge was a regulation on the European Regional Development Fund. According to this regulation, Community decisions had to be in keeping with Community policies on

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[33] Case C-25/62 *Plaumann* & Co v The EEC Commission [1964] CMLR 29.

[34] De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 231.

[35] Case C-29/62 to 22/62 *Fediol* [1962] ECR 491.

[36] Case C-29/62 to 22/62 *Fediol* [1962] ECR 491, para. 3(5) p 499. Emphasis added.

[37] Case C-321/*95 Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651.

environmental protection. The problem was that the Commission had funded the projects without requiring a prior environmental impact assessment.

According to the *Plaumann* test, the applicants could only claim to be individually concerned by the decision if it affected them by reason of certain attributes which were peculiar to them, or by reason of factual circumstances which differentiated them from all other persons, and thereby distinguished them individually in the same way as the person addressed.[38] Since an interest in the protection of the environment is not of individual concern,[39] the applicants argued for an exception in environmental matters.[40] More specifically, Greenpeace argued that interests in environmental matters were, by their very nature, common to and shared by potentially large numbers of individuals.[41] Accordingly, unless there was an exception in the form of a wider interpretation of individual concern in environmental matters, there would be a legal vacuum when it came to ensuring compliance with EC environmental law.[42]

The ECJ, however, reiterated previous case law, stating that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned by a measure affecting the general interest of that category.[43] Accordingly, the ECJ rejected the argument for an exception in environmental matters, with

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38 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 232.

39 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 230.

40 Case C-321/*95 Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651, para. 17-19.

41 *Ibid.*, para. 17-19.

42 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 233.

43 See Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651, paras 27 and 29.

the result that Greenpeace was barred from bringing an action for annulment unless its members could do so individually.[44]

On the other hand, the Court of First Instance ("the CFI") and the ECJ did advance two possible exceptions that could give NGOs *locus standi* under Article 230 (4) EC.[45] Firstly, an NGO could have *locus standi* if it was granted procedural rights in the legal basis on which the decision was based.[46] Secondly, the ECJ did not exclude the possibility of an exception in cases where there would otherwise be a denial of an effective remedy due to the absence of a national judicial procedure.[47] These two exceptions will be discussed in more detail below.

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44 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' 227, 232

45 See Order of the Court of First Instance of 9 August in Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1995] ECR II-2205, para. 60 and 62 and Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651, para. 32-33.

46 See Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1995] ECR II-2205, para. 62-63. Because Greenpeace did not question the CFI's finding that the organisation was not granted procedural rights that would make it individually concerned; this point was not further discussed by the ECJ. It is however clear from cases such as Joined Cases 67, 68 and 70/85 *Van der Kooj and Others v EC Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and others v Commission* [1993] ECR I-1125, that where an organisation has played a role in the procedure which led to the adoption of an act, this may make the organisation individually concerned even though its members are not directly or individually concerned by the measure.

47 Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1998] ECR I-1651, para. 32-33.

2.4 Procedural rights as a ground for standing

In cases such as *Van der Kooj*[48] and *CIRFS,*[49] the ECJ considered private applicants and associations involved in the negotiations leading up to a decision to be individually concerned. In competition law cases, for example, the ECJ took account of active participation in administrative procedures to establish the existence of individual concern.[50]

The Court's case law on this subject was effectively summed up by the ECJ in *Cofaz*.[51] Here the Court stated that "where a Regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings in order to protect their legitimate interest."[52] The rights of consultation or participation must, however, be laid down in the legal basis for the institution's decision.[53] The fact that an NGO has participated in one way or another in the process leading to the adoption of a Community measure does not distinguish it individually in relation to the decision in question.[54] As in *Greenpeace*, the applicants were

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48 Joined Cases 67,68 and 70/85 *Van der Kooj and Others v EC Commission* [1988] ECR 219.

49 Case C-313/90 *CIRFS and others v Commission* [1993] ECR I-1125.

50 *Cf.* Case C-169/84 *Cofaz and others v Commission* [1986] ECR 391 and Joined cases C-68/94 and C 30/95. *France and others v Commission (Kali and Salz)* [1998] ECR I-1375.

51 *Cf.* Case C-169/84 *Cofaz and others v Commission* [1986] ECR 391

52 See Case C-169/84 *Cofaz and others v Commission* [1986] ECR 391, para. 23.

53 *Cf.* Case C-191/82 *Fediol v Commission* [1983] ECR 2913, Case C-264/82 *Timex v Council and Commission* [1985] ECR 849 and Case T-177/96 *Federolio v Commission* [1997] ECR II 1559, which also provides an overview to the ECJ's jurisprudence in this area in para. 60.

54 Case T-60/96 *Merck and others v Commission* [1997] ECR II-849, para. 73. See Arnull, Anthony 'Private Applicants and the Action for Annulment since Codorniu' (2001) 38 CML Rev 7,44.

unsuccessful in arguing that their participation in the decision-making process, which in *Greenpeace* had occurred through contacts between Greenpeace and the Commission, constituted special circumstances giving rise to "individual concern." [55] If Greenpeace had succeeded with this line of argument, NGOs would be able to make themselves individually concerned simply by sending in their observations to the relevant institution.[56]

Next we need to ask what applicants granted standing on the basis of procedural rights are entitled to request the court to do. Are they simply entitled to seek protection of their procedural rights, or can the substantive measure itself be challenged? We also need to consider whether the Regulation makes NGOs individually concerned by virtue of the new procedural rights granted to them. These issues will be discussed in more detail below. Firstly, however, we will examine recent developments in the ECJ's case law on individual concern.

2.5 AG Jacobs, *Jégo-Quéré* and *UPA* – a possible liberalisation of the notion of individual concern?

In *Jégo-Quéré*[57], the CFI had to rule on a challenge brought by fishing company *Jégo-Quéré* to the provisions of Commission Regulation 1162/2001[58] Applying the *Plaumann* test, the CFI concluded that *Jégo-Quéré* was not individually concerned.[59] The Court also found that *Jégo-*

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[55] Case T-585/93 *Greenpeace*, paragraphs 56 and 62.

[56] Arnull, Anthony 'Private Applicants and the Action for Annulment since Cordoniu' (2001) 38 CML Rev 7, 44

[57] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651.

[58] Commission Regulation 1162/2001 establishing measures for the Recovery of the Stock of Hake in ICES Sub-areas III, IV, VI and VII divisions VIII a, b, d, e and Associated Conditions for the Control of Activities of Fishing Vessels [2001] OJ L159/4.

[59] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 30.

Quéré did not possess any procedural rights capable of making it individually concerned. Nevertheless, the Court found it necessary to consider whether "the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy."[60]

Firstly the CFI looked at the two alternative routes to judicial review to challenge the legality of an EC measure: namely the preliminary reference procedure under Article 234 EC and an action for damages under Article 288 EC. The problem in *Jégo-Quéré* was that the contested regulation did not give rise to national implementing procedures.[61] Accordingly the applicants were unable to institute proceedings before a national court that would result in a reference for a preliminary ruling under Article 234 EC.[62] The Court also made it clear that *Jégo-Quéré* could not be required to break the law in order to gain access to justice.[63] The Court further stated that an action for damages pursuant to Article 288 EC would be unsatisfactory, because such proceedings would not bring about the removal of a possibly illegal Community measure.[64]

As a result, the CFI identified a need for a reinterpretation of Article 230 (4) in order to provide the applicant with the right to an effective remedy. Referring to the opinion of AG Jacobs in *Union Pequenos Agricultores (UPA)*[65], the Court held that "there is no compelling reason to read into the notion of individual concern (…) a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others

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[60] *Ibid.*, para. 43.

[61] *Ibid.*, para. 45.

[62] *Ibid.*, para. 45.

[63] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 45, with reference to the Opinion of A-G Jacobs in Case C-50/00 *Union Pequenos Agricultores (UPA)* [2002] ECR I-6677, para. 43.

[64] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 46.

[65] Opinion of A-G Jacobs in Case C-50/00 *Union Pequenos Agricultores (UPA)* [2002] ECR I-6677, para. 59.

affected by it in the same way."[66] Instead the Court suggested that if the measure in question affected the applicant's legal position in a manner both "definite and immediate", by restricting his rights or imposing obligations on him, the applicant should be considered individually concerned regardless of the number of other persons equally affected by the measure.[67]

According to the CFI, such a reinterpretation of Article 230 (4) was necessary in order to ensure the applicant a right to an effective remedy.[68] Recalling the fact that the ECJ itself had confirmed that access to court was one of the essential elements of a Community based on the rule of law,[69] the Court remarked that situations could not be tolerated where individuals were denied access to court to argue for the review of Community measures that had an adverse effect on their legal positions.

In *UPA*, which concerned a similar situation to *Jégo-Quéré,* the UPA lodged a complaint with the CFI[70] under Article 230 (4) EC against Regulation 1638/98.[71] The Court found the action to be inadmissible, as the UPA could not be considered individually concerned.[72] The Court rejected the UPA's argument that it would otherwise be denied an effective remedy.[73]

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[66] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 49.

[67] *Ibid.*, para. 50.

[68] *Ibid.*, para. 42.

[69] Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 41.

[70] Case T-173/98 *Union de Pequenos Agricultores v Council (UPA)* [1999] ECR II-3357.

[71] Regulation 1638/1998 amending Regulation 136/66 establishing a Common Organisation of the Market of Oils and Fats [1998] OJ L210/32.

[72] Case T-173/98 *Union de Pequenos Agricultores v Council (UPA)* [1999] ECR II-3357, para. 48 and 58.

[73] Case T-173/98 *Union de Pequenos Agricultores v Council (UPA)* [1999] ECR II-3357, para. 61-63.

AG Jacobs pointed out in his Opinion[74] that the strict interpretation of individual concern was no longer sufficient.[75] He considered it paradoxical that the ECJ's interpretation of individual concern meant that the greater the number of persons affected by an EC measure, the less likely it was that an applicant would be to be granted *locus standi* pursuant to Article 230 (4) EC.[76] In order to rectify this, AG Jacobs proposed that a person should be regarded as individually concerned by a Community measure where, by reason of his/her particular circumstances, the measure had, or would be liable to have, a "substantial adverse affect" on his/her interests.[77]

In its appeal, the UPA only challenged the CFI's analysis of the right to an effective remedy with regard to Article 230 (4) EC.[78] Thus the only question for the ECJ was whether the UPA could be granted standing to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection required it.[79] In other words, the question to be answered by the ECJ was not whether it was time to reinterpret the notion of individual concern, but whether an exception from the requirement for

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74 Opinion of A-G Jacobs in Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677.

75 Opinion of A-G Jacobs in Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 3-4.

76 Rodenhoff, Vera 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 356.

77 Opinion of A-G Jacobs in Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 103. Thus proposing a more relaxed test than the one put forward by the CFI in *Jégo-Quéré*.

78 Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 32.

79 Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 33.

individual concern had to be made when the applicant would otherwise be denied justice.

According to the ECJ, it was impossible to make a general exception to the requirement for individual concern in Article 230 (4) EC as proposed by the applicants. This would amount to setting aside the express requirement for individual concern and to do so would exceed the jurisdiction conferred to the Court by the Treaty. The Court held that while it was "admittedly, possible to envisage a system of judicial review of legality of Community measures of general application different from that established by the founding Treaty (…) it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force."[80]

While acknowledging that individuals were entitled to effective judicial protection, the ECJ held that the EC Treaty, in Articles 230, 241 and 234 EC, constituted "a complete system of legal remedies and procedures" designed to ensure judicial review by the Community Courts.[81] These procedures were meant to be complementary and together provide individuals with effective judicial protection.[82]

The Court further held that it could not accept an exception to Article 230 (4) EC in circumstances where national rules did not allow an individual to bring proceedings to contest the validity of a Community measure.[83] The Court found this was once again outside its jurisdiction, as such an exception would require it to examine and interpret national procedural law.[84]

Accordingly, the *UPA* judgment rejected arguments for a 'denial of justice' exception that would have allowed the review of alleged infringements of individual rights. In response to the opinion of AG Jacobs,

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[80] See *UPA* (n) paras 38-45.

[81] *Ibid.*, para. 40-41.

[82] *Ibid.*, para. 38-39.

[83] *Ibid.*, para. 43.

[84] *Ibid.*, para. 43.

the Court merely stated that the requirement of individual concern had to be interpreted in the light of the principle of effective judicial protection by taking account of the various *circumstances* that might distinguish an applicant individually.[85] However, such an interpretation could not have the effect of setting aside that requirement altogether.[86] This led commentators such as De Lange,[87] Granger[88] and Mathiesen[89] to suggest that it would be possible for the Court to accept another more generalised approach to *locus standi* in public interest litigation cases based on a wider understanding of the *circumstances* that could be liable to differentiate certain representative NGOs from all other persons.[90] According to Granger, this would be possible as long as the proposed reinterpretation of Article 230 (4) EC would not be tantamount to removing the condition of individual concern altogether.[91]

Although neither *Jégo-Quéré* nor *UPA* involved arguments concerning public interest in environmental protection, both are significant as they exclude from consideration the question of whether persons other than the

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85 *Ibid.*, para. 44. Emphasis added.

86 *Ibid.*, para. 44.

87 De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law 227, 237.

88 Granger, Marie-Pierre 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jego-Quere et Cie SA v Commission and Union de Pequenos Agricultores v Council' (2003) 66 The Modern Law Review 124, 137.

89 Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36.

90 *Ibid.*, p 50.

91 Granger, Marie-Pierre 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Union de Pequenos Agricultores v Council' (2003) 66 The Modern Law Review 124, 137.

applicant might in general and abstract terms be similarly affected. Such an approach would have widened the admissibility of actions from private applicants to challenge general measures and decisions relating to specific projects that had "definite and immediate" or "substantial adverse" environmental effects on the local population. The spill-over effect of this would have benefited EOs representing such applicants,[92] provided the notion of "interest" had been interpreted broadly enough to allow for the more general, non-economic environmental interest to be taken into account. If not, neither the test in *Jégo-Quéré* nor that of AG Jacobs would have been of much assistance to the NGOs.

Hopes for a more relaxed approach to Article 230 (4) EC were, however, quashed by the ECJ's decision in the *Jégo-Quéré* case.[93] The Court confirmed its own findings in *UPA* [94], explicitly stating that the "definite and immediate effect" test as advanced by the CFI in *Jégo-Quéré*[95] would be equivalent to "removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC."[96] As a result, the decision of the CFI could not be upheld and *Jégo-Quéré's* action was held to be inadmissible.

To sum up, the ECJ's case law so far on *locus standi* for private applicants constitutes an insurmountable hurdle to public interest litigation. Unless the contested measure is addressed to the NGO in question, or the NGO is given procedural rights in the legal basis for the decision, EOs acting in the public

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92 Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 50.

93 Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425.

94 See Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425, para. 30-35.

95 Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651, para. 50.

96 *Cf.* Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425, para. 37-38

interest are not considered individually concerned within the meaning of Article 230 (4) EC.

The current restrictive approach to Article 230 (4) EC has been widely criticised by academic commentators.[97] According to Ebbeson,[98] no EOs have been granted standing under Article 230 (4) EC to challenge decisions not addressed to them.[99] As already mentioned, this is problematic, since applying the *Plaumann* test of individual concern to environmental matters bars the possibility of targeted public interest litigation and this is done on the basis of considerations that are not relevant to the environmental interests for which protection is being sought.[100] The EC Treaty no longer exclusively concerns the protection of individual economic interests, and academic commentators such as Cygan[101] have argued that a more liberal approach to Article 230 (4) EC in cases involving public interest litigation would be an

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[97] See Krämer, Ludwig 'Public Interest Litigation in Environmental Matters before European Courts' (1996) 8 Journal of Environmental Law 1, Ebbeson, Jonas 'The European Community', Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002) 49, Ward, Angela 'Judicial Review of Environmental Misconduct in the European Community: Problems, Prospects and Strategies' (2000) 1 Yearbook of European Environmental Law 137 and Williams, Rhiannon 'Enforcing European Environmental Law: Can the European Commission be Held to Account?' (2002) 2 Yearbook of European Environmental Law 271

[98] See Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002).

[99] *Ibid.*, p 80.

[100] McLeod-Kilmurray, Heather 'Stichting Greenpeace and Environmental Public Interest Standing before the Community Judicature: Some lessons from the Federal Court of Canada' (1998) 1 The Cambridge Yearbook of European Legal Studies 269, 285.

[101] Cygan A 'Protecting the interests of civil society in Community decision-making – the limits of Article 230 EC' (2003) International & Comparative Law Quarterly 995.

important "starting point for shaping the future of the social and political structure of the EU."[102]

In the following chapter we consider the impact of the Convention on granting *locus standi* to NGOs before the ECJ in environmental matters. As mentioned in the introduction, the Convention recognises the important role that may be played by the public through public interest litigation. We will therefore discuss the rights granted to NGOs under the Convention and subsequently look at how these have been implemented in Community law so far.

3 The Århus Convention

The Convention[103] is an international agreement that lays down a set of basic rules to promote citizens' involvement in environmental matters and improve the enforcement of environmental law. The Convention recognises a substantive right to a healthy environment[104] and aims to create procedural

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[102] Cygan A 'Protecting the interests of civil society in Community decision-making – the limits of Article 230 EC' (2003) International & Comparative Law Quarterly 995, 1012.

[103] United Nations Economic Commissions for Europe (UNECE), Convention on Access to information, public participation in decision-making and access to justice in environmental matters (1998) 38 International Legal Materials 3.

[104] *Cf.* preamble of the Århus Convention, para. 7.The status of a substantive right to a healthy environment is not without controversy. *Cf.* Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Århus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 333, with further reference to Hill, 'Human Rights and the Environment: A synopsis and some Predictions' (2004) 16 (3) GIELR 359.

This issue is, however, beyond the scope of this dissertation.

rights for the public in relation to environmental issues.[105] It consists of three 'pillars': the first concerns public rights of access to environmental information; the second concerns rights to participate in environmental decision-making; while the third concerns rights of access to judicial review in cases where environmental laws are infringed – including infringements of rights under the first two pillars.

The Convention was negotiated by countries belonging to the United Nations Economic Commission for Europe (UNECE). It was adopted on June 25, 1998 at a pan-European conference of environment ministers in the Danish city of Århus. All EU governments signed up to the Convention, as did the EU. The Convention entered into force on October 30, 2001.[106]

By signing and ratifying[107] the Convention, the EU committed itself to implementing it in EU law. This has been done through several directives aimed at the Member States and also through the Regulation, which came into force on17 July 2007.[108]

Below we will examine whether European NGOs are being granted judicial access by virtue of the Regulation to obtain the review of decisions taken by EU institutions and bodies which, in the opinion of the NGOs,

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105 Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Århus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 333

106 EU Focus 'Commission to increase citizens' involvement in environment law' (2003) EU Focus 10 and 'Questions and Answers on the Århus Convention, MEMO/03/210 of October 28 2003

107 The Århus Convention was ratified by Council decision 2005/370/EC of 17 February 2005, on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making and access to justice regarding environmental matters; deposited with the United Nations.

108 Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and bodies [2006] OJ L 246/13

breach environmental legislation. Does the Regulation finally open up for public interest litigation before the ECJ? If so, to what extent are NGOs granted *locus standi* before the ECJ, and on what grounds? Further, will a full implementation of the Convention within the EU secure the efficient judicial protection of environmental rights?

The Convention is based on the recognition that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."[109] Concerning access to justice, the Preamble[110] stresses the importance of the availability to the public (including NGOs) of effective judicial mechanisms to allow members of the public to protect their legitimate interests and assist in enforcing environmental legislation.[111] The question is, however, how this right of "access to justice" will work at the EU level.

Communications from the Community institutions focus primarily on the securing of "access to justice" at Member State level, leaving it unclear how access to judicial review before the ECJ will operate. For example, a MEMO[112] from the Community institutions states that, where citizens feel that they are directly affected by an EU institution's or body's infringement of environmental law, "the EU Treaty already allows them to challenge the infringement before the European Court of Justice." The MEMO goes on to

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109 See Preamble, United Nations Economic Commissions for Europe (UN/ECE), Convention on Access to information, public participation in decision-making and access to justice in environmental matters (1998) 38 International Legal Materials 3.

110 See Preamble to the Århus Convention para. 7, 8, 13 and 18.

111 *Cf.* Preamble of the Århus Convention para. 18, and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 238*

112 Questions and Answers on the Århus Convention, MEMO/03/210 of October 28 2003

state that under the Regulation, “environmental organisations too will enjoy this right.”[113] This fails, however, to answer the question of how EOs will be able to overcome the near insurmountable hurdle of showing ‘individual concern’ in environmental matters.

Before discussing the significance of the Convention at EU level, we need to take a closer look at the rights of access to justice that EOs derive under the Convention.

3.1 Access to justice following Article 9 of the Århus Convention

The right of access to justice in environmental matters is regulated in Article 9 AC. According to the Convention, “access to justice” means that legal mechanisms are available to members of the public to allow them to obtain the review of potential violations of the Convention’s provisions concerning access to information and public participation, as well as of domestic environmental law.[114]

As stated in the Preamble to the Convention, “effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.”[115] The rationale behind this pillar of the Convention is a perceived need to strengthen the enforcement of the rights to information and participation and

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[113] Questions and Answers on the Århus Convention, MEMO/03/210 of October 28 2003, p 7

[114] Stec, Steven ‘The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 123

[115] Preamble to the Århus Convention para. 18.

of environmental law in general, by enabling individuals and NGOs to invoke the power of the law.[116]

More specifically, Article 9 AC links *locus standi* to rights concerning access to information and public participation, as well as granting a more general right of standing regarding the review of alleged violations of environmental law. In the following, we focus on how Article 9 AC grants standing to NGOs in cases concerning the right to public participation, as well as in cases concerning violations of environmental law.[117]

3.2 Standing to initiate the review of measures relating to public participation

According to Article 9 (2) AC, each Party to the Convention shall "within the framework of its national legislation" ensure that the "members of the public concerned" have access to a "review procedure" to challenge the "substantive and procedural legality" of measures requiring public participation pursuant to Article 6 AC.[118] The wording of Article 9 (2) AC raises several questions regarding both its scope and its applicability to the Community institutions.

First of all, the right of access to a review procedure provided for in Article 9 (2) is limited to the review of measures falling within Article 6

[116] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 123

[117] Standing to initiate judicial review in relation to access to information does not cause any problems under Article 230 (4) since decisions on allowing (or not allowing) access to information will be addressed to the NGO who requested the information in the first place.

[118] *Cf.* Article 9 (2) AC para. 2.

AC.[119] Under Article 6 AC, the Parties to the Convention are obliged to provide for wide public participation with regard to decisions on whether to permit "proposed activities." The relevant activities are listed in Annex I of the Convention.[120] Further, each Party shall, in accordance with its national law, also ensure public participation in decisions on proposed activities not listed in the Annex "which may have a significant effect on the environment."[121]

A general problem with the Convention is its many references to "within the framework of its national legislation" or in "accordance with its national law," as in Articles 9 (2) and 6 AC. These references to national legislation are somewhat unfortunate, as they could be interpreted as limiting the rights derived under the Convention through the application of national rules and regulations. Such an interpretation would, however, render the rights granted to the public in the Convention meaningless. According to the Implementation Guide[122], the reference to national legislation in, for example, Article 6 AC means that in respect of those proposed activities not listed in Annex I, each Party must determine whether a particular proposed activity has a significant effect on the environment in accordance with its

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[119] *Cf.* Article 9 (2) AC para. 2. It is, however, far from clear to what extent Article 6 AC is applicable at the EC level at all. As put forward by Rodenhoff, this depends on whether decisions covered by Article 6 are made at the EC level. See Rodenhoff, Vera 'The Århus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 352. It is however beyond the scope of this dissertation to discuss in detail which decisions made at the EC level would fall within the scope of Article 6 AC.

[120] *Cf.* Article 6 (1) a.

[121] *Cf.* Article 6 (1) b.

[122] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08).

national law.[123] In general, the references to national law are meant to give the Parties some flexibility with regard to implementation, but they cannot remove the basic obligation of ensuring public participation with regard to activities that under national law are considered to have a significant effect on the environment.[124]

The members of the "public concerned" referred to in Article 2 (5) EC are defined as those members of the public "affected or likely to be affected, or having an interest" in environmental decision-making procedures. Furthermore, any NGO "promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."[125]

It is, however, not sufficient to be a member "of the public concerned". Such persons must also have a "sufficient interest" or, alternatively, be "maintaining impairment of a right where the administrative procedural law of a party requires this as a precondition." It is important in this regard that, according to Article 9 (2) AC third paragraph, NGOs shall at a minimum be deemed to have a sufficient interest or a right capable of being impaired.[126]

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[123] *Ibid.*, p 31.

[124] *Ibid.*, p 31. See also Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (2002, Kluwer Law International) 14, where it is submitted that "while it essentially remains a matter for national law to determine what constitutes a sufficient interest and an impairment of a right, this must be defined in consistency with the objective of the Convention, to give the public concerned "wide access to justice," cf. Article 9 (2) of the Convention.

[125] *Cf.* Article 2 (5) AC. With regard to the reference to "national law," this must be read as allowing the Parties to lay down certain requirements as long as these are not so restrictive as to deny NGOs access to justice completely. See discussion above.

[126] Cf. Article 9 (2) para. 3, and Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org-/env/pp/acig.htm (accessed 28.08.08) p 129.

The reason for including two alternative ways of obtaining access to justice in matters falling within the scope of Article 6 AC was to accommodate differences between the Parties' legal systems.[127] Once again the Parties have been left with a certain degree of flexibility concerning the ways in which an NGO can be deemed to have a "sufficient interest", but this needs to be exercised in a way that is consistent with the objective of giving the public wide access to justice within the scope of the Convention.[128] This also applies to those legal systems that do not recognise the possibility of NGOs having subjective rights that can be impaired when acting in the public interest.[129] According to Article 9 (2) AC, those legal systems will have to recognise the possibility that NGOs may have rights capable of being impaired.[130]

As a result, NGOs that, for example, participated in a decision-making procedure pursuant to Article 6 AC, shall be regarded as having a "sufficient interest", or a right capable of being impaired, under Article 9 (2) AC.[131] The application of Article 9 (2) AC is, however, not limited to those NGOs who participated in a decision-making procedure pursuant to Article 6 AC. As long as an NGO that did not participate is considered "members of the public

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[127] *Ibid.*, p 129.

[128] See Article 9 (2) para. 3 first sentence, and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 239.*

[129] Cf. Article 9 (2) para. 3 last sentence, and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 239.*

[130] Cf. Article 9 (2) para. 3, last sentence.

[131] *Cf.* Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 41 and 129, and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 239.*

concerned", having a sufficient interest or maintaining impairment of a right as discussed above, it will be granted access to challenge measures falling within Article 6 AC.[132]

In addition, Article 9 (2) AC third paragraph states that NGOs shall be allowed to challenge both the "substantive and procedural legality" of the measures covered by Article 6 AC.[133] This means that an NGO can challenge the legality of the contested measure as such and is not, for example, restricted to bringing claims regarding alleged violations of its procedural rights under Article 6 AC.

Article 9 (2) AC further grants NGOs that fulfil the conditions above the right of access to a review procedure before "a court of law and/or another independent and impartial body established by law." The Parties to the Convention are, however, allowed to require the holding of a preliminary review procedure before an administrative authority before a review procedure takes place before a court or other independent and impartial body established by law.[134] Requirements for such administrative procedures may not, however, affect the right of access to independent judicial review procedures once the administrative review procedures are exhausted.[135] This is of particular interest with regard to the Regulation since, as we will see, the Regulation establishes an internal review procedure. It is, however, uncertain whether the Regulation grants NGOs the right to appear before the ECJ if they are not satisfied with the outcome of the administrative review procedure.

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132 *Cf.* wording of Article 9 (2) para. 1 and 2 which does not entail any requirement of actual participation in the decision making procedure.

133 *Cf.* Article 9 (2) last subparagraph.

134 *Cf.* Article 9 (2) para. 4 and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 240.*

135 *Cf.* Article 9 (2) para. 4 and De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law 227, 240.

3.3 Standing to review violations of environmental law under Article 9 (3)

The provisions of Article 9 (3) AC concerning standing in relation to the review of violations of environmental law have so far received the least attention, but may potentially be the most intrusive for the Parties' domestic legal systems.[136]

Article 9 (3) AC states that, in addition to the review procedures prescribed with regard to access to information and rights of public participation, "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." This is intended to give the public a more general right to enforce environmental law.

As with Article 9 (2) AC, there are several questions regarding the scope and applicability of Article 9 (3) AC to the Community institutions. First, we have the ambiguous reference to national law, more specifically the statement that access to justice under Article 9 (3) AC is to be granted to members of the public who "meet the criteria, if any, laid down in [the Parties'] national law." As discussed above, in relation to Article 9 (2) AC, while this is meant to give the Parties some flexibility regarding the implementation of Article 9 (3) AC, this cannot be done in such a way as to make access to justice within the scope of Article 9 (3) AC unattainable for NGOs.[137] Accordingly, Article 9 (3) AC should not be read as only allowing the public to file lawsuits if national law permits them to do so. Such an interpretation would render the article meaningless. The paragraph should

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[136] De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 241.*

[137] De Lange, Femke 'Beyond Greenpeace, Courtesy of the Århus Convention' (2004) 3 Yearbook of European Environmental Law *227, 241.*

rather be read as granting the right to standing, but also as permitting a Party to the Convention (such as the EU) to lay down certain requirements for standing if it so wishes.[138]

Secondly, there is the question of who has the right to initiate a review pursuant to Article 9 (3) AC. More particularly, does the Convention grant access to justice for EOs in cases falling within the scope of Article 9 (3) AC?

According to Article 9 (3) AC, access to justice is granted to “members of the public”. Article 9 (3) AC was designed to liberalise the classes and categories of persons, natural or legal, able to file lawsuits against public authorities in situations where such persons perceived the law to have been violated.[139]In Article 2 (4) AC, “the public” is defined as one or more natural or legal persons, as well as, in accordance with national legislation or practice, public associations, organisations or groups. Again, the reference to national legislation is ambiguous. According to the Implementation Guide[140] the reference is intended to signal that associations, organisations or groups *without legal personality* may also be considered members of the public under the Convention, if this is allowed under national law.[141] NGOs *with legal personality* are automatically within the definition of “the public”.

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[138] Bonine, John E ‘The Public’s Right to enforce environmental law’, Ch 3, p 32 in Stec, Stephen (ed) ‘Handbook on Access to Justice under the Århus Convention’ (2003) Available at http://pdc.ceu.hu/archive/00002416/ (accessed 23.08.08).

[139] Bonine, John E ‘The Public’s Right to enforce environmental law’, Ch 3, p 32 in Stec, Stephen (ed) ‘Handbook on Access to Justice under the Århus Convention’ (2003) Available at http://pdc.ceu.hu/archive/00002416/ (accessed 23.08.08).

[140] Stec, Steven ‘The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters’ (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08)

[141] *Ibid.*, p 40.

Further, to what kind of review is an applicant entitled to under Article 9 (3) AC. While Article 9 (2) AC grants a right of access to a review procedure before a court of law and/or another independent and impartial body established by law, Article 9 (3) AC refers to an "administrative or judicial procedure". As a result, Article 9 (3) AC covers a wider range of administrative and judicial procedures, including the possibility of public interest litigation in which members of the public would be granted standing directly to enforce environmental law in court.[142] The obligation imposed by Article 9 (3) AC may, however, also be satisfied by providing the opportunity to initiate an administrative procedure,[143] as long as this provides applicants with adequate and effective remedies and is fair, equitable and timely.[144] This is significant, as the Community has chosen to implement the Convention by establishing an internal review procedure available to certain NGOs in environmental matters. It is uncertain whether the Regulation grants NGOs the right to go before the ECJ if they are not satisfied with the outcome of the internal review procedure.

With regard to what may be reviewed, Article 9 (3) AC allows a person to challenge "acts and omissions by (…) public authorities".[145] "Acts and omissions" covers failures to take actions required by law, as well as actions that violate the law in themselves. Further, according to the Implementation Guide, omissions "include the failure to implement or enforce environmental law with respect to other public authorities or private entities."[146]

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142 *Ibid.*, p 131.

143 *Ibid.*, p 131.

144 *Cf.* Article 9 (4) AC.

145 Article 9 (3) also covers acts and omissions by private persons. This will not be discussed further as the Commission considers this to be a task for the Member States.

146 Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and

It is unclear from the wording of Article 9 (3) AC, however, whether this provision allows for the judicial review of legislative, as well as administrative, acts. In most Member States review procedures are primarily available for reviewing the legality of administrative acts.

The question of whether the Convention allows for the review of legislative acts is closely connected to the Convention's definition of what constitutes a "public authority" whose acts and omissions may be reviewed. In Article 2 (2) (d) AC, "public authority" includes "the institutions of any regional economic integration organisation," hence the institutions of the EC. The term "institutions" in the Convention has a functional meaning and does not have the same meaning as "institutions" in EC terminology. The term "institutions" thus refers to all bodies of the EC fulfilling public administrative functions.[147]

Institutions "acting in a judicial or legislative capacity" are, however, exempted in Article 2 (2) AC last paragraph. This is due to the "fundamentally different character of decision making in a legislative capacity, where elected representatives are more directly accountable to the public through the election process."[148]

The problem is that the term "legislative capacity" is not defined in the Convention. Some guidance as to its meaning can however be found in the Implementation Guide,[149] which states, for example, that the Commission should not be considered as acting in a "legislative capacity" within the

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Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 131.

[147] Rodenhoff, Vera 'The Århus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 351.

[148] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) 34.

[149] *Ibid.*, p 34-35.

meaning of the Convention.[150] Furthermore, Article 8 of the Convention recognises that there may be collaboration at various levels between executive and legislative authorities during the law-making process. As the activities of the public authorities in relation to the drafting of regulations, laws and normative acts are expressly covered by Article 8, it is logical to conclude that the Convention does not necessarily consider these activities to constitute acting in a "legislative capacity". Once again it is necessary to take a pragmatic approach, deciding on a case-by-case basis what type of function the institution in question is carrying out with regard to the issue at hand.[151]

To sum up, the exception for institutions acting in a "legislative capacity" suggest that the public's right to enforce environmental law does not encompass the right to request judicial review of legislative measures. Even though the phrase "acts and omissions" may include legislative acts and omissions, these will not be made by a "public authority" within the meaning of the Convention. Consequently the Convention does not allow the judicial review of legislative acts.

Furthermore, Article 9 (3) AC allows NGOs to challenge administrative measures that contravene provisions of a Party's "national law[152] relating to the environment". Since a wide variety of laws may in some way "relate" to the environment, this provision is intended to allow the public to enforce a broad range of environmental laws.[153]

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[150] *Ibid.*, p 34-35.

[151] Rodenhoff, Vera 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 351.

[152] According to the Implementation Guide (n 147) p 34, the term "national law" also covers Community legislation.

[153] Bruch, Carl E. & Czebiniak, Roman 'Globalizing environmental governance' (2002) 32 Environmental Law Report 10428.

Another question is whether Article 9 (3) AC allows reviews to be initiated on the grounds of procedural illegality in general, or whether reviews are limited to contraventions of environmental law in the strict sense. Unlike Article 9 (2) AC, Article 9 (3) AC does not explicitly state that it grants a right to challenge a measure's substantive and procedural legality. The extent to which Article 9 (2) AC can be applied by analogy with Article 9 (3) AC is unclear. This will be discussed in more detail below in the context of the Regulation.

To sum up, Article 9 (3) grants access to administrative or judicial procedures to challenge administrative decisions of the Community institutions that violate Community law relating to the environment. Article 9 is, in other words, supposed to constitute a strong affirmation that NGOs have standing. Their right to standing may be subject to reasonable restrictions, but only as long as the overall scheme continues to promote "wide access to justice."[154] Such restrictions must be clear, consistent and fair, and not designed to discourage the bringing of claims. Instead they must be reasonably calculated to ensure that claims are brought by NGOs whose activities and purposes are genuinely focused on environmental protection.[155]

The problem at Community level is that, according to Article 230 (4) EC, an NGO only has standing if it is 'directly and individually concerned'. This has been interpreted so restrictively that, at least for the time being, European NGOs are denied the rights granted by Article 9 of the Convention. As we saw in *Greenpeace*, the ECJ refused to take a broad view of standing in environmental matters. The ECJ clearly stated that an

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[154] Bonine, E John 'The public's right to enforce environmental law' p 62, in Stec, Steven (ed.) 'Handbook on Access to Justice under the Arhus Convention' (2003, Szentendre, Hungary).

[155] *Cf.* Article 9 (4) AC and Bonine, E John 'The public's right to enforce environmental law' p 62, in Stec, Steven (ed.) 'Handbook on Access to Justice under the Arhus Convention' (2003, Szentendre, Hungary).

association formed for the protection of the collective interests of a category of persons could not be considered to be directly or individually concerned for the purposes of Article 230 (4) EC.

This leads us to ask whether the Treaty will have to be amended in the light of the Convention. Either that, or Article 230 (4) EC has to be interpreted differently by the Court, in order to give effect to the commitments expressed by the Parties in ratifying the Convention. It has been argued that both the ECJ and the EC legislature have an equal obligation to take account of the rights in Article 9.[156] But to what extent has the Community followed up these obligations since it signed the Convention? And will full implementation of the Convention result in a more relaxed approach to standing before the Community Courts? These topics are explored in the following sections.

4 Access to justice in environmental matters in Community law

By signing, and subsequently ratifying the Convention, the European Community committed itself to alignment with the obligations of the Convention at Community level.[157]

The European Parliament and Council accordingly adopted the Regulation with the aim of implementing the Convention into Community law by

[156] Bonine, E John ‘The public’s right to enforce environmental law’ p 34, in Stec Steven (ed.) ‘Handbook on Access to Justice under the Arhus Convention’ (2003, Szentendre, Hungary).

[157] The Convention was ratified by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the EC, of the Convention on access to information, public participation in decision-making, and access to justice regarding environmental matters; deposited with the United Nations.

applying the Convention's provisions to Community institutions and bodies.[158]

It is the implementation of Article 9 AC that provides NGOs with a right of access to judicial review.[159] Problems relating to the implementation of the provisions on access to information and participation in decision-making will not be discussed here, although they are of equal importance and contribute to effective judicial review.

4.1 The internal review procedure

Article 9 AC has been implemented by Articles 10 to 12 of the Regulation. A problem with the Regulation is its failure to distinguish between the rights deriving from Article 9 (2) AC and the rights under Article 9 (3) AC. This is significant as the Community has a greater margin of discretion to grant NGOs judicial review in environmental matters under Article 9 (3) AC than under Article 9 (2) AC. First, the internal review procedure introduced in Article 10 of the Regulation will be discussed. Secondly, the extent to which the Regulation complies with the rights of access to justice established by

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[158] Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and bodies [2006] OJ L 264/13. The Regulation entered into force 28 September 2006 and is to be applied from 8 June 2007.

[159] As mentioned above, acts and omissions by private persons that contravene environmental law are not covered by any measure applicable to Community institutions. The Commission considers this a task for individual Member States and the intention is to cover this in the proposed directive on access to justice. *Cf.* Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM/2003/624/FINAL. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0624:FIN:EN:PDF, (accessed 23.08.08) and Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Århus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 334 in footnote 22.

Articles 9 (2) and 9 (3) of the Convention will be commented on. Much of the discussion will concern the implications of the internal review procedure in Article 10 of the Regulation for *locus standi* for EOs before the ECJ.

According to Article 10 of the Regulation, any NGO that meets certain requirements is entitled to "make a request for internal review to a Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act." The institution concerned must consider any request for review "unless it is clearly unsubstantiated" and must respond with a "written reply" no later than 12 weeks after receipt of the request.

For an NGO to be entitled to request an internal review, it must meet the following criteria: it must be an independent, non-profit-making legal person according to the relevant Member State's national law or practice; its primary stated objective must be the promotion of environmental protection in the context of environmental law; it must have existed for more than two years and be actively pursuing its objective; and the subject matter of the request for internal review must correlate to the NGO's objective and activities.[160]

These requirements are generally known within the various Member States[161] and can hardly be seen as unreasonable, since they aim to ensure that claims are only brought by NGOs whose activities and purposes are genuinely focused on environmental protection. Accordingly, the above-mentioned criteria appear to comply with the Convention.

A request for an internal review can be made to a "Community institution or body". One problem with the Regulation is that it fails to clarify what it means when it states that a "community institution or body" is defined as "any public institution, body, office or agency established by, or on the basis

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[160] *Cf.* Article 11 Århus Regulation.

[161] See De Sadeleer, Roller and Dross 'Access to Justice in Environmental Matters' ENV.A.3/ETU/2002/0030 Final Report.

of, the Treaty except when these are acting in a *judicial or legislative capacity*."[162]

The World Wildlife Fund (WWF)[163] has expressed concerns that the Community institutions may interpret the latter qualification very broadly; in the sense that decisions taken in discussions and debates leading up to the adoption of legislation may be deemed to fall within the definition of "acting in a legislative capacity".[164] As mentioned above, with regard to Article 9 (3) AC, where public authorities draft regulations, laws and normative acts, they should not necessarily be considered to be "acting in a legislative capacity." Hence the WWF has urged the Commission to take a narrow view of this definition, *i.e.,* to restrict it to the actual decision on whether or not to adopt a legislative measure.[165]

Considering the complex nature of the Community's law-making procedures, it would not be natural to view the activities of executive institutions during the law-making process as falling within the scope of the Regulation. As a result, it may be accepted that the activities of community institutions or bodies in drafting regulations, laws and normative acts are considered as "acting in a legislative capacity," thus falling outside the scope of the Regulation.

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162 Emphasis added. Compare identical exception in Article 2 (2) final paragraph AC.

163 See WWF's response to the Community's Implementation Report, available at http://ec.europa.eu/environment/aarhus/pdf/comments_wwf.pdf (accessed 23.08.08). The Aarhus Convention Implementation Report European Community SEC/2008/556 is available at http://ec.europa.eu/environment/aarhus/pdf/-sec_2008_556_en.pdf (accessed 23.08.08).

164 *Cf.* WWF's response to the Community's Implementation Report, available at http://ec.europa.eu/environment/aarhus/pdf/comments_wwf.pdf (accessed 23.08.08) p 3.

165 WWF's response to the Community's Implementation Report, available at http://ec.europa.eu/environment/aarhus/pdf/comments_wwf.pdf (accessed 23.08.08) p 3.

Another problem is that it is not clear in Community law when an institution is acting in a legislative capacity and when it is not. This is because Community law does not operate, either in its institutional structure or in its system of legal instruments, with a clear distinction between the terms 'legislative' and 'executive'. On the one hand, regulations and directives are considered legislative in nature.[166] On the other hand, *Calpak*[167] and subsequent case law of the ECJ establish that the label put on a Community act by the adopting institution is not necessarily decisive.[168] This means it is necessary to undertake a substantive assessment of the measure's nature and content to find out whether it is legislative or not.[169]

This does, however, bring us back to the distinction between regulations and decisions that was abandoned by the ECJ in *Cordoniu* [170] and lately confirmed in *Jégo-Quéré*[171]. The ECJ used to distinguish between these measures on the basis of the abstract terminology test. According to this test, the measure was of general application if it was drafted in abstract terms, directed at undefined classes of persons and applied to objectively determined situations. This test met a great deal of criticism[172] and was in the end abandoned by the ECJ. As pointed out by Craig and de Burca,[173] the

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166 *Cf.* Article 249 EC.

167 *Cf.* Joined Cases 789 and 790/79 *Calpak Spa and Societa Emiliana Lavorazione Frutta Spa v Commission* [1980] ECR 1949 para. 7.

168 See for example Case C-309/89 *Cordoniu v Council* [1994] ECR I-1853 and Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651.

169 Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 335.

170 Case C-309/89 *Cordoniu v Council* [1994] ECR I-1853.

171 Case T-177/01 *Jégo-Quéré* [2002] ECR I-1651.

172 *Cf.* Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) p 516.

173 *Cf.* Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007).

problem with the test was that, rather than looking behind form to substance, it came very close to looking behind form to form.[174] A regulation would be accepted as a true regulation if, as stated in *Calpak*,[175] it applied to objectively determined situations and produced legal effects with regard to categories of persons described in a generalised and abstract manner.[176] However, it is always possible to draft norms in this manner and thus immunise them from challenge.[177] Especially since the Court makes it clear that knowledge of the number or identity of those affected will not prevent the norm from being regarded as a true regulation.[178]

It is now clear that the Community Courts are in principle willing to admit that a regulation might be a true regulation as judged by the abstract terminology test, but to accept that it nonetheless might be of individual concern to an applicant.[179] As a result, the distinction between decisions and acts of general application is not always clear under ECJ's case law.[180] In effect, this also blurs the understanding of when a community institution is acting in a "legislative capacity".

The reintroduction of this distinction between decisions and regulations might be a step backwards,[181] but would not necessarily violate the Convention. The ambiguity of the distinction between measures of general application and administrative decisions does, however, mean that the

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174 *Ibid.*, p 516.

175 Joined Cases 789 and 790/79 *Calpak Spa and Societa Emiliana Lavorazione Frutta Spa v Commission* [1980] ECR 1949 para. 7.

176 *Cf.* Joined Cases 789 and 790/79 *Calpak Spa and Societa Emiliana Lavorazione Frutta Spa v Commission* [1980] ECR 1949 para. 7.

177 Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) p 516.

178 Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) p 516.

179 Case C-309/89 *Cordoniu v Council* [1994] ECR I-1853, para. 19.

180 Keessen, A 'Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products' (2007) 16 (2) EELR 26, 34.

181 *Ibid.*, p 34.

question of whether a Community institution is acting in a "legislative capacity", and is thus excluded from the scope of the Regulation, needs to be evaluated on a case-by-case basis.[182]

The next question concerns what can be reviewed under the Regulation. According to Article 10 of the Regulation, the right to internal review applies to "administrative acts" or omissions. The term "administrative act" is defined in Article 2 (1) (g) of the Regulation as "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects." Administrative omissions are "any failure of a Community institution or body to adopt an administrative act as defined in (g)." As discussed above, this does not contravene the Convention, as "public authorities", when acting in a judicial or legislative capacity, are excluded from its application.

One may, however, question the meaning of the requirement that the measure must be of "individual scope". This is an unfamiliar term in Community law and it is unclear how it should be interpreted.[183] One possibility is that it refers to a distinction between a measure of "general application" and a measure which is only "binding upon those to whom it is addressed."[184] Examples of measures of "individual scope" might thus include: a Commission decision to reject environmental measures taken by a

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[182] Rodenhoff, Vera 'The Aarhus Convention and its Implications for the 'Institutions' of the European Community' (2002) 11 (3) RECIEL 343, 351. More problematic is Article 2 (2) of the Regulation, which excludes Community institutions and bodies from internal review when "acting as an administrative review body." This effectively excludes certain parts of the Commission's activities. There is reason to doubt whether this additional exception was necessary, and it will thus not be considered further, c*f.* Jans, Jan H 'Did Baron von Munchhausen ever Visit Aarhus?'

[183] Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 336.

[184] Keessen A 'Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products' (2007) 16 (2) EELR 26, 34.

Member State as incompatible with the internal market; refusals to provide information requested by a NGO; or Commission decisions to fund or permit a particular project.[185] Examples of omissions and failures could include: failing to stop funding a project that does not comply with Community environmental policy; or omitting to set adequate conditions for the carrying out of certain activities in the Community.[186] On the other hand, measures of general application, such as decisions of the Commission and the Council to adopt codes of conduct regarding access to information, would not be decisions of "individual scope."

Such a distinction between measures of general application and individual decisions correlates with the wording of Article 249 EC when distinguishing between regulations and decisions. It also makes sense in view of the exclusion of legislative measures from the Convention.[187]

Further, pursuant to Article 10, a request for internal review may only be made in relation to an administrative act "under environmental law." The first thing to note here is that the wording "an administrative act under environmental law" seems more restrictive than "acts and omissions (…) which contravene provisions of its national laws *relating to the environment*."[188]

Article 2 (1) (f) of the Regulation defines "environmental law" as "Community legislation which, irrespective of legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out

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185 Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002) 75

186 *Ibid.*, p 75.

187 As discussed above, the distinction between measures of general application and individual decisions is, however, not always clear and needs to be assessed on a case-by-case basis.

188 *Cf.* Article 9 (3) of the Århus Convention (emphasis added).

in the Treaty:[189] preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional and worldwide environmental problems." Accordingly it would appear that an "administrative act under environmental law" should be understood to mean an administrative decision based on Community legislation contributing towards the Community's policies on the environment.

The Regulation is, however, unclear as to when community legislation can be said to be contributing towards the Community's policies on the environment. If, for example, it was necessary for the legislation's objective to refer explicitly to the environment, this would limit the scope of Article 10 of the Regulation significantly. For the most part, Community decisions are based on legislation that, while it is primarily intended to attain other objectives of the Community, also has a significant impact on the environment. It is therefore important to avoid a situation where the definition of "under environmental law" is too closely tied up with the decision's legal basis.

Considering the special nature of environmental interests, it would have been better if Article 10 had made a more general reference to administrative decisions "relating to the environment."[190] For example, Article 6 TEU is based on recognition of the fact that a wide variety of decisions and actions may adversely impact the environment. That is why it is necessary for requirements concerning environmental protection to be integrated into the definition and implementation of all Community policies and activities.[191] A more general reference to decisions "relating to the environment" would therefore have made it clear that the Regulation made available the

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[189] *Cf.* Article 174 (1) EC.

[190] *Cf.* Article 9 (3) of the Convention.

[191] *Cf.* Article 6 and 3 EC.

administrative review of all decisions which, irrespective of legal basis, were breaching EC environmental law. The wording of Articles 10 and 2 (1) (f) of the Regulation indicates, however, that the internal review procedure can only be initiated with regard to administrative decisions based on EC legislation that has environmental protection as one of its main objectives.

So what is the significance of this departure from the Convention? It might substantially restrict the scope of the Regulation, as most Community legislation does not refer specifically to the environment as required in Article 2 (1) (f) of the Regulation.[192] More specific and concrete environmental standards – in the form of directives and regulations – are normally directed to the Member States. This means it is currently possible for an institution to adopt a measure affecting the environment without running the risk of applications for internal review, or challenges from NGOs before the ECJ, provided the measure is not "under environmental law", as described in Article 2 (1) (f) of the Regulation. This constitutes a breach of the obligations under the Convention.[193]

Another problem with the Regulation is that it is unclear what legal standards will be applied for assessing whether institutions have breached environmental law, or how intense the review will be.[194] This will be

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[192] Jans, Jan H 'Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) 482. Available at SSRN: http://ssrn.com/abstract=956602.

[193] Crossen, Teall and Niessen, Veronique 'NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?' (2007) 16 (3) RECIEL 332, 336.

[194] Jans, Jan H 'Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) 482 Available at SSRN: http://ssrn.com/abstract=956602.

discussed further below when we examine access to the ECJ in the light of Article 12 of the Regulation.

To sum up, the Regulation introduces an internal review procedure that is available to certain NGOs. The procedure enables an NGO to request a Community institution to reconsider its decision in the light of the comments and findings of the NGO. In effect, the internal review procedure establishes an important forum for dialogue between the Community institutions and NGOs. This may result in an opening up of the administrative decision-making process to NGOs, changing the way in which decisions are made at the administrative level in environmental matters. If practised properly, this may provide an effective and cheap way of addressing the possible illegality of administrative decisions covered by the Regulation. It would also reduce the need for judicial review, as many breaches of EC environmental law could be rectified at an administrative level.

The introduction of an internal review procedure is fully in keeping with the Convention. Article 9 (2) AC explicitly states that a Party may provide for a preliminary review procedure before an administrative authority, while Article 9 (3) AC refers to an "administrative or a judicial procedure". With regard to measures falling within the scope of Article 9 (2) AC, the administrative appeal system is, however, not to be replaced with the opportunity of appeal to a court or other independent body.[195]

Furthermore, with regard to measures falling within Article 9 (3) AC, the administrative procedure may only replace judicial review if the administrative procedure is "fair and equitable."[196] According to the

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[195] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) 130

[196] *Cf.* Article 9 (4) AC.

Implementation Guide[197], the administrative procedure may only be considered "fair" if the procedure, including the final ruling of the decision-making body is "impartial and free from prejudice, favouritism or self-interest."[198] The internal review procedure under the Regulation, whereby the institution that made the decision in the first place is asked to review its own decision, cannot be considered impartial or free from self-interest. As a result, the availability of the internal review procedure is not sufficient to comply with the Convention. This means it is necessary to investigate the extent to which the Regulation grants NGOs judicial access if they are dissatisfied with the outcome of the internal review procedure.

4.2 Does Article 12 of the Regulation grant NGOs access to court?

According to Article 12 of the Regulation, "the non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice *in accordance with the relevant provisions of the Treaty*."[199] Equally, where the Community institution fails to act in response to the request for review, Article 12 (2) of the Regulation entitles the NGO to initiate proceedings before the ECJ in accordance with Article 230 (4) EC.

As a result of the wording of Article 12, the Regulation does not introduce any new rights of judicial review not already granted under the EC Treaty.[200] Accordingly the issue to be considered here is the implications of the

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[197] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08)

[198] *Ibid.*, p 133.

[199] Emphasis added.

[200] *Cf.* "in accordance with Article 230 (4)."

internal review procedure for NGOs standing before the ECJ in the light of the Court's current case law under Article 230 (4) AC. We will also ask what the ECJ can review – the institution's response (or lack of it) to the request for an internal review, or the administrative act in respect of which the review was requested? And finally, what legal standards apply to the Court's review?

As mentioned above, the ECJ has so far effectively barred the possibility of public interest litigation by requiring all applicants to be directly or individually concerned when challenging measures not addressed to them. In contrast, the Convention does not require the persons 'concerned' to be more affected or more likely to be affected than the public in general.

4.2.1 Outcome of the internal review procedure – 'decision' addressed to environmental organisation?

One possible outcome of the entry into force of the Regulation is that an NGO, by virtue of requesting an internal review pursuant to Article 10, will become the addressee of the decision resulting from the internal review procedure.[201] One problem with this approach is that it might limit the scope of the ECJ's review.

The Preamble of the Regulation states "where previous requests for internal review have been *unsuccessful*, the non-governmental organisation concerned should be able to institute proceedings before the Court of Justice in accordance with the provisions of the Treaty."[202]

What exactly does "unsuccessful" mean in this context? It could mean unsuccessful in having the administrative act either changed or annulled, unsuccessful in being heard properly by the institution or unsuccessful in receiving a "written reply" as required by Article 10 of the Regulation. The

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201 Keessen, A 'Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products' (2007) 16 (2) EELR 26, 33.

202 *Cf.* Preamble of the Århus Regulation, para. 21 (emphasis added).

meaning very much depends on the grounds on which the NGO was granted *locus standi* under Article 12 of the Regulation.

If an NGO is granted standing before the ECJ on the basis that it is the addressee of the decision resulting from the request for an internal review, the fear is that, at best, the ECJ will accept actions brought by NGOs for the annulment of decisions taken during internal review procedures, but only insofar as such actions seek to safeguard the prerogatives of NGOs in respect of internal review procedures, *i.e.,* whether there was a fair hearing of complaints and other due process-type arguments.[203] The NGO would still have to show individual concern to challenge the substance of the contested decision.

4.2.2 Does the internal review procedure make environmental organisations individually concerned?

Another, preferable, interpretation would be that the NGO was granted procedural rights under the Regulation that made it 'directly and individually concerned' within the meaning of Article 230 (4) EC. This approach would be based on an analogy with the more relaxed approach taken to standing in competition law and state aid cases.[204] As mentioned in the chapter on procedural rights as grounds for standing, if the Regulation accords applicants procedural guarantees entitling them to request Community institutions to identify infringements of Community rules, those applicants

[203] Jans, Jan H 'Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) p 484. Available at SSRN: http://ssrn.com/abstract=956602.

[204] See for example Case C-26/*76 Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435 and Case C-169/84 *Cofaz and others v Commission* [1986] ECR 391.

should be able to institute proceedings before the ECJ in order to protect their legitimate interests.[205]

Since the internal review procedure provides NGOs with a legal right to request a Community institution to review its decision within the scope of Article 10 of the Regulation, NGOs should be able to institute proceedings before the ECJ in order to protect their legitimate interests.

Being granted standing on the basis of procedural rights has the advantage of opening the door to a full review of the contested decision, pursuant to Article 230 EC. This follows from *Metro,*[206] where a company was granted standing under Article 230 (4) EC due to its involvement in administrative proceedings in a competition law case.[207] Metro argued that a distribution system operated by a competitor, SABA, breached Articles 85 and 86 EC, and accordingly initiated a complaint under Article 3 (2) of Regulation No. 17.[208] The Commission decided that certain aspects of the distribution system did not breach Article 85 EC, and it was this decision, addressed to SABA, that Metro sought to annul before the ECJ.

The action for annulment was brought and allowed, not only in order to ensure the protection of the procedural rights of the applicant, but also to ensure judicial review of the validity of the Commission's decision.[209] The ECJ stated that it was in the interests of the satisfactory administration of

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[205] *Cf.* Case C-26/76 *Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435, Case C-169/84 *Cofaz and others v Commission* [1986] ECR 391, para. 23 and *Greenpeace* (n) para. 56 and 62.

[206] Case C-26/76 *Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435.

[207] Case C-26/76 *Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435.

[208] Regulation 17/1962 of the EEC Council: EEC Council: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.

[209] De Schutter, Oliver 'Public Interest Litigation before the European Court of Justice' (2006) 13 (1) MJ 9, 21.

justice and the proper application of Articles 85 and 86 EC that natural and legal persons who were entitled pursuant to Article 3 (2) of Regulation No. 17 to request the Commission to identify an infringement of Article 85 and 86 EC, should be able, if their request was not complied with wholly or in part, to institute proceedings in order to protect their legitimate interests. The ECJ then went on to say that "in those circumstances the applicants must be considered to be directly and individually concerned within the meaning of Article 230 (4), by the contested decision."[210]

In *Fediol*[211] moreover, the Court stated that the Community Court was required to exercise "its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion rewarded to the Community authorities by the aforementioned Regulation."[212] In effect the Court was saying that once the legislature had identified certain actors who had an interest in the adoption of a Community act; those actors should be accorded the possibility of contributing to the preservation of legality within the EC legal order by bringing annulment proceedings against the decision in question.[213]

In addition, by referring to Article 220 EC, according to which the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed," the Court's reasoning in *Fediol* was clearly based less on the need to ensure effective protection of the applicants' procedural rights than

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[210] Case C-26/76 *Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435, at 7848.

[211] Joined Cases C-29/62 to 22/62 *Fediol* [1962] ECR 491.

[212] *Ibid.*, para. 29-30.

[213] De Schutter, Oliver 'Public Interest Litigation before the European Court of Justice' (2006) 13 (1) MJ 9, 23.

on the need to ensure that no act adopted within the EC legal order is immune from judicial review.[214]

It is important, however, to note that judicial review by the ECJ, following an unsuccessful internal review procedure, would not require the Court to make difficult political decisions. Judicial review pursuant to Article 230 EC is intended to review the procedural and substantial legality of the decision in question. It is clear from the ECJ's case law[215] that where Community institutions are given broad discretion involving political, economic or social choices, requiring complex assessments, the courts will only overturn the resulting decisions only if they are clearly or manifestly disproportionate.[216] The more discretion given to the institution in its decision-making, the less the contested measure will be scrutinised by the Court. It is not for the Court to substitute its own view for that of the administration.[217] Judicial review under Article 230 EC is rather about the Court's power potentially to annul a measure on the grounds of lack of competence, infringement of essential procedural requirements, infringements of the Treaty itself (or any rule of law relating to its application – including general principles of law and fundamental rights), or the misuse of power.

Although these judgments concerned the competition law sector, there is no reason why they cannot be relied upon by organisations in general,[218]

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[214] De Schutter, Oliver 'Public Interest Litigation before the European Court of Justice' (2006) 13 (1) MJ 9, 23 Compare the Court's reasoning in Les Verts Case C-294/83 *Parti ecologiste "Les Verts" v European Parliament* [1986] ECR 1339.

[215] Case C-331/88 *Fedesa* [1990] ECR I-4023, para. 14 and Case C-491/01 *British American Tobacco* [2002] ECR I-11453, para 123.

[216] For a general presentation, see Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) pp 548-549 and 569-571.

[217] Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) p 548.

[218] De Schutter, Oliver 'Public Interest Litigation before the European Court of Justice' (2006) 13 (1) MJ 9, 24.

including NGOs acting in the public interest.[219] As seen in *Greenpeace*[220] the CFI explicitly considered whether Greenpeace had been granted procedural rights that made it individually concerned.[221] The main point is that Article 10 of the Regulation grants certain NGOs the right to request an internal review of administrative decisions in the context of environmental law. It follows from the above-mentioned case law that this makes the NGOs individually concerned within the meaning of Article 230 (4) EC, allowing a full review of the contested measure.

To sum up, the internal review procedure, taken together with the possibility for NGOs to request subsequent judicial review by the ECJ would increase the legitimacy, quality and acceptability of EC environmental decision-making and overall decrease the likelihood of disputes.[222] The hope is that this will enable the meaningful judicial review of a decision's procedural and substantive legality should a dispute arise.[223] Such an interpretation would also ensure compliance with the Convention at EU level.

The problem is that the ECJ has yet to decide whether the Regulation grants NGOs *locus standi* or not. The wording of the Regulation is not decisive, so the decision may go either way. The most recent judgment from

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[219] De Schutter, Oliver 'Public Interest Litigation before the European Court of Justice' (2006) 13 (1) MJ 9, 27.

[220] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1995] ECR II-220.

[221] Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and others v EC Commission* [1995] ECR II-220, paras 62-63.

[222] If practised properly, most issues will be resolved through the internal review procedure.

[223] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 52.

the Community Courts on this issue is the *EEB* case.[224] Here some EOs unsuccessfully argued that they should be granted standing by referring to their specific status as EOs fulfilling the requirements laid down in the Regulation.[225]

The *EEB* case was brought before the CFI by the European Environmental Bureau (EEB) and other EOs to challenge Commission Directive 2003/112/EC,[226] which included paraquat as an active substance in Annex I to Council Directive 91/414/EEC[227].

The CFI declared the action inadmissible, finding that the organisations were not "individually concerned" within the meaning of Article 230 (4).[228] Regarding the applicants' argument that they should be granted standing since they fulfilled the conditions laid down in Article 11 of the Regulation, which would have qualified them to request an internal review pursuant to

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224 Order of the CFI in T-94/04 *European Environment Bureau (EEB) and others v Commission* [2005] ECR II-4919.

225 At the time of the judgment the Regulation was still at the proposal stage, *cf.* Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final. The NGOs had therefore not actually made use of the internal review procedure, which is a requirement pursuant to Article 12 of the Regulation.

226 Commission Directive 2003/112/EC amending Council Directive 91/414EEC [2003] OJ L321/32.

227 Council Directive concerning the placing of plant protection products on the market 91/414/EEC [1991] OJ L 230. This directive lays down the conditions and general procedures applicable to the granting, review and withdrawal of authorisations for plant protection products. Article 4 (1) (a) of the directive provides that only products containing the active substances listed in Annex I may be authorised.

228 Order of the CFI in T-94/04 *European Environment Bureau (EEB) and others v Commission* [2005] ECR II-4919, para. 68.

Article 10,[229] the CFI stated that the hierarchy of norms precluded secondary legislation from conferring standing on individuals who did not meet the requirements of Article 230 (4) EC.[230]

Would the ECJ have come to the same conclusion if presented with the same situation once the Regulation had entered into force? In other words, would granting NGOs standing based on the procedural rights granted to them in Article 10 of the Regulation contravene the principles governing the hierarchy of norms? As stated by the ECJ in *Germany v Commission*,[231] a secondary law measure cannot add to the rules of the Treaty[232]. Adding to the rules of the Treaty is not the same thing, however, as granting certain procedural rights of participation under secondary legislation to interested parties.[233] As seen in both *Metro*[234]and *Fediol,*[235] it was the associations' procedural rights under Article 3 (2) of Regulation No. 17[236] that made them individually concerned within the meaning of Article 230 (4). This is not the same as extending primary law through secondary law. It is rather about secondary law identifying certain actors as having a particular interest in the

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229 According to the Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final.

230 Order of the CFI in T-94/04 *European Environment Bureau (EEB) and others v Commission* [2005] ECR II-4919, para. 67.

231 Case C-240/90 *Germany v Commission* [1992] ECR I-5383.

232 *Ibid.*, para. 42.

233 See generally, Lenaerts, Koen 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 (3) CMLRev 531.

234 Case C-26/76 *Metro v Commission* [1977] ECR 1875, Common Market Report (CCH) p 8435.

235 Joined Cases C-29/62 to 22/62 *Fediol* [1962] ECR 491.

236 Regulation 17/1962 of the EEC Council: EEC Council: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.

adoption of a Community act and placing those actors in a position of individual concern within the meaning of primary law.

As a result, granting NGOs standing based on the procedural rights granted to them in Article 10 of the Regulation does not contravene the principles governing the hierarchy of norms and is fully in line with the case law regarding procedural rights as a ground for standing under Article 230 (4).

To sum up, it is possible to argue that the Regulation grants NGOs standing before the ECJ in environmental matters falling within the scope of the Regulation. The problem is that, until the ECJ or the legislature clarifies the position on *locus standi* under the Regulation, there is still a possibility that NGOs will be refused standing under Article 230 (4). This possibility will be discussed in the following section.

4.2.3 Individual concern as a continuing barrier for environmental organisations – what about the Århus Convention?

Opinions on the impact of the Convention on *locus standi* for EOs before the ECJ are so far divided.[237] Some commentators[238] are pessimistic, fearing that

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[237] See for example De Lange, Femke 'Beyond Greenpeace, Courtesy of the Aarhus Convention' (2004) 3 Yearbook of European Environmental Law *227, who concludes that the Community must relax its rules on standing in order to comply with the Convention. At the other end of the spectrum is* Jans, Jan H 'Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) p 484. Available at SSRN: http://ssrn.com/abstract=956602. Jans is less optimistic about whether the Regulation will be capable of broadening the scope of Article 230 (4) beyond the current case law of the ECJ.

[238] See Keessen, A 'Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products' (2007) 16 (2) EELR 26 and

the notion of individual concern will continue to prove an effective barrier for EOs acting in the public interest.[239] On the premise that the ECJ will not grant NGOs *locus standi* on the grounds of the procedural rights granted to them in Article 10 of the Regulation, we will now discuss whether such a refusal would be compatible with the Convention. In other words, is the strict interpretation of individual concern compatible with the rights of judicial review in the Convention?

As noted by Ebbeson,[240] the wording of Article 230 (4) EC does not *prima facie* contravene the Convention. As mentioned above, the Parties to the Convention are allowed set certain criteria that NGOs must meet to obtain access to judicial review.[241] Those criteria cannot, however, be so strict as to exclude NGOs from access to judicial review altogether.[242]

Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002).

[239] Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002) 54 and 80.

[240] Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The Hague/London/New York, Kluwer Law International, 2002).

[241] *Cf.* Article 9 (3) AC.

[242] De Lange, Femke 'Beyond Greenpeace, Courtesy of the Aarhus Convention' (2004) 3 Yearbook of European Environmental Law *227, 246.* According to extensive studies on the conditions for *locus standi* in the Member States, the criteria for standing currently in force at EU level are stricter than in any Member State. See Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (2002, Kluwer Law International) 27. Chapter 1 is a comparative study of the conditions in the Member States based on reports prepared in 1997 for the European Commission by the European Council of Environmental Law and the Environmental Law Association. All the reports were updated for the purposes of the book.

When considering the Community's compliance with the Convention, it is, however, necessary to consider the complete system of remedies under the EC Treaty. As made clear by the ECJ in *UPA,*[243] the Treaty was intended to create a complete system of legal remedies and procedures designed to ensure judicial review before the Community Courts.[244] Under the Treaty there are several ways of achieving judicial redress in respect of allegedly illegal Community measures. In the following we discuss these alternative routes, focusing on the extent to which they are adequate to ensure EOs the access to judicial review granted to them under the Convention.

The main reason why the ECJ has not relaxed its interpretation of "direct and individual concern" has been that private applicants are able to achieve judicial review through the preliminary reference procedure pursuant to Article 234.[245] In order to achieve the aim of a coherent and complete system of remedies for infringements of Community law, the ECJ has turned to the Member States and required them to establish a system of legal remedies and procedures that respect the right to effective judicial protection.[246] Access to judicial review under Articles 230 (4) and 234 EC is, in other words, meant to be complementary rather than contradictory. The broad access to national courts to bring actions based in EC law and the duty of national courts to make Article 234 references to the ECJ on matters involving the interpretation and validity of EC law are supposed to offset the limited

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[243] Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677. Confirmed in Case C-263/02 Jégo-Quéré [2004] ECR I-03425.

[244] Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 40. See De Lange, Femke 'Case Note, *European Court of Justice, Union de Pequenos Agricultores v Council'* (2003) 12 (1) RECIEL 115, 116.

[245] Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 40.

[246] Case C-50/*00 Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677, para. 41.

access of private applicants to bring actions directly before the Community Courts.[247]

This approach has, however, been severely criticised by both the CFI[248] and the Court's Advocate Generals,[249] as well as by academic commentators.[250] The issue is whether the availability of the preliminary reference procedure in Article 234 EC is sufficient to comply with the Convention, which requires access to judicial review to be fair, equitable, timely and not too expensive. [251]

First of all, Article 9 (4) AC requires the Parties to ensure that the review procedures implementing Article 9 AC are "fair." The problem with the preliminary reference procedure is that it will not be available to all NGOs regardless of nationality.[252] As not all Member States grant judicial access to EOs acting in the public interest, the procedure will only be available to EOs in those Member States where public interest litigation is allowed under

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247 Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 48.

248 Case T-177/01 Jégo-Quéré [2002] ECR I-1651.

249 Opinion of AG Jacobs in Case C-50/00 Union de Pequenos Agricultores v Council (UPA) [2002] ECR I-6677

250 See for example, Albors-Llorens, Albertina 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? (2003) 62 (1) CLJ 72, Van den Broek, Naboth 'A Long Hot Summer for Individual Concern? The European Court's Recent Case Law on Direct Actions by Private Parties… and a Plea for a Foreign Affairs Exception' (2003) 30 (1) Legal Issues of Economic Integration 61 and Gormley, W Laurence 'Public Interest Litigation in Community Law' (2001) 7 (1) EPL 51.

251 *Cf.* Article 9 (4) AC.

252 Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) p 133. Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08)

national law. The wide margin of discretion allowed to the Parties under Article 9 AC also means that, even if the Member States have fully implemented the Convention at national level, NGOs will be granted standing based on a huge variety of conditions. This is liable to create inequality between NGOs in different Member States.

Issues relating to subsidiarity and Community competence make it unlikely that harmonisation can be achieved in this area throughout the Member States. For example, the proposal for a directive on access to justice in environmental matters (intended to implement the Convention at Member State level)[253] had an unenthusiastic reception in the Member States and is unlikely to be adopted in the near future.[254] Most Member States have long-established traditions in this area which, in the absence of EU legislation, they regard as outside the scope of EU law and fully within their national procedural autonomy.[255]

Although the Member States, under Article 10 EC, are obliged as far as possible to interpret and apply their own legislation and procedural rules to comply with Community law and ensure its effective enforcement,[256] this can only be taken so far. As the ECJ held in *Von Colson,*[257] the principle of harmonious interpretation only applies insofar as the national court has

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[253] Proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters COM (2003) 624 final.

[254] 'Public information and participation in EC Environmental Law' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) chapter 4, p 82.

[255] 'Public information and participation in EC Environmental Law' in Macrory, Richard (ed.) 'Reflections on 30 years of EU environmental law: a high level of protection?' (Groningen, Europa Law, 2006) chapter 4, p 82.

[256] Case C-14/83 *Von Colson* [1984] ECR I-1891, Case C-106/89 *Marleasing* [1990] ECR I-4135 and Case C-201/02 *Wells* [2004] ECR I-00723.

[257] Case C-14/83 *Von Colson* [1984] ECR I-1891.

discretion to apply it under national law.[258] In general, it is up to national courts to decide whether an interpretation that conforms to Community law is possible according to national principles of interpretation.[259] This means that Article 10 EC does not oblige national courts to grant access to EOs acting in the public interest if this is not allowed under national law and if national principles of interpretation preclude the court from doing so. This makes it questionable whether the Article 234 EC route to judicial review in environmental matters can be considered "fair" within the meaning of Article 9 (4) AC.

Another criticism concerns the directing of cases to national courts, as these are *forum non conveniens* for questions regarding the validity of Community measures.[260] It is well established in case law that national courts do not have jurisdiction to review the legality of Community measures.[261] This means that private applicants in such cases are forced into a 'detour' via the national courts.

The Convention also requires the Parties to ensure that review procedures provide "adequate and effective" remedies in order to comply with the Convention.[262] This includes the availability of injunctive relief when

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258 *Ibid.*, para. 28.

259 Case C-106/89 *Marleasing* [1990] ECR I-4135, para. 8 and Case C-201/02 *Wells* [2004] ECR I-00723, para. 69.

260 Case C-314/85 *Foto-Frost* [1987] ECR 4199 and Ginter, Carrie 'Access to Justice in the European Court of Justice in Luxembourg' (2002) 4 (3) European Journal of Law Reform 381, 395.

261 Case C-314/85 *Foto-Frost* [1987] ECR 4199 and Ginter, Carrie 'Access to Justice in the European Court of Justice in Luxembourg' (2002) 4 (3) European Journal of Law Reform 381, 395.

262 Article 9 (4). See Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 132.

appropriate.[263] Considering that environmental damage may potentially affect the territory of several Member States simultaneously, it is questionable whether it is "adequate and effective" to require EOs to apply to their national courts for injunctive relief. In some cases this would mean applying to courts in several national jurisdictions, giving rise to significant extra costs.

In view of the above, it is clear that Article 234 EC cannot be considered adequate within the meaning of the Convention. The timeliness of the preliminary reference procedure is open to question, as is its fairness, since access to national courts will vary between Member States. Although there is a slow, consistent and heterogeneous tendency in European law towards loosening the conceptual dichotomy between private and public interests in the environment,[264] it is outside the scope of Community competence to introduce public interest litigation in the Member States.

Another route to achieving judicial review of an allegedly illegal measure is through an action for damages under Article 288 EC. The case law so far seems to suggest that it is acceptable to cause environmental harm provided a remedy is available in damages. However the Court has defined the conditions for Community liability so narrowly that awards of damages seem highly unlikely.[265]

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[263] Stec, Steven 'The Aarhus Convention: an implementation guide: UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (New York, United Nations, 2000) Available at http://www.unece.org/env/pp/acig.htm (accessed 28.08.08) p 132.

[264] Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (2002, Kluwer Law International) 4. See footnote 240 above regarding the specifics of this study.

[265] Case C-5/71 *Schöppenstedt* [1971] ECR 975 and Case C-352/98 *Bergaderm* [2000] ECR I-5291. According to the ECJ's case law, the applicant must prove that: the rule of law infringed was intended to confer rights on individuals; the breach was sufficiently serious; and there was a causal link between the breach and the resultant

The problem here with regard to fully implementing access to judicial review pursuant to the Convention is that an action for damages does not achieve efficient protection of the environment. In other words, an action for damages under Article 288 cannot be regarded as an adequate or efficient mean of addressing breaches of EC environmental law. In environmental matters it is especially important for the system to allow scrutiny of the validity of legislative measures before any damage is caused.[266] Some types of ecological damage cannot be rectified by the payment of monetary damages, which in any case cannot easily be claimed by NGOs or for that matter by any other natural or legal person.

This means that if the notion of individual concern is still a barrier to EOs acting in the public interest before the ECJ, this contravenes the Convention's provisions granting EOs access to judicial review. Even though it is necessary to look at the complete system of legal remedies available under the EC Treaty when considering access to judicial review in the Community, it is questionable whether these alternative routes meet the minimum qualitative standards set out in Article 9 (4) AC.

To sum up, it is submitted that although Article 12 of the Regulation does not introduce new rights of judicial review that are not already granted under the EC Treaty, the best way forward for full implementation of the Convention is to consider the EOs' right to request an internal review as making EOs individually concerned within the meaning of Article 230 (4) EC. The adoption by the Community Courts of this approach would not only accord with the obligations arising under the Convention, but also with the Courts' own case law in *UPA*[267] and *Jégo-Quéré,* [268] which state that Article

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harm. See Craig, Paul and de Burca, Grainne 'EU Law' (Oxford University Press, 2007) p 586.

[266] Arnull, Anthony 'Private Applicants and the Action for Annulment since Cordoniu' (2001) 38 CML Rev 7, 51.

[267] Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677.

230 (4) EC must be interpreted in the light of the fundamental right of effective judicial protection, but without going so far as to remove all meaning from the notion of individual concern.[269]

5 The situation with regard to legislative measures

Another interesting implication of the Århus Convention is that full implementation of the second pillar concerning public participation in decision-making might also open the door to targeted representative actions from EOs with regard to legislative measures.

As mentioned above, judicial access under Article 9 AC is limited to the review of administrative acts and omissions. The task of providing residual judicial review is at present still entrusted to the Member States through the preliminary reference procedure in Article 234 EC.[270] The problem with regard to legislative measures is that, as shown in *Jégo-Quéré* and *UPA*, in cases concerning "regulatory acts" not implemented at Member State level, it is currently impossible for NGOs acting in the public interest to hold the Community institutions accountable. Even if the legislative measure does result in an implementing measure that can be challenged at Member State level, it is uncertain whether the preliminary reference procedure suffices to ensure efficient judicial protection of environmental interests.

Full implementation of the participation rights established in Articles 6 to 8 AC would, however, expand the range of situations in which rights of consultation and participation for NGOs are laid down in the legal bases on

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268 Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425.

269 Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425, para. 37-38.

270 Keessen, A 'Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products' (2007) 16 (2) EELR 26, 33.

which Community institutions base their decisions. This would also mean wider access to judicial review with regard to legislative measures.

With regard to the participation rights flowing from the Convention, the Convention itself distinguishes between different forms of decision-making. Most detailed are the principles in Article 6 AC, which apply to "decisions on proposed activities (…) which may have a significant effect on the environment."[271] In such cases the parties are obliged to provide for wide public participation.[272] On the other hand, Article 8 AC leaves each contracting party to determine whether these participation rights shall extend to general and legislative measures.[273]

Decision-making regarding certain plans, programmes and policies occupies a middle ground.[274] The Parties are obliged to "make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment"[275] and the minimum standards set forth in Article 6 AC apply. But with regard to policies, each Party is only obliged "to the extent appropriate" to provide for public participation in the preparation of policies relating to the environment.

Consequently the Convention does not oblige the Parties to implement general rights of participation, but only with regard to the activities specifically mentioned in Article 6 AC and the preparation of plans and programmes pursuant to Article 7 AC. Nevertheless, if the Community were to follow up the Convention's recommendations for public participation with

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271 *Cf.* Article 6 (1) b AC.

272 Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (2002, Kluwer Law International) 13.

273 According to Article 8 AC, each Party "shall" strive to promote effective public participation. See Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 51.

274 Article 7 AC, first sentence.

275 Article 7 AC, first sentence.

regard to environmental policies and legislative measures, this would, according to the current case law of the ECJ, make EOs individually concerned within the meaning of Article 230 (4) EC. Would this be advisable at Community level?

On the one hand, most arguments against allowing NGOs standing to challenge Community measures concern the review of legislative measures. This is also reflected in the fact that the Convention did not succeed in introducing judicial access beyond certain administrative measures. Some branches of public law theory consider the provision of limited access for the public to challenge general legislative measures or decisions that do not formally concern them directly and individually to be important for ensuring the efficiency of legislative and administrative processes.[276] Such access is argued to assist public authorities in enacting workable legislation and in making decisions affecting indeterminate groups of third parties in a general, abstract manner, without running the risk of being seriously hampered by individuals claiming to be concerned or adversely affected.[277]

Restrictive rules regarding *locus standi* also help prevent the Courts from second-guessing substantive political choices made by the legislature or the executive. The Courts do not have the political authority, democratic legitimacy or expertise necessary to second-guess legislative or executive choices on how to achieve political goals or reconcile conflicting social interests.[278] This the rationale for restricting the review of legislative

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[276] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 48.

[277] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 48.

[278] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 38.

measures, or at least why legal standards for review need to be limited to ensure compliance with due process and possibly with higher constitutional norms.[279]

These objectives may, however, be accomplished by limiting the scope and intensity of substantive judicial review in annulment actions to situations where the legislature or executive appears to have manifestly exceeded the constitutional or legal limits of their powers or to have infringed essential procedural standards in exercising their discretion in the decision-making process.[280] In such situations there should be no reason to protect public authorities from accountability.

In some countries such as Norway, NGOs are entitled to challenge legislative measures.[281] Such challenges are naturally subject to several conditions, but the main line of reasoning is that there is no reason to exclude legislative measures as such.[282] Emphasis should rather be placed on the kind of review suitable for legislative measures. In other words, a distinction needs to be made between the question of justiciability and rules on standing.[283]

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[279] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 48.

[280] Mathiesen, Anders S 'Public Participation and Access to Justice in EC Environmental Law: the Case of Certain Plans and Programmes' [2003] European Environmental Law Review 36, 48.

[281] Lov om tvistemål (2005) § 1-3.

[282] On the situation in Norway see Skoghøy, Jens Edvin A 'Kravene til søksmålsgjenstand, partstilknytning og søksmålssituasjonen etter tvisteloven - noen grunnleggende spørsmål' (2006) Lov og Rett 407.

[283] Groussot, Xavier 'The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?' (2003) 30 (3) Legal Issues of Economic Integration 221, 224 and McLeod-Kilmurray, Heather 'Stichting Greenpeace and Environmental Public Interest Standing before the Community

At EU level, the public participation rights flowing from the Convention have so far been implemented through the establishment of certain minimum standards of participation.[284] Article 9 of the Regulation builds on these minimum standards.[285] The problem is that these standards are not legally enforceable before the ECJ. According to the Commission, the objective of the minimum standards of participation is not the establishment of procedural rights that would be subject to judicial control and review.[286] The Commission's fear is that allowing legislative measures to be challenged before the ECJ would be incompatible with the need for timely delivery of policy.[287]

It is, however, questionable whether the Commission's concerns regarding a more relaxed approach to *locus standi* can be substantiated. Extensive studies on access to justice in the Member States[288] clearly refute the

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Judicature: Some lessons from the Federal Court of Canada' (1998) 1 The Cambridge Yearbook of European Legal Studies 269, 295.

284 *Cf.* Commission of the European Communities, Communication on the Consultation Document: Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (2002) 704.

285 Obradovic, Daniela 'EC rules on public participation in environmental decision-making operating at the European and national levels' (2007) European Law Review 839, 844.

286 European Commission (2002) European Governance: Preparatory Work for the White Paper. Luxembourg: Office for Official Publications of the European Communities, p 73.

287 Commission of the European Communities, Communication on the Consultation Document: Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM (2002) 704, 10. See also Obradovic, Daniela 'EC rules on public participation in environmental decision-making operating at the European and national levels' (2007) European Law Review 839, 853.

288 See Ebbeson Jonas (ed.) 'Access to Justice in Environmental Matters in the EU/Accès à la justice en matière d'environment dans I'UE' (The

suggestion that a more relaxed approach to standing in public interest cases would overburden the courts or hamper the timely delivery of policy.[289] The extraordinary burden and financial strain of instituting legal proceedings in environmental matters, as well as the length of such proceedings,[290] lead NGOs to be cautious and only pursue cases where they believe there to be clear infringements of environmental law and/or the possibility of preventing acts that may be seriously detrimental to the environment.[291]

The introduction of explicitly enacted participation rights with regard to environmental policies and legislation would accordingly, rather than hampering the efficiency of the European legislature, allow NGOs to bring targeted representative actions fulfilling certain requirements in environmental matters. It seems more important to focus on the kind of review that is suitable in the case of legislative measures. Although the Community is under no obligation under the Convention to introduce such rights, such a step would go a significant way towards fulfilling the European Parliament's call for the Community to lead by example through implementing the Convention in a rigorous manner.[292]

Hague/London/New York, Kluwer Law International, 2002) chapter 1 and De Sadeleer, Roller and Dross 'Access to Justice in Environmental Matters' ENV.A.3/ETU/2002/0030 Final Report. The study by De Sadeleer, Roller and Dross was commissioned by the Commission to assess recent developments and the current situation concerning access to justice in environmental matters in selected Member States. The Member States examined encompassed a wide range of different legal traditions and experience regarding access to justice by environmental NGOs.

289 De Sadeleer, Roller and Dross 'Access to Justice in Environmental Matters' ENV.A.3/ETU/2002/0030 Final Report, 33.

290 De Sadeleer, Roller and Dross 'Access to Justice in Environmental Matters' ENV.A.3/ETU/2002/0030 Final Report, 12.

291 De Sadeleer, Roller and Dross 'Access to Justice in Environmental Matters' ENV.A.3/ETU/2002/0030 Final Report, 13.

292 European Parliament resolution of 22 May 2008 on the EU strategy for the third Meeting of the Parties to the Århus Convention in Riga, Latvia, available at

6 Conclusions

This dissertation has shown that the ECJ has not allowed public interest litigation in environmental matters under Article 230 (4) EC. Moreover, the Community can only to a limited extent require its Member States to amend their national procedural rules to grant judicial access to EOs acting in the public interest. As a result, the Article 234 EC route cannot be considered as providing EOs with sufficiently wide access to judicial review. We also demonstrated the lack of suitability of Article 288 EC in environmental matters. Following *UPA* and *Jégo-Quéré,* a wider understanding of individual concern encompassing public interest litigation would exceed the scope of the Court's jurisdiction and require Treaty amendment.

It was, however, submitted that although Article 12 of the Regulation does not introduce new rights of judicial review not already granted by the Treaty, the internal review procedure pursuant to Article 10 of the Regulation grants EOs such procedural rights as to make them individually concerned within the meaning of Article 230 (4) EC.

Such an approach would not only accord with the obligations arising from the Convention, but also with the ECJ's own case law in *UPA*[293] and *Jégo-Quéré*,[294] where the Court stated that Article 230 (4) EC must be interpreted in the light of the fundamental right of effective judicial protection, without going so far as to remove all meaning from the notion of individual concern.[295]

With regard to legislative measures, full implementation of the right to participate in decision-making, as set out in Articles 6 to 8 AC, would allow

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http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0236+0+DOC+XML+V0//EN&language=EN (accessed 07.08.2008).

293 Case C-50/00 *Union de Pequenos Agricultores v Council (UPA)* [2002] ECR I-6677.

294 Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425.

295 Case C-263/02 *Jégo-Quéré* [2004] ECR I-03425, para. 37-38

targeted representative actions to be brought in environmental matters, including cases concerning environmental policies and legislative measures.

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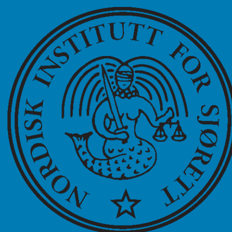

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