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Biological Diversity and the Public Interest

On the encounter between traditional Swedish perspectives on Non-Governmental Organisations' access to justice in relation to nature conservation and species protection and the modern development within EC law and international agreements.

1 Introduction

This article concerns the question of who represents the public interest in relation to biological diversity. The traditional perspective in Swedish legislation in this area is that the prerogative for defending the public interest resides exclusively with the environmental authorities. As a result of this standpoint, other entities have no say on decision-making or participation in legal proceedings on such "green" matters. Countries such as the United States, and many other Member States in the European Union, have taken a different view – which perhaps can be regarded as more of a "Western" perspective.[1] Here it is argued that the NGOs have an important role to play in the control of environmental legislation and in the way that it is accomplished and enforced. Furthermore, this perspective is already prevalent in international environmental law, and is most

[1] I use the expression "Western" as referring to a wide scope of standing for NGOs in green cases (see Jóhannsdóttir, A: Miljødemokrati – offentlighedens deltagelse i beslutningsprocessen. Inledning på Nordiska juristmötet i Køpenhamn 2008. Skrift från det 38. Nordiska juristmötet 21–23 augusti 2008. Den Danske Styrelse. Kandrups Bogtrykkeri A/S, Bind I (2008).

clearly expressed and elaborated on in the 1998 Aarhus Convention.[2] Moreover, modern EC law in this sphere is strongly influenced by this way of thinking. In this article, the Swedish position is compared with the requirements of EC law and the Aarhus Convention in relation to access to justice on decision-making concerning nature conservation and species protection. The author's position is that the traditional Swedish concept of environmental authorities retaining sole jurisdiction in terms of defending the public interest can survive neither the demands of EC law supremacy nor current international demands for access to justice.

2 Protection of nature and endangered species

2.1 Swedish traditions on nature protection

All Scandinavian countries have long-established traditions regarding the preservation and maintenance of nature. The first law on nature reserves was introduced in Sweden in 1909, and in the opening decades of the twentieth century regulations were introduced on the protection of species close to extinction. For example, hunting the golden eagle was prohibited in 1924. In parallel with the development of the welfare state after the Second World War, Sweden enacted modern laws on nature protection, focusing on the exploitation of sensitive areas surrounding cities and along coasts and in mountains. Provisions protecting shores against over-exploitation came into effect as early as 1947 and 1951. The Nature Conservancy Act of 1964 introduced several new legal instruments in this area. Modern methods in forestry, such as clear cutting and ploughing, required new rules on general considerations with regard to nature and endangered species in the new Forestry Act of 1979. This legislation reinforced the position of the Forest Agency as the national authority in this sphere.

The traditional viewpoint in our country – as in most Northern European states – is that the environmental authorities uphold the public interest concerning "green" issues. However, from the very beginning the Swedish legislature accepted the entitlement of other entities to participate in decision-making in such cases. Consequently, between 1952 and 1967, three non-governmental organisations (NGOs) had the right to

[2] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark, 1998-06-25, 2161 UNTS 447).

appeal decisions in accordance with the provisions of the Nature Conservancy Act and its predecessors. These organisations were the Society for Nature Conservation, the Royal Academy of Sciences and the Local Heritage Movement.[3] However, this ended with the establishment of the Swedish Environmental Protection Agency (SEPA) in 1967. From the outset, it was made clear that SEPA would hold the sole legal capacity of representing the public interest, as it relates to environmental issues. With that change in approach came the possibility for SEPA to appeal all kinds of decisions made by various other authorities on green issues. But the legislature went even further – because SEPA was now to be the sole defender of the public interest, the previous access to justice for the NGOs was eliminated.

This new perspective on the role of the NGOs became customary in our country for a long time. Over the years, there were suggestions that they should be allowed to regain their former standing, but to no avail. The Government was not interested. Its philosophy was that participation in decision-making should be open to all, but the right of appeal should be a privilege open only to the authorities. That point of view was reinforced by the close cooperation existing between public authorities and landowners in relation to nature and species protection. This "road of voluntariness" was for many years successful in convincing landowners to protect large areas for posterity. The drawback was that other representatives for "the green interests" had no say in decision-making.

The first changes to this practice occurred with the Environmental Code of 1999. With the Code came the possibility of certain NGOs appealing decisions made in environmental cases. However, this only affects decisions involving "permits, approvals or exemptions".[4] Furthermore, the requirements for such "status" are strict: the organisation in question is required to have 2,000 members and to have been active in Sweden for three years. Furthermore, it can only consist of one limited type of non-profit association.

[3] Svenska Naturskyddsföreningen, Kungliga vetenskapsakademin and Samfundet för hembygdsvård (KK 1952:821).

[4] Chapter 16 sec. 13 Environmental Code (1998:808).

2.2 The European network Natura 2000

Together with national legislation on nature protection and endangered species, green issues have raised substantial concern on the part of the European Union. The EU's viewpoint is that the protection of habitats and species is of mutual interest to all European countries and accordingly is a matter best administered on a supranational level. Starting in 1979, a wide network of protected areas – Natura 2000 – has now been built up throughout Europe. Two EC directives on the protection of nature and species, the Birds Directive of 1979[5] and the Habitats Directive of 1992,[6] created the network. These directives have implemented international obligations that the Union has undertaken on behalf of its Member States.[7] The network consists of areas designated by the Member States for the purpose of protecting those habitats and species listed in the Annexes of the two directives. In all, more than 170 habitats (nature types) and 900 species of plant and animal life – some of which are so-called priority nature types, or species – demand special attention. The contributions of Member States depend upon the size, number and share of habitats and species existing in the territories concerned, and on the number of areas required to maintain a favourable conservation status.

The key provision of granting protection under Natura 2000 is found under Article 6 of the Habitats Directive. Article 6.1 of the directive is a traditional nature conservation provision in relation to designated areas, where Member States are required to undertake any necessary and appropriate measures corresponding to the ecological needs of the habitats and the species present on the area in question. According to Article 6.2, appropriate steps shall be taken to avoid a significant decline in habitats and the disturbance of species. EU case law established by the European Court of Justice (ECJ) requires that this perspective should also be applied to ongoing activities.[8]

[5] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

[6] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[7] Two international conventions dominate the area; the Ramsar Convention on wetlands (Ramsar, Iran, 1971-02-02, 996 UNTS 14583) and the Convention on the conservation of European wildlife and natural habitats, the so-called Bern Convention (Bern, Switzerland, 1979-09-19, CETS 104).

[8] C-392/97 *Irish salami*, C-117/00 *Owenduff* and C-441/03. Case law from ECJ is found on the website EUR-lex (http://eur-lex.europa.eu). However, the easiest way is

Article 6.3 stipulates that any plan or project which – either individually or in combination with other plans or projects – is likely to have a significant effect on a Natura 2000 site must be subject to appropriate assessment of its implications in view of the conservation objectives for that site. The competent national authorities may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site. Thus, Article 6.3 contains three obligations. First, to decide whether the plan or project is likely to have a significant effect on the site. Second, to assess the implications of the plan or project on the site concerned in light of the conservation objectives for the area. And third, to agree to the activity only after having determined that there will be no adverse effects. Those three steps – which can be described as *screening*, *assessing* and *deciding*[9] – together lend practical meaning to the precautionary principle, which is one of the basic principles of European law, as stated in Article 174(2) in the Treaty Establishing the European Union (EC).[10]

Finally, according to Article 6.4, despite the fact that a plan or project might contain harmful implications for the particular site, it can still be permitted, though under strict conditions. No reasonable alternative solutions must be available. If the activity in question claims precedence or superiority over the public interest, then there must be imperative reasons for its doing so. Compensatory measures, if necessary, must be in place to ensure that the overall coherence and integrity of Natura 2000 is protected. If the particular site hosts a priority habitat or species, the plan or projects concerned can only be carried out for reasons relating to human health, public safety or environmental benefits or after a hearing of the European Commission.

Listed birds and species exist not only within Natura 2000 sites but in all parts of the Union. The Birds Directive and the Habitats Directive therefore also contain provisions on the protection of species *per se*,

to google on the Celex number, which for cases are ***6****year****J****number (four digits)*. Accordingly, the Celex numbers for the cases in this footnote are *61997J0392, 62000J0117* and 62003J0441. The Celex number for a EC directives is ***3****year****L****number (four digits)* and for an opinion of the Advocate General ***6****year****C****number (four digits)*.

[9] Tegner Ancker, H: *The precautionary principle and nature conservation law* in Implementing the precautionary principle (ed. de Sadeleer). Eartscan (London) 2007, p. 270.

[10] See de Sadeleer, N: *The precautionary principle in European community health and environment law* (ibid, p. 10).

together with their living and resting areas. For example, Article 12 of the Habitats Directive demands that Member States establish a system of strict protection of listed species in their natural range, prohibiting all forms of deliberate capture or killing. The national systems must also guarantee that these species shall not be disturbed, particularly in periods of breeding, rearing, hibernation and migration, and nor shall there occur the deliberate destruction or taking of eggs, and the deterioration of breeding sites or resting places. Article 16 of the Habitats Directive leaves open only very limited possibilities for Member States to derogate from this prohibition. This can only occur if there is no satisfactory alternative and the proposed measure are not detrimental to the favourable conservation of species status within their natural range. Under such conditions, Member States may derogate from Article 12 only (a) in the interest of protecting wild fauna and flora and conserving natural habitats; (b) in the interests of public health and public safety to prevent serious damage; (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest; (d) for the purpose of research and education; (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of listed species.

2.3 Natura 2000 in Sweden

Today in Sweden – as in many countries throughout Europe – the network Natura 2000 commands a dominating position in nature protection. Some 4 100 areas have been designated, totalling more than six million hectares covering almost 14 percent of the country. The designation of "Special Protection Areas" (SPA) under the Birds Directive is made by Government declaration. "Special areas of conservation" (SAC) under the Habitats Directive are designated in an intricate interaction between the Government and the European Commission. We have about 90 of the listed nature types, out of which 25 assume priority status. Some of the 90 listed nature types are common and widespread – for example, Western taiga. A little over 100 of the listed protected species regularly occur in Sweden, of which the wolf, the wolverine and Arctic fox are priority ones. However, birds have their own designations. We have about 60 species considered worthy of protection in accordance with the Birds Directive. These include the larger birds of prey, the stork, the lesser white-fronted goose and several types of woodpecker.

The implementation of the Habitats Directive in Sweden has been realised in phases. From the beginning the Government (as always, one might add) adopted the position that all is well in our country, and accordingly there was no need for new regulations in this area. The European Commission criticised that position and in 2001 the legislature secured a specific Natura 2000 permit regime.[11] To explain simply, permits are required under the same circumstances as are used in Article 6.3 in the Habitats Directive. Accordingly, a permit is compulsory for any plan or programme likely to have a significant influence or effect on a site of Natura 2000. On applying for a permit, the operator must deliver an Environmental Impact Assessment (EIA). This covers the biological issues at stake and the project or plan can only be agreed upon after the permitting body has satisfied itself that no damage will occur in relation to the protected interest. The system for the strict protection of species is in Sweden implemented in part by special species protection legislation[12] and in part by the legislation regulating hunting.[13]

In a way, one might say that the Natura 2000 network has overshadowed other and more national areas of nature protection. As we say in Sweden: "like the baby cuckoo which has eaten his siblings out of the nest", it has placed its hands on a substantial portion of public resources in this area. Of course, some of the work that has been accomplished has involved other and more "national" interests, such as nature reserves. However, it cannot be denied that much of the effort expended by the Swedish environmental authorities in the green area has gone to the EU Natura 2000 network.

2.4 The European Court of Justice and Natura 2000

The ECJ has heard many cases on Natura 2000 issues. In most of them, the Commission has brought an action against a Member State in accordance with Article 226 EC for either failure or delay in implementing the directives. Most of these cases concern the Birds Directive. This is hardly surprising and is partly due to the Birds Directive being the oldest. To some extent it is also because the procedure for designating areas according to that directive leaves more room for discretion than that of the

[11] Chapter 7, section 27–29b Environmental Code.
[12] The Species Protection Ordinance (2007:845).
[13] The Hunting Act (1987:253) and the Hunting Ordinance (1987:905).

Habitats Directive.[14] As a result many of the well-known cases heard in the ECJ in this field deal with Member States that have not designated the "most suitable territories" in accordance with Article 4.1 and 4.2 of the Birds Directive.[15] In the *Leybucht* case, the ECJ ruled that once an area had been designated, a Member State can not allow the protection afforded to deteriorate for the sake of economic interests.[16] This was repeated in the case concerning the Santoña Marshes in Spain,[17] where the court found that only ornithological criteria could be decisive with regard to which areas should be designated.[18] The ECJ has also established that the protection of "the most suitable areas" must be upheld, regardless whether or not such areas had previously been designated as Natura 2000 site by the Member State concerned. Furthermore, in the *Lappel Bank* case[19] the court asserted that economic and social factors must not be considered in arriving at a particular decision. On designated areas, information from NGOs can be useful as basic information for decision-making.[20] Furthermore, decisions made on those projects that might be liable to "significant effect" must proceed on a case-by-case basis. Member States must not use general exceptions or lists of activities, if it cannot be ruled out that such activities will cause damage.[21] The protection afforded must be provided by statute or regulation, mere agreements or contracts will not suffice.[22] Finally, it is insufficient reason that the area concerned and its surroundings happens to be public property.[23].

In the noted *Waddenzee* case, the court emphasised that Article 6.3 in the Habitats Directive contains a mandatory requirement that the assessments of plans and projects are made in an authorisation procedure.[24] This landmark case of Natura 2000 – which concerned mechanical cock-

[14] de Sadeleer, N: *Habitats conservation in EU law: from nature sanctuaries to ecological network*. Yearbook of European Environmental Law, Vol. 5 (Oxford University Press 2005), p. 215ff.
[15] E.g. C-103/00, C-75/01 and C-221/04.
[16] C-57/89 *Leybucht*.
[17] C-355/90 *Santoña Marshes*.
[18] This statement has thereafter been repeated in many cases, e.g. C-3/96, C-166/97, C-374/98 and C-209/04. For further examples, see de Sadeleer (p. 223ff).
[19] C-44/95 *Lappel Bank*.
[20] C-374/98 *Basses-Corbiéres*.
[21] C-72/95 *Kraaijeveld*, C-256/98, C-392/96 *Irish Salami*, C-143/02 and C-83/03.
[22] C-209/04, C-3/96.
[23] C-166/97 *Seine Estuaries*.
[24] C-127/02 *Waddenzee*.

le fishing in the Netherlands – dealt with many issues of vital importance. In relation to the demand for an EIA (*screening*), the ECJ stated that it must cover all activities for which one cannot *on the basis of objective information exclude that they will not have significant effects* on the site concerned (the "Waddenzee test").

Finally, when it comes to *deciding* whether or not the plan or project concerned will adversely affect the integrity of the particular site – only a few cases have reached the ECJ. The leading one relates to Wörschacher Moos in Austria, where the authorities had agreed on the extension of a golf course which destroyed one of the few feeding and resting areas for the corncrake in the Central Alps.[25] The court meant that the authorities at the time of the decision could not justify the finding that the proposed project would not significantly disturb the population in the area.

2.5 Unconditional and sufficiently precise

The ECJ's strict interpretation of the duties of Member States in accordance with Article 4.2 of the Birds Directive and Article 6 of the Habitats Directive have been described in the legal literature as that of the provisions having "direct effect". [26] The most suitable areas are to be protected (*Santoña Marshes*) and such protection follows directly from the provision in the directive (*Leybucht*). By comparison with the ECJ's judgment in *Kraaijeveld*, one can also reasonably conclude that the national authorities are obliged to consider the requirements of the Directives "ex officio" – that is, irrespective of whether or not any of the parties have invoked them.[27] The issue of direct effect, however, is best illustrated in the *Waddenzee* case.[28]

In that case, Advocate General Kokott specified that according to clear jurisprudence of the court, a provision in a directive has direct effect if it is "unconditional and sufficiently precise". In her opinion, this could be true of Article 6.2 and 6.3 in the Habitats Directive, since they were unconditional, at least in the situation that was to be judged in the case. Article 6.3 is based upon a number of conditions and legal consequences

[25] C-209/02 *Wörschacher Moos*.
[26] de Sadeleer p. 242.
[27] C-72/95 pp. 56–62.
[28] See also C-287/98 *Linster*, para 32, C-435/97 *WWF*, para 68 and C-72/95 *Kraaijeveld*, para 22–24.

that are precisely and clearly arrived at step-by-step. Even if there is room for Member States on the choice of measures to be taken, this still remains an issue that can be made the subject of judicial review. Kokott also considered that the correspondence between Article 6.2 and 6.3 of the Habitats Directive and those provisions in other directives where the ECJ had found direct effect was so much stronger than those that had been considered merely as programme documents.[29]

In its preliminary ruling in the *Waddenzee* case, the ECJ did not take a position on whether or not Article 6.2 of the Habitats Directive has direct effect. However, as to Article 6.3 the court stated:[30]

> "It would be *incompatible with the binding effect* attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes *may be relied on by those concerned*. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, *the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts*, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, *has kept within the limits of its discretion set by the directive* (see Kraaijeveld and Others, paragraph 56). (emphasises added)

The ECJ's conclusion was that it is up to the national courts to determine whether or not the particular authority's decision authorizing a plan or a project has been made within the limits of discretion enjoyed in accordance with Article 6.3.[31] The court's judgment in the *Waddenzee* case can be said to represent a clear position that the provision has direct effect. However, a question remains as to its precise meaning.

[29] In other words, the parallel to the *WWF* case – which concerned Article 2.1 and 4.2 in the EIA Directive (85/337) – was much stronger, compared with the C-236/92 *Comitato*. The latter dealt with Article 4.2 in the Waste Directive (75/442). See Kokott in *Waddenzee* (Celex 62002C0127) para 128–137.

[30] *Waddenzee* para 66.

[31] *Waddenzee* para 70.

2.6 The primacy of EC law

The starting point for the doctrine of direct effect originally came in 1963 in the case of *Van Gend en Loos*.[32] From the beginning the ECJ applied this viewpoint – that if provisions of EC directives are unconditional and sufficiently precise, they may be relied upon before a national court – in relation to "rights" for individuals. The first cases on this question concerned competition, social security, consumer protection, and so on. In those situations, there is typically an easily identified actor able to trigger the case. Early on, however, the ECJ also found that the doctrine of direct effect should be employed with respect to environmental protection. Initially, this viewpoint was applied to health protection.[33] This is also the perspective in the Swedish legal literature, where the issue of direct effect has primarily been discussed in relation to individual rights for private persons.[34] One of the standard works in English on European environmental law – that is, Krämer, take the same perspective.[35] These examples deal with the possibilities open to neighbours to rely on EC air and water Environmental Quality Standards when challenging acts and omissions made by the environmental authorities.

However, in discussing Natura 2000, one cannot really talk of individual rights. The expression "direct effect" under these circumstances describes instead a broader concept, dealing with the "primacy of EC law".[36] This principle was manifested by the ECJ in the *WWF* case, meaning that whenever a provision in a directive is found to be unconditional and sufficiently precise, it must be applied in preference to any national legislation inconsistent with it.[37] Other leading commentators on European environmental law in English, Jans & Vedder, direct attention to the fact that the ECJ has found "rights" in all manner of provisions

[32] 262/62 *Van Gend en Loos*, REG 1963 p. 13.

[33] The ECJ's case law has developed from the *TA Luft* cases in 1991 (C-361/88 and C-59/89) to the *Janecek* case in 2008 (C-237/07).

[34] Mahmoudi, S: *EU:s miljörätt*. Norstedts Juridik, 2nd ed. 2002, p. 245 f., Michanek, G & Zetterberg, C: *Den svenska miljörätten*. Iustus, 2nd ed. 2008, p. 96 f.

[35] Krämer, L: *EC Environmental Law.* Thomson (Sweet & Maxwell), 6th ed. 2007, p. 433.

[36] See Prechal, S: *Directives in EC law*. Oxford University Press, 2:a uppl. 2005, p. 231 ff.

[37] C-435/97 *WWF,* para 68 and 70, the latter introduced with the words (my italics): "Consequently, if that discretion has been exceeded and the *national provisions must therefore be set aside on that account*, (…)".

dealing with quality of the environment and the duties of public authorities in this area. The authors accordingly argue that the issue of "rights" for individuals is a procedural rather than a substantive issue. To them, the concept of direct effect essentially means providing procedural mechanisms to the public to challenge administrative decisions on the basis of environmental quality requirements clearly provided under EC law.[38]

> The way the Court has extended the concept of direct effect in recent years justifies the assertion that the crucial criterion is whether a provision provides a court with sufficient guidance to be able to apply it without exceeding the limits of its judicial powers. Viewed thus, a provision of EC law is directly effective if a national court can apply it without encroaching on the jurisdiction of national or European authorities.

Viewed from this perspective, the rights of individuals and direct effect form two separate and different concepts. Rights for individuals become of interest mainly when claims for damages are made on a Member State for failing to implement correctly EC law. Moreover, the principle of direct effect goes farther than the Colson principle of loyal interpretation of directives, because it means that sufficiently precise provisions of EC law have primacy over national legislation under certain circumstances. However, such an effect does not apply in "horizontal relationships" – that is, between different individuals. The primacy of EC law must also be balanced against other basic principles, such as the principle of legal certainty, and must not encroach on legal rights of interest.[39] However, such rights are accorded a narrow interpretation and do not include granting an advantage to an individual by decision of a national authority. Such a "triangular" situation was illustrated in the renowned case of *Delena Wells*, where a neighbour succeeded in her action to challenge the permit of a quarry because the authorities had granted it in breach with the EC law.[40]

In summary, "direct effect" of EC law can be described as *"the obligation of the court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or a standard for legal review*".[41] In other words, it is a matter of the authority flowing from

[38] Jans, JH & Vedder, HHB: *European Environmental Law*. Europa Law Publishing, 3rd ed. 2008, Chapter 6, citation on p. 168.
[39] Kokott in the *Waddenzee* case (62002C0127), para 149.
[40] C-201/02 *Delena Wells*.
[41] Prechal p. 241.

those provisions in EC laws that are unconditional and sufficiently precise. The national authorities and courts are obliged to apply the requirements of those provisions *ex officio.* In this way, the provisions can be used by all concerned parties, regardless of whether or not they provide "individual rights". The discussion therefore shift focus to the issue on *who belongs to this class of "concerned parties"* and on the *procedural autonomy* of the Member States.

2.7 The "protective law theory"

To discuss these issues in relation to nature conservation and species protection is not without difficulty, because the whole notion depends on the proposition that someone has standing to bring the case to a national court. And here, the procedural systems of the Member States of the European Union differ greatly.

First of all, an interesting confrontation with the traditional administrative "protective law theory" will occur. This "Schutznormentheorie" was originally developed in German jurisprudence but has also been employed in varying degrees in many other countries. According to this theory, a private party can rely only on his or her own interests in bringing a case: the interests of others affected by the decision – including the public interest – cannot be invoked. In the German version, the concerned person cannot invoke such "other" interests even when he or she has been allowed to challenge a decision on the basis of the existence of individual interests.[42] In other countries the protective law theory may instead determine who should be granted leave to appeal in certain cases. The most common situation occurs in cases on nature conservation and biodiversity, which are not considered to concern private interests and therefore cannot be challenged by individuals. Accordingly, from this standpoint the direct effect doctrine becomes a non-issue in relation to a case concerning Natura 2000 if there is no one affected in any personal capacity. Thus, in this situation if an authority makes an erroneous decision regarding the demands of the Habitat Directive, it cannot be challenged at all.[43]

[42] See Rehbinder, E in *Access to justice in environmental matters in the EU* (Ed. Ebbesson, J., Kluewer 2002), pp. 233 f.

[43] These issues are discussed more thoroughly in Darpö, J: *Justice through the Environ-*

EC law also demonstrate this line of argument. In the *Waddenzee* case, the General Advocate (Kokott) suggested that the direct applicable provisions of EC Directives could be divided into two categories: those that carried rights of prohibition and those that gave grounds for entitlements. Only in relation to the latter were Member States obliged to provide a procedural entrance for concerned parties. For the provisions that carried rights of prohibition, individuals may rely on the EC provision *only in so far as avenues of legal remedy against infringements were available under national law*.[44] But the ECJ did not follow Kokott's reasoning. Instead, the court repeated its mantra from previous case law that individuals must be able to rely on the directives before their national courts.

It is debatable as to what conclusions one can draw from this statement. The judgment, however, is clear in that the ECJ did not wish to bind itself to the viewpoint that it is up to the Member States to provide for legal means in those cases where there are no "individual rights" or concerned persons in the traditional sense. It is also noteworthy that the ECJ has utilised the same perspective in several cases brought by environmental NGOs. So if there is to be any real meaning in discussing the notion of direct effect in relation to green issues, *then someone must be able to bring such questions to court.* This is not a problem in those Member States that offer a system of judicial review widely accessible to the public. This is, for example, the case in the Netherlands, where an environmental NGO, Nederlandse Vereniging tot Bescherming van Vogels, initiated the *Waddenzee* case. Furthermore, in the UK, NGOs have a far-reaching standing that has been established by case law. It is hardly a coincidence that Friends of the Earth (UK) and the Royal Society for the Protection of Birds (RSPB) have initiated many of the more celebrated cases in the ECJ on the Birds Directive and the Habitats Directive. It was the latter organisation, for example, that was responsible for the action for judicial review in the *Lappel Bank* case.[45] However, this is not the general picture all over the Union. As mentioned above, in some Member States NGOs have little or almost no standing in green cases.

mental Courts. Lessons learned from the Swedish experience. In Environmental Law and Justice in Context (Cambridge University Press 2009), p. 176.

[44] C-127/02, para. 140–144.

[45] For Swedish cases, see MÖD 2001:29, MÖD 2005:8.

Finally, it is also noteworthy that the situations in the Member States differ when it comes to *what kind of case* the public concerned can bring to court. In many systems, the courts' control of the administration is mainly triggered in relation to specific decisions. In others, the public concerned also has access to "abstract norm control". This was clearly illustrated in the *TOS* case, where an NGO brought an action for misuse of powers ("detournement de pouvoir") against the French Ministry of the Environment.[46] The NGO sought annulment of certain decrees concerning fish farming, claiming that they failed to fulfil requirements for an authorisation procedure in accordance with Directive 2006/11. The French Conseil d'État made a reference for a preliminary ruling and the ECJ confirmed the standpoint that those kinds of fish farming operation must be subjected to permits. In other Member States, this kind of case simply cannot by brought to court. Although one cannot argue that the possibility of abstract norm control generally is a requirement under EC law – or required by the European Convention of Human Rights for that matter[47] – one might say that the national system must provide *some effective legal remedy* in similar situations.[48] A reasonable conclusion to be used in the following discussion is therefore that actions and omissions by public authorities dealing with EC law having direct effect must be possible to challenge before a national court. Dealing with nature conservation and species protection, the crucial question to be considered is to what extent the environmental NGOs enjoy such access in the national courts of the Member States. Before attempting to answer that question, one must also consider the fact that the EU – together with most Member States – has signed the Aarhus Convention. This Convention establishes international standards for information, public participation and access to justice in environmental matters. The "Aarhus effects" on the subject of this article – the public interest and biological diversity – must be described in order to make the picture more complete.

[46] C-381/07 *Association nationale pour la protection des eaux et rivières – TOS.*

[47] European Court of Human Rights' (ECHR) judgments in the cases *Norris v. Ireland*, *Klass v. Germany* and *Västberga taxi v. Sweden*.

[48] C-432/05 *Unibet*, para 37.

3 The Aarhus Convention

3.1 General points about the Aarhus Convention

The Aarhus Convention is built on three "pillars": *access to information*, *public participation* in decision-making procedures and *access to justice* in environmental matters. The preamble to the Convention emphasises the importance of a close relationship between environmental rights and human rights, and that all three pillars are of decisive importance for sustainable development. The ideas forming the pillars are intertwined to form an entirety, a basic viewpoint advanced in the Implementation Guide of the Convention:[49]

> "Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar."

The Aarhus Convention is relatively short, containing only 22 Articles. Like many international instruments, it starts with a general part, including a provision laying out the objectives (Article 1), largely reflecting what was earlier stated in the preamble. In this part, there are also some definitions (Article 2) and general provisions (Article 3). The definition of environmental information is broad, including information from decision-making procedures. Of particular interest for this article are the definitions of the "public" and the "public concerned". The broader concept "public" is defined as natural or legal persons, and, in accordance with national legislation or practice, their organisations and groups. The "public concerned" means the public most likely to be affected or having an interest in environmental decision-making. The definition also includes NGOs promoting environmental protection and meeting any requirements under national law. It should be noted that the expression "public authority" also refers to regional institutions such as the European Union. The general provisions make clear that the provisions of the Convention constitute a floor ("minimum provisions") that do not prevent the Parties from maintaining or introducing enhanced information, wider participation and more effective access to justice than that required by the Convention (Article 3.5). Article 3.9 essentially prohibits discrimination on the basis of citizenship, nationality, domicile or registered seat.

[49] *The Aarhus Convention – An Implementation Guide*. Economic Commission for Europe/UN 2000.

The first pillar – access to information – consists of two parts, passive and active information. The first concerns the right to seek information from public authorities. The second is about the obligation on the part of authorities to collect and dispense information to the public.

Public participation constitutes the second pillar. Under Article 6, the public is guaranteed the basic right of participation, which today is associated with most national and international EIA procedures. This includes elements such as promulgating public notice in the early stages of decision-making, providing information on applications (including an assessment of their environmental impacts), providing information about the operators and authorities involved, advertising public hearings, informing the public about how to submit comments, clarifying time frames, and so on. The right to participate, however, only applies to authorisation decisions relating to certain activities, listed in Annex 1 to the Convention (Article 6.1.a). Paragraphs 1–19 in the Annex lists those operations and installations relating to industrial activities possessing the potential for a major impact on the environment.[50] However, the list ends at paragraph 20, which covers any other activity where public participation is provided for under an EIA procedure in accordance with national legislation. In addition, the demand for public participation also covers all other activities that may have a significant effect on the environment (Article 6.1.b).

The Aarhus Convention's demands for access to justice are expressed in Article 9.2–9.4. According to Article 9.2, the public concerned have the right of access to a review procedure before a court of law, or other independent body established by law, to challenge the substantive and procedural legality of acts or omissions under Article 6. However, this provision does not exclude the possibility of a preliminary administrative review procedure or a requirement of exhaustion of such procedures prior to judicial recourse. In addition, members of the public should have the possibility of access to administrative or judicial procedures to challenge any acts or omissions by private persons and public authorities believed to

[50] These include, for example, nuclear power stations, steel plants, metallurgical processes, installations for the production of glass and ceramic products, chemical industry, waste management, landfills, waste water treatment plants and paper industry. It also includes infrastructural projects (railways, motorways, waterways and ports), dams and other water works, extraction of oil and gas, intense farming, quarries and opencast mining, electric power lines, storage of petroleum and a number of other activities entailing environmental risks.

have contravened national law concerning the environment (Article 9.3). The remedies thus demanded must be both adequate and effective, including the possibility of injunctive relief. They must also be fair, equitable, timely and not prohibitively expensive to pursue (Article 9.4).

The Convention's tenth anniversary was in 2008, and in June of that year the third Meeting of the Parties was held in Riga, Latvia. The meeting declared that the Convention had won wide acceptance. No fewer than 42 states had signed it and a further 12 were preparing to do so. The meeting in Riga also confirmed that there is a continuing need to enforce public rights in relation to environmental decision-making.[51]

3.2 Implementation in Europe

As stated earlier, both the European Union and most Member States have signed and ratified the Convention. Accordingly, the EU has decided on a number of directives, or provisions within directives, implementing the Convention. In relation to the first and second pillars, the most important pieces of legislation are Directive 2003/4 on public access to environmental information[52] and Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.[53] The latter also contains Aarhus amendments in two fundamental EC directives in the environmental area – that is, the EIA Directive[54] and the IPPC Directive.[55] In 2003, the Commission also proposed a directive on access to justice.[56] In addition,

[51] See especially Decision III/3 on promoting effective access to justice (ECE/MP.P/2008/2/Add.5). All the Aarhus documents mentioned in this article are available on the website of the Aarhus Convention; www.unece.org/env/pp.

[52] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[53] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

[54] Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

[55] Council Directive 96/61/EC concerning integrated pollution prevention and control, today Directive 2008/1/EC.

[56] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM (2003) 624 final (2003/0246 (COD)).

there is a Regulation to implement the Aarhus Convention in relation to decision-making by the Community and its constituent bodies.[57]

In Sweden, implementing the provisions of the Convention has served little practical purpose. The Government specifically declared that, for the most part, the legislative efforts were aimed at fulfilling demands for information and participation. In relation to the third pillar of the Convention, it wished to await the Union's processing of the proposal for a directive on access to justice before considering further measures to be taken.[58] In relation to the first pillar, a specific law on environmental information was introduced, which makes the Aarhus demands also applicable to certain (very few) private bodies carrying environmental information.[59] The provision on access to justice by NGOs in the Environmental Code has been expanded to certain other laws dealing with infrastructural projects, mining, electric power lines, and so on. A similar provision has been introduced in the Planning and Building Act, however, that only deals with activities that are relatively insignificant to the environment. Most important is the new possibility open to NGOs to apply for judicial review of governmental decisions in accordance with the Act 2006:304. Here, it is stated that NGOs, meeting the criteria of the Environmental Code, shall have the possibility open to them to challenge any such governmental decisions to which Article 9.2 of the Aarhus Convention applies.

3.3 General conclusions from the first decade of the Aarhus Convention

At the outset, I wish to point out that the text of the Convention is not very precise and is partly contradictory. This is particularly true of the two main provisions on access to justice, Article 9.2 and 9.3. Obviously, this is mainly due to the Convention being a result of negotiations between many parties. However, it is also quite clear that the Convention was written with a distinct civil law procedural perspective on decision-

[57] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 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 Community institutions and bodies.

[58] Prop. 2004/05:65 p. 124 f.

[59] For the public authorities, the principle of administrative transparency applies in accordance with the Constitution (Freedom of Information Law from 1949).

making in environmental matters. The same is true of the Implementation Guide, which was published soon after the signing. These civil law procedural aspects are visible, for example, in the wording on injunctive relief and litigation costs.

However, this characteristic is counteracted by the enormous amount of attention the Convention has attracted and, from time to time, the intense debate concerning its provisions. Over the course of the ten years that have elapsed since its signing, vast amounts have been written and published on access to justice in preparatory works, reports, academic articles and anthologies, pamphlets and analysis, at both national and international level.[60] Furthermore, the European Commission has undertaken a number of studies on implementation efforts by Member States.[61] Most important, the Convention is equipped with a Compliance Mechanism that is rather unusual, to say the least.[62] There is a Compliance Committee, consisting of nine members, who have been nominated by the Parties and NGOs, and elected at the Meeting of the Parties. The Committee is independent, because its members are judges and legal scholars and sit in their personal capacities for six years. The Compliance Mechanism of the Aarhus Convention has a "public trigger", meaning that the public can communicate complaints about breaches against the provisions. All communications and meetings among the Committee,

[60] I wish to draw attention to *Access to justice in environmental matters in the EU*. Ed. Ebbesson, J. (Kluewer 2002), de Sadeleer & Roller & Dross: *Access to justice in environmental matters and the role of the NGOs.* (Europa Law Publishing 2005) and *How far has the EU applied the Aarhus Convention?* (Ed. Hontelez) European Environmental Bureau (EEB) 2007.

[61] Among other reports, a comprehensive study of the Member States implementation of Article 9.3: *Summary report on the inventory on the EU member states' measures on access to justice in environmental matters.* Milieu Environmental Law and Policy, Bryssel 2007. However, national contributions differ in quality, and some have been questioned, e.g. by professor Peter Pagh at the University of Copenhagen. The report, Pagh's and other communications are published on the website of the European Commission: http://ec.europa.eu/environment/aarhus/study_access.htm.

[62] Kravchenko, S: The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements. Colorado Journal of International Environmental Law and Policy. No. 1, 2007. Also Wates, J: *The Aarhus Convention: a Driving Force for Environmental Democracy*. Journal for European Environmental & Planning Law (JEEPL), Number 1, 2005, pp. 2 and Koestler, V: *The Compliance Committee of the Aarhus Convention – An overview of procedures and jurisprudence*. Environmental Policy and Law (EPL), 2007 p. 83.

the complainant and the Party are open to the public.[63] Another advantage with the Compliance Mechanism is that the procedure is fast. From 2004 to date, the Commission has received 33 communications from the public and one complaint ("submission") between two Parties. Of these, 21 have been concluded (14 recommendations and seven dismissals). One must not underestimate the importance of Committee decisions. Although its statements are not binding, they play an important part in the understanding of the Convention and accordingly work as "interpretive factors" in the building of international norms in the field of environmental democracy.

Today one might draw some basic conclusions from all of this material. First, it is clear that the Convention is *built on three independent pillars*. Access to justice does not merely cover those situations where a member of the public has been denied information or excluded from participating in a decision-making procedure. Access to justice is also related to the merits of the case in question, the result of the decision-making. The difference between Article 9.2 and 9.3 is that the former covers authorisation decisions in accordance with Article 6 and Annex 1. Article 9.3 has wider coverage of all other forms of action and omission by both authorities and private parties in breach of national legislation in the environmental realm. In other words, while Article 9.2 deals with permit decisions, Article 9.3 deals on the one hand with activities undertaken by operators in a wide sense and on the other with decisions and – perhaps even more important – omissions from public authorities in supervisory matters.

One point that has been debated is whether the Convention *contains a "non-deterioration clause"*. Early on, in the Implementation Guide, it was argued that Article 3.6 – in comparison with the Sofia Guidelines produced during the preparation of the Aarhus Convention – should be understood as containing such a clause.[64] However, this does not follow from the wording of the provision, which merely states that the Convention does not *require* any derogation from existing rights of information, public participation or access to justice in environmental matters. The Compliance Committee discussed the issue in the decision on *Hungary* and stated that, when formulating Article 3.6, the negotiating parties did

[63] All documents are published on the Aarhus Convention's web site (http://www.unece.org/env/pp/).

[64] Implementation Guide pp. 46, 115, 119, 129.

not wish to completely exclude the possibility of reducing existing rights, so long as they did not fall below the level granted by the Convention.[65] Because the Committee regarded such a reduction as being at variance with the Convention, it recommended the forthcoming Meeting of the Parties to urge the parties concerned not to take such action. However, the meeting in Almaty in 2005 made no such declaration.[66] In my view, the conclusion to be drawn from this is that Article 3.6 is not to be taken as a non-deterioration clause.[67]

Furthermore, the Convention *does not pose any demand for "actio popularis"* – that is, a way open for everyone to challenge environmental decisions by legal means. Examples of such actions can be found in many states. The possibilities open to the public in UK to bring individual private prosecutions is perhaps one of the most important examples in Europe. In some of the Nordic countries, all inhabitants in a municipality can challenge the legality of certain decisions by politic boards and civil servants. However, such a procedural order is not required by the Convention, a point that was made clear in a decision from the Compliance Committee in a case concerning *Belgium*.[68]

Neither does the Convention require that individuals and NGOs have access to courts through *direct action in court*. The Convention requires access to justice, but is silent on the matter of how the Parties arrive at different solutions. This can be met by the existing procedural orders, but they must be able to fulfil the requirements of Article 9.2–9.4. The requirements should also be considered in relation to the entirety of the system. When deciding if a national system is in compliance with the Convention, one must consider both the opportunity to challenge decisions through appeal on the merits of the case, as well as through judicial review of legal issues. We must also understand the aims and purposes of the Aarhus Convention. In the decision on *Kazakhstan*, the Compliance Committee made clear that the Convention demands that the environmental legislation of the Parties must offer an opportunity for the public concerned to challenge by legal means the supervisory authority's

[65] Communication C/2004/4 (Hungary), para 18.

[66] Second Meeting of the Parties, decision II/5 para 3.

[67] This is also the conclusion drawn by the chairman of the Compliance Committee, Veit Koestler, in the above mentioned article in Environmental Policy and Law (EPL), 2007 p. 83, at p. 92.

[68] Communication C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para 35.

reluctance to take action against illegal activities. [69] Accordingly, when the text of the Convention talks of injunctive relief, the words must be "translated" and transformed into their equivalents in the administrative procedures that prevail in some countries – for example, Sweden and Finland.

3.4 Relationship between the Aarhus Convention and EC law/Member States' law

The relationship between the Convention and EC law has attracted a certain amount of attention. As mentioned earlier, both the European Union and the Member States have signed the Aarhus Convention. According to Article 300(7) EC, the institutions of the Community and the Member States are bound by international agreements concluded by the EU under certain conditions. Under this provision, the ECJ has developed a doctrine of direct effect of international conventions, similar but not identical to the criteria of *Van Gend en Loos*.[70] Most of the cases concern the

[69] Compliance Committee 2006-07-28 (C/2004/06 and C/2007/20 Kazakhstan). In this context, one may also mention that the Nordic countries made a statement when signing the Convention that might be understood as their thinking that the Parliamentary Ombudsman should be considered as an administrative recourse that fulfils the requirements of Article 9.3. I understand that this still is the Danish position (see Implementation report submitted by Denmark (ECE/MP.PP/IR/2008/DNK 4 April 2008), para 151). It might therefore be worth mentioning that this can hardly be said to be Sweden's standpoint today. In implementing the Convention, the Government had already stated that the scrutiny of the Ombudsman alone could not meet such demands, since it only covers activities by public authorities and offers no opportunity for injunctive relief (prop. 2004/05:65 part 9.5). The issue was also discussed during the implementation of the Environmental Liability Directive (2004/35, ELD), which contains two Aarhus provisions (Article 12 and 13). When those provisions were implemented in the Environmental Code, it was considered that the Ombudsman did not meet the requirements of Article 9.3 of the Convention, since a decision on his or her part was not binding and did not address the merits of the case (SOU 2006:39, p. 183 and prop. 2006/07:95, part 6.19). The Parliamentary Ombudsman has also repeatedly raised objections to any attempt to describe the institution as an administrative recourse in accordance with Article 9.3 of the Aarhus Convention (JO:s decision 2006-08-21 on the implementation of ELD (dnr 2116-2006), also decision 2007-11-12 (dnr 4560-2007) on the Implementation report 2008 submitted by Sweden (M2007/4342/R)).

[70] Hartley, T. C.: The Foundations of European Community Law. Oxford University Press, 6th ed. 2007, p. 183.

GATT agreement, which the court has found does not "confer rights".[71] However, in certain situations, the ECJ has found that sufficiently clear and unconditional provisions of international conventions concluded by the EU prevail over contradicting national legislation. This was illustrated in the case of *Étang de Berre,* which concerned the direct applicability of Article 6(3) in the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (the Barcelona Convention).[72] The provision lays down an obligation to subject certain discharges to an authorisation decision by the national authorities. The ECJ began its findings by stating:[73]

> According to the settled case-law of the Court, a provision in an agreement concluded by the Community with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (…).

Because the Court found that the provision in the Convention clearly, precisely and unconditionally lays down an obligation for Member States, it was considered as having direct effect. Accordingly, any interested party is entitled to rely on it before a national court.

In conformity with this judgement, those provisions of the Aarhus Convention sufficiently clear and unconditional – and there are many – have direct effect and therefore should take precedence over any national legislation conflicting with them. The European Commission in the *EU* case advanced this argument before the Compliance Committee. The Commission meant not only that the Member States have to interpret EC law – for example, the EIA Directive – in the light of the Convention, but that in certain situations they also have to apply directly the provisions of the Convention. The Committee reiterated the Commission's position.[74] The idea of Conventions having direct effect is not very novel

[71] Craig & de Burca: EU Law. Oxford University Press, 4th ed. 2008, p. 206 ff.

[72] C-213/03 *Syndicat professionell coordination des pêcheurs de l'étang de Berre.*

[73] The judgment, para 39.

[74] Compliance Committee's decision 2006-06-12 in Communication C/2005/17 (*European Community*), ECE/MP.PP//2008/5/Add.10, 2 May 2008, para 23, 28 and 35. However, one must also take into consideration the fact that the European Community made a declaration on the approval of the Aarhus Convention, stating that Member States were responsible for the performance of Article 9.3 and would remain so unless and

in relation to those parties that belong to a monistic tradition. However, to my understanding, in those countries belonging to the dualistic tradition – that is, many countries in Western Europe – this in fact renders the system monistic in relation to provisions in international agreements that are sufficiently precise and unconditional.

The Committee also has highlighted another issue concerning the Union's external relationships. In the *Danish* case, the Committee made a statement about the expression "national law" according to Article 9.3. First, it noted that the Community's legislation in different ways constituted a part of the national law of the EU Member States, and, in some cases, national courts and authorities were obliged to consider EC directives even where they had not been fully transposed into national law by the Member State concerned. The Committee then declared:[75]

> "For these reasons, in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be a part of the domestic national law of a member state."

The use of the expression "applicable" is here ambiguous. It is one thing to assert that if the Council enters into an international agreement, certain provisions of that convention can by direct applicability become part of national law, even in dualistic Member States. However, it is another thing to say that such an agreement has an effect on the relation between secondary legislation of the Union and national law of the Member States. EC law is part of Member States' law according to Article 249 EC and the (extended) doctrine of direct effect. If the Compliance Committee means that the fact that the Union has signed the Aarhus Convention renders EC directives applicable in the Member States *to a wider extent* than follows from the doctrine of direct effect, I disagree. Furthermore, the consequences of such a position would be substantial. There are many general provisions in EC secondary law not having direct effect because they are not sufficiently precise and unconditional. According to such a viewpoint, those provisions must be open for the public concerned to challenge in court. This would not be a practical problem in those coun-

until the Community adopted legislation covering the implementation of those obligations (http://www.unece.org/env/pp/ratification.htm). The importance of this declaration on the issue debated here, remains to be seen.

[75] Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 59, reiterated in the Report 2008-05-22 to the third Meeting of the Parties (ECE/MP.PP/2008/5. para 65).

tries delimiting that class of person narrowly – for example, by demanding a connection between the decision and the actual effect on the interests of the complainant. However, as mentioned above, in some Member States the public has a much wider access to the courts in environmental matters. In such states there will be a difference, because actions and omissions of private parties and public authorities in breach of provisions in EC directives not having direct effect would become possible to challenge in the courts. However, if the Committee only meant to say that those provisions in EC law having direct effect are part of national law, the conclusion is uncontroversial.

4 Encounters between traditions and international obligations

4.1 Analysing the encounter

In the final section of this article, an analysis will be made between international demands on access to justice in relation to biological diversity and the legal situation in Sweden. First, I shall conclude what the requirements from the Aarhus Convention and EC law mean with regard to nature conservation and species protection. I shall then compare those requirements with the legal position in our country. Finally, I make a short remark about the role of the Swedish courts on this area.

4.2 The requirements from international law on standing in green issues

To my understanding, the Aarhus Convention is clear on the issue of access to justice concerning decision-making in relation to nature conservation and species protection. On permit decisions, according to Article 9.2, someone must be able to bring an action to defend green interests, either directly against the operator or against the authority in charge. The same goes for acts and omissions that contradict national legislation (Article 9.3). The Compliance Committee illustrated this in the *Danish* case. The complainant was denied access to justice because Denmark failed to enable him the possibility of challenging in court a municipality's decision on the culling of rooks (protected by the Birds Directive). However, the Committee stated that the mere fact that the private person

could not challenge such a decision did not constitute a breach of the Convention, *but some member of the public must be able to do so*.[76] An explicit condition of this position was that the Danish courts would continue to allow for NGOs to have standing in such cases.[77]

The position of EC law is more complicated. On the one hand, we have the EC law demand for primacy described above, and on the other, there is the notion of procedural autonomy – meaning that it is up to each Member State to develop its own system for decision-making and judicial review. However, the national systems must be based upon the principles of equivalence and effectiveness. The meaning and intention of those principles is that there has to exist the possibility of a *fair trial*[78] on the matter that is *effective*;[79] that the procedure is not *less favourable* than those governing similar situations where there has been a breach of domestic legislation; and that the particular system does not *render it impossible* in practice, or excessively difficult, for the parties concerned to execute rights conferred by EC law. When one applies this perspective on the green area, it becomes difficult to reach a conclusion other than that actions and omissions by operators and public authorities dealing with EC law having direct effect must be possible to challenge before a national court by the public concerned, including environmental NGOs. This standpoint was firmly taken by Advocate General Sharpston in the *DLV* case (C-263/08, see part 4.6 below), which concerned the possibility open to a small NGO to appeal a permit to which the EIA Directive was applicable. She argued that, even if there had not been a specific provision such as Article 9 of the Aarhus Convention or the similar one in the EIA Directive, it is incompatible with EC law to deny the NGO access to justice in the case:[80]

> The case-law of the Court contains numerous statements to the effect that Member States cannot lay down procedural rules which render impossible

[76] Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 32.

[77] Referring to a decision by the Vestre Landsret about Danmarks Sportfiskerforbund, U.2001.1594V.

[78] C-87/90 *Verholen,* p. 27.

[79] C-413/99 *Baumbast*.

[80] Sharpstone in the *DLV* case (62008C0263), para 80. In the paragraph, she also referred to the jurisprudence of ECJ concerning the principle of effectiveness, C-430/93 and C-431/93 *Van Schjindel and van Geen*, C-129/00 *Commission v. Italy,* C-432/05 *Unibet* and C-222-225/05 *van der Geerd.*

> the exercise of the rights conferred by Community law. Directive 85/337, which introduces a system of environmental assessment and confers rights, would be stripped of its effectiveness if the domestic procedural system failed to ensure access to the courts. The present case is clear proof that, given that access to justice is made impossible for virtually all environmental organisations, such a measure would fall foul of the Community law principle of effectiveness.

Obviously, others may reach the conclusion that it is up to the Member State in question to decide access to justice in such cases. However, as that position implies that important decisions on EC law in a Member State could never reach the ECJ, I find it hard to see how that would comply with EC law. Furthermore, that position is in clear conflict with the fact that the Union itself has signed and ratified the Aarhus Convention. Thus, the point of departure in the following is that decisions concerning Natura 2000 must be challengeable in court in accordance with Article 9.2–9.4 in the Aarhus Convention. As stated earlier, the key issue here is the possibilities open to NGOs to represent the public interest, and their access to justice in relation to the demands of the two EC directives.

Having said all this, the dominating question in the following is whether or not Sweden is fulfilling its obligations under EC law on Natura 2000. It is my considered view that the present Swedish system has four systemic problems with regard to compliance with international obligations in this area.

4.3 Natura 2000 decisions

The structure of the requirements in Article 6.3 in the Habitats Directive – that is, screening, assessing and deciding – together with clear statements from the ECJ on the matter, means that the authority's position on the effects of projects and plans in reference to a Natura 2000 site must be given in a formal authorisation, that is, in a permit decision. Before the authority can issue such a permit, there has to be an EIA on the biological effects. According to the basic principles of EC law, Member States cannot avoid this demand by labelling the assessment as something else, because EIA is a self-contained legal concept. The Natura 2000 protection of Sweden is implemented by a specific permit regime in the Environmental Code. The possibility remains open to environmental NGOs to challenge, by legal means, any such permit decision if it repre-

sents a breach in the law.[81] So far, this order complies with Article 6.3 in the Habitats Directive.

Difficulties arise when the relevant authorities make no decisions. Such omissions can be in contravention of the duty, in accordance with Article 6.2, to initiate the updating of conditions in a Natura 2000 permit. An omission can also concern enforcement or supervision. This can be illustrated by the decision-making of the Forest Agency. According to the Forestry Act, persons engaged in a clear-cutting project over a certain size must notify the authority. Such a project could typically entail significant effects on a Natura 2000 site. When the authority receives the notification, it decides in a so-called "advice" as to whether a permit is required under Natura 2000 provisions. In accordance with the Environmental Code, such a permit application is made to another authority, the County Board.[82] Sometimes the Forest Agency will even insert conditions in its decision to ensure that the particular project will not be subject to an obligation to apply for a permit. Even though these advice documents are administrative orders in accordance with the Code, none can be challenged by environmental NGOs. In fact, the Swedish administrative system concerning Natura 2000 is full of such predicaments, where decisions are made that can never be challenged by "outsiders". It goes without saying that such a state of affairs is problematic if Article 6.3 of the Habitats Directive is to be given direct effect, because NGOs must retain the possibility of challenging omissions by environmental authorities.

4.4 Legislation outside the Environmental Code

NGO access to justice is not provided by important environmental legislation outside the Code, such as the Forestry Act and the Planning and Building Act. There have been a number of cases in the Supreme Administrative Court illustrating that building development often con-

[81] More precisely, the Swedish environmental procedure allows a complainant to invoke all questions, as the procedure is reformatory, meaning that the trial is full and the court decides on the merits of the case.

[82] Actually, the Forest Agency cannot decide on this matter, as it is the responsibility for the landowner – under criminal liability – to decide whether or not there is a duty to apply for a permit. Nevertheless, the system is waterproof for the landowner, as no attorney will prosecute after a "to go" decision from the Forest Agency, as negligence is difficult to establish in such situations.

cerns vital Natura 2000 interests.[83] Quite often, the municipalities – which are responsible for planning and building – are not too concerned with the effects on biological diversity resulting from such projects. The absence of any opportunity to legally challenge decisions of this sort must also be considered to be a major deficit in the Natura 2000 system in Sweden.

Another important piece of legislation residing outside the Environmental Code is the legislation on hunting. Although vital parts of the Habitats Directive are implemented by this legislation, decisions in accordance with the Hunting Act cannot be challenged by NGOs. The devastating effects of this circumstance have been illustrated by recent legislative reforms to increase the hunting of wolves and lynx in Sweden.[84] After having negotiated with the Commission, the Government introduced an interpretation of its own of the Directive's possibilities to derogate from the strict protection of these species. According to the new regulation, the County Boards will have the opportunity of deciding on "protective hunting" on a regional basis. The support for this view is said to be Article 16.1.e of the Habitats Directive. To say the least, it is unclear how the Government could reach this conclusion. Neither the wolf nor the lynx have favourable conservation status in Sweden. To authorise the hunting of these species, without first establishing that it would in fact prevent serious damage to crops or livestock etc., is clearly in breach of the Directive, as shown in the *Finnish wolf* case.[85] The Government has defended its position by claiming that Sweden has strong traditions of defending livestock from wolf attacks and that the ECJ accepted regional decisions in the above-mentioned case. What it failed to state was that NGOs in Finland have the authority to appeal regional decisions right up to the national level, while this is not allowed in Sweden. What we see here is a controversial example of "jurisprudence through the Commission". These cases will never reach the ECJ, since the Commission – according to the Swedish Government – has promised not to bring action and the decisions cannot be brought to court by NGOs or any other entity representing the public interest.

[83] RÅ 2005 ref. 44 and RÅ 2006 ref. 88.
[84] Prop. 2008/09:210 En ny rovdjursförvaltning.
[85] C-342/05 *Finnish wolf* case.

4.5 Governmental decisions

Another related issue concerns governmental decisions on Natura 2000. Such decisions deal mostly with larger projects or plans. As mentioned above, governmental decisions can be challenged by means of judicial review by NGOs within the provisions of Act 2006:304 if the decision in question is "such as to which Article 9.2 of the Aarhus Convention is applicable". Decisions by the Government are crucial for these projects because they bind authorities and courts in subsequent proceedings. This order can be problematic, both in relation to the European Convention of Human Rights and from a general EC law perspective, because in certain situations it denies stakeholders the opportunity for a fair trial on matters concerning them.[86] That issue lies outside the scope of this article and accordingly will not be pursued further. However, I raise the same objections to these decisions as I discussed in relation to the advices documents from the Forest Agency. Government omissions, that is, a finding that a project does not require a Natura 2000 permit, cannot be legally challenged. However, in relation to governmental decisions this might constitute less of a problem, because the provision on standing in Act 2006:304 opens the way for the Supreme Administrative Court to define the scope and limitation in accordance with Article 9.2. But if the court does not apply a systematic viewpoint on this issue, such situations become fraught with difficulty.[87] Unlike most other legal systems having recourse to judicial review, this possibility is not open to authorities in

[86] This is illustrated clearly in the *Botnia* case (RÅ 2004 ref. 108 and RÅ 2008 ref. 89), where the stakeholders have initiated legal proceedings in ECHR. In *Borelli* case (C-97/91 para 14), the ECJ stated that the "requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.".

[87] Clearly, the Supreme Administrative Court does not always apply a systematic perspective. This was illustrated in the *Botnia* case, which dealt with Article 6.4 of the Habitats Directive. On appealing the Government's second decision, the court found that the derogation from the strict protection of the site was already decided and that that decision could not be challenged, despite the fact that the NGOs were not permitted to appeal the first decision. Thus, the Government's derogation decision was never reviewed in court. One member of SAC did not agree, and she wanted to quash the decision on the grounds that it breached the requirements that the ECJ set up in the *Castro Verde* case (C-239/04).

Sweden.[88] So if the Supreme Administrative Court finds that NGOs cannot take action, then nobody can – unless there is a very persistent neighbour in the vicinity. Unfortunately for Natura 2000 interests, this is seldom the case regarding large projects concerning high degrees of biological diversity – for example, in mountain or sea habitats.

4.6 Criteria for NGO standing

Finally, and perhaps obviously, decisions concerning Natura 2000 can only be challenged by a small number of large-scale organisations. According to the Environmental Code, only certain kinds of non-profit associations with 2000 members can appeal or take action for judicial review. The Swedish Government has argued stubbornly that both Article 2.5 and 9.3 of the Aarhus Convention leave room for national criteria in deciding which organisations should be permitted to take legal action. However, from an Aarhus perspective it is made clear that such criteria must be arrived at with a degree of consideration for the objectives of the Convention, and should not mean that all organisations, or almost all of them, are excluded from access to justice.[89] On numeric limitation, it is perhaps worth mentioning that Sweden is the only country in Europe having such a criterion.[90] It is also interesting to note that many European countries, instead of pointing out the large scale and nationwide attendance among the NGOs, do quite the opposite. For them, local support and the "ad hoc" nature of the small organisations are key factors in allow-

[88] In the case of the wind park in Sjisjka (Governments decision 2007-12-19, dnr. M2007/1617/F/M), the County Board, the Environmental Agency and the Legal, Financial and Administrative Services Agency all opposed the project because of its effects on a nearby Natura 2000 site. However, none of these authorities was able to apply for judicial review.

[89] Decision II/2 (on Promoting Effective Access to Justice, ECE/MPP.PP/2005/6) on the second meeting of the parties to the Aarhus Convention in Almaty 2005. Advocate General Sharpston argues in the *DLV* case that the Member States do not enjoy any additional scope for manoeuvre when transposing the provisions of the EIA Directive in order to make it more difficult for NGOs to have access to administrative and judicial procedures. National criteria can only be employed as requirements for the existence of such bodies under national law (registration, constitution or recognition of associations) or in relation to the organisations' activities and how these are linked to the legitimate protection of environmental interests (62008C0263, para 72–73).

[90] See the above-mentioned study (footnote 61) initiated by the Commission on the implementation of Article 9.3 in the Member States.

ing the organisations to have a say in decision-making and in access to justice.[91] In our country, strict conditions have created a situation where only one or two NGOs have the authority to institute legal proceedings, while renowned organisations such as Greenpeace and the WWF remain excluded.[92] Accordingly, it came as no surprise when last summer the Supreme Court asked the ECJ for a preliminary ruling on the Aarhus provisions in the EIA Directive in the *DLV* case (C-263/08). The ECJ recently delivered its opinion, finding that the Directive precluded such a strict numeric criterion, as it deprived local associations of any judicial remedy.[93] This judgment means, first, that the criterion is no longer valid since the provision in the Directive without doubt has direct effect, and, second, that the legislature has to intervene. It is expected that the coming reforms will deal with both the numeric criterion and restrictions on what kinds of association will in future have access to justice.

4.7 The role of the Swedish courts

Finally, what is surprising in this context is the negative role played by the Swedish courts. One would have thought that such a closed system would have precipitated in judges the sense of "making right what ought to be right". In other countries, such as the UK, the courts have been at the forefront in facilitating access to justice for environmental NGOs.[94] No such perspective has been present in the Supreme Court[95] or the Supreme Administrative Court in Sweden. Not even the Environmental Court of Appeal, which in other issues has taken a distinctly environ-

[91] This is the situation in the other Nordic countries. In Finland, nationwide NGOs are allowed to appeal only on large-scale operations – for example, larger industries with discharges to the air that affect the whole country (see Kuusieniemi, K in *Access to justice in environmental matters in the EU*. (Ed. Ebbesson, Kluewer 2002), p. 177.

[92] Greenpeace has insufficient members (the organisation differs between "core members" and supporters) and the WWF is a foundation, which is an organisational form not covered by the provision.

[93] The case concerned a local NGO – Djurgården-Lilla Värtans miljöskyddsförening – having about 300 members.

[94] See Castle, P & Day, M & Hatton, C & Stokes, P: Environmental Justice. Report by The Environmental Justice Project. Environmental Law Foundation/Leigh Day & Co Solicitors/WWF-UK, 2004.

[95] The Supreme Court found in a decision that the word "permit" in Ch 16 sec. 13 of the Environmental Code did not comprise conditions in a permit (NJA 2004 p. 885).

mentally friendly position, has played a progressive role on this issue.[96] The only exception has been the Council of Legislation, dealing with legislative efforts to implement the Aarhus Convention.[97]

The Swedish position differs greatly from that in Finland, our neighbouring country with which we share administrative and legal traditions. The Finnish Supreme Administrative Court (HFD) has regarded itself as the ultimate defender of the primacy of EC law on green issues. With reference to the Finnish Constitution, where the protection of the environment is emphasised, and with reference to international development in the area (the Aarhus Convention), HFD has in two landmark cases expanded the right of NGOs to appeal in situations where no such right previously existed.[98] The most recent case dealt with a decision on hunting the wolf, a species protected by the Habitats Directive. Two regional environmental NGOs were granted leave to appeal, although the hunting legislation left no room for NGO access to justice. An important reason for the position of HFD was that someone has to be able to challenge decisions concerning the implementation of EC law.

5 Concluding remarks

5.1 Sweden goes West?

According to the administrative traditions in our country, neither individuals nor environmental NGOs are regarded as being affected by decisions on green issues and they cannot therefore appeal, because they have no standing. Under the influence of modern environmental law theory and the ratification of the Aarhus Convention, the legislature has to some extent adjusted to the more "Western" perspective, also confirming that environmental NGOs have a part to play in challenging decisions in certain areas. However, it might be worth drawing attention to the fact that in all of our neighbouring Nordic countries NGOs enjoy a much

[96] In fact, the ECoA has confirmed its very strict interpretation on NGOs standing in a couple of decisions over the last year, MÖD 2008-10-03 in cases M 7157-08 & M 7158-08, MÖD 2009:6 and MÖD 2009:11.

[97] The Council consists of members of the Supreme Court and the Supreme Administrative Court, appointed for a fixed period of time. It might be worth mentioning that one of three members of the Council who dealt with the Aarhus issues from the beginning was also chairman of the Swedish Tourist Association.

[98] HFD 2004:76 and HFD 2007:74.

broader access to justice, including cases concerning green issues. In Sweden, however, resistance from industry and landowning organisations has been unremitting and downright obstinate.[99]

One therefore cannot expect the legislature in our country to expand voluntarily the right of NGOs to challenge environmental decision-making. To my understanding, this must be achieved by pressure from the international community, not least the EU. However, the picture of access to justice in the Union is inconsistent. On the one hand, the official position is pro-environmental democracy and – as described above – a number of legislative acts have been introduced to implement the Convention, both at Community level and by Member States. On the other hand, there is hesitation among European countries to further these issues, especially when it comes to the third pillar.[100] At the EU level the Council – that is, the Governments of the Member States – has for many years blocked the proposal for a directive on access to justice. My understanding is that there are two explanations for this. First, leading countries such as Germany and UK are seen to be defending their own procedural autonomy and their understanding of the third pillar. In addition, the strong winds of "better regulations" have been blowing across Europe for some years. According to this philosophy, the procedures for environmental decision-making must become "simpler", which among other things brings about discussions on how to make it harder for the public concerned to protest and make appeals. Finally, one must not forget that the institutions of the Union are defending a long tradition of secrecy and non-transparency. Or as Krämer characterises the position within the bureaucracy of Brussels:[101]

[99] During the implementation of the ELD – which was extremely complicated to fit into the Environmental Code and which concerned vital questions for industry – a great deal of the industry's attention was concentrated on opposing increased possibilities for NGOs to have standing.

[100] In a sharply formulated letter 2008-04-08 to the Ministers of the Environment, shortly before the Riga meeting in 2008, John Hontelez, chairman of the European Environmental Bureau (an organisation for interaction of the European environmental NGOs), wrote that in some Member States, the Convention is considered to be "two pillars and a stick" (EEB 2008-04-08; Call for constructive decisions at the Third Meeting of Parties of the Aarhus Convention).

[101] Krämer, L: *EC Environmental Law*. Thomson (Sweet & Maxwell), 6th ed. 2007, p. 54.

> Community institutions, and in particular the Commission, start from the premise that the protection of the environment is the task of the public authorities – as if the (Community) administration were the owner of the environment: since the (Community) administration knows what is desirable to preserve, protect or improve the quality of the environment, an individual is, under this concept, rather perceived as a nuisance.

However, one must not become too discouraged. The urgent need to implement EC laws, the ECJ's strong position that Member States are required to offer legal protection where rights and obligations under environmental directives are breached,[102] in addition to the demands of the Aarhus Conventions, are all strong drivers for furthering environmental democracy in Europe. Furthermore, there is growing concern among the institutions of the Union that the demands of EC law must not only be implemented in the requested form, but also actually must be *enforced* in the 27 Member States. Given this, it cannot be too adventurous to guess that the ECJ in a near future confirms – at least step by step – that the public interest concerning green issues is to be represented by environmental NGOs. It is to be hoped that this article has made some modest contribution to an understanding of the urgent need for such a position to be realised.

[102] It is, however, noteworthy that the ECJ seems to apply a far less strict standard on acts and omissions of the Union itself. In the cases *Greenpeace* (C-321/95 P), *Paraquat* (T-94/04), *Região autónoma dos Açores* (T-37/04) and, most recent, WWF-UK (C-355/08 P), the court has been applying an extremely traditional perspective on the right of entities outside the EU institutions (NGOs, regions) to have a say in environmental decision-making. Comparing these cases with those of Member States' obligations, Jans & Vedder mean that in fact the ECJ is applying a double standard and that "the legal protection against European decisions having significant environmental effect is seriously flawed" (Jans & Vedder p. 214).