

## **Access to Justice in Environmental Matters**

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Final Report

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# 1 Introduction

## 1.1 Background to the study

Public participation and access to justice in environmental matters have been on the agenda of the European Community for a number of years now. The EC signed the UN-ECE Aarhus Convention in 1998, but has yet to ratify it. The Convention obliges the Contracting Parties to implement information, participation and litigation rights for individuals and environmental associations. The ratification and implementation process is currently underway both by the EU and by the EU member states. To this end, the so-called first pillar of the Aarhus Convention was implemented by the Directive on public access to environmental information of 28 January 2003.<sup>1</sup> The Directive on public participation in certain environmental decision-making processes, which has recently come into force, will put into effect the second pillar.<sup>2</sup> As regards the issue of access to the courts, the European Commission has published a draft Working Document on Access to Justice in Environmental Matters and which is now under discussion.<sup>3</sup>

Against such a background, the Commission ordered a study to assess recent developments and the current situation concerning access to justice in environmental matters in selected member states. These member states are Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal and the UK.<sup>4</sup> The member states examined encompass a wide range of different legal traditions and experience regarding access to justice by environmental NGOs and environmental public interest citizen representation. The study thus focuses exclusively on cases brought by environmental associations, but including environmental public interest claims by individuals.

The main objectives of this study were to identify any general conclusions to be drawn as to the relevance and the consequences of access to justice for environmental NGOs as a general trend in these EU member states and to present appropriate recommendations in relation thereto to the European Commission based on the findings of the study.

The study is based on country reports providing an overview on the legal situation, as well as on empirical data such as the number and outcome of administrative and other judicial environmental law proceedings taken by environmental NGOs and citizen initiatives. In addition the study includes, for each member state, a Case Study chosen specifically to reflect the general findings of the national study in a concrete legal case, which Case Study addresses the ecological, economic and democratic impacts of that law-suit.

The study was undertaken by the Environmental Law Research Centre (*Centre d'études du droit de l'environnement* - CEDRE) an Institute associated with St. Louis University (Facultés Universitaires Saint Louis), Brussels and the Öko-Institut e.V., Germany. The study was directed by Prof. Dr. N. de Sadeleer (CEDRE, St-Louis University) and Prof. Dr. G. Roller

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<sup>1</sup> 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 OJ L 41/26, 14.2.2003.

<sup>2</sup> 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, OJ L 156/17, 25.6.2003.

<sup>3</sup> Second Working Document, Access to Justice in Environmental Matters, 22 July 2002, <http://www.europ.eu.int/comm/environment/aarhus/index.htm> (visited 13 July 2003).

<sup>4</sup> The UK report is confined to the position in England and Wales.

(Öko-Institut/University for Applied Sciences, Bingen). The Final Report was written in cooperation with the Öko-Institut (Miriam Dross, LL.M., who was also responsible for the German report and case study). A main contribution was made by subcontractors, who produced the country reports and case studies. The sub-contractors were Sandrine Belier, Université Robert Schumann et Alsace-Nature (France), Isabel Carinhas de Andrade and Gonçalo Cavalheiro from Euronatura (Portugal), Ulf Kjellerup, COWI AS (Denmark), Stefano Nespore, Angelo Maestroni and Patrisia Serena, lawyers (Italy), Maurice Sheridan, Matrix Chambers (United Kingdom) and Jonathan Verschuuren from Tilburg University (Netherlands).

## **1.2 Methodology**

One focus of this study was to obtain empirical data on the number of cases brought to court by environmental associations. Generally, these data were not easy to obtain in any of the countries included in the study. The main reasons for this were the lack of central database systems that covered the time period analysed in all member states, or the fact that the relevant court decisions are not identified specifically on point in existing data bases. Furthermore, while court decision data bases have become more widespread, it appears that they are likely to contain only the decisions considered by their compilers as the most representative or most important decisions.

The directors of the project therefore proposed the use of standardised questionnaires in the countries included in the study. Insofar as it was considered useful by the researchers in the selected member states, use was made of the questionnaires. However, the outcome in this regard was mixed. In some countries (e.g. France and Portugal) the associations contacted did not respond in all cases. This was found to be due to time and money restraints on the part of the NGOs in question. The same can be said with regard to courts that were asked to complete questionnaires. The actual use of the questionnaire thus proved to be limited. This fact, however, did not profoundly impede the data collection since various other methods for assembling the data were employed. Some researchers set aside the questionnaires from the start because they judged their direct access to NGOs or other sources to be more useful.

Most importantly, the researchers inquired directly with key players. Contacts with NGOs were used to inquire and gain access to their archives, but which proved to be very efficient only where it is a small number of NGOs that bring the majority of the cases in issue (e.g. Germany). In addition, personal interviews were conducted with the judiciary (e.g. Netherlands), as well as with lawyers and academics in the field (e.g. Portugal).

Annual court reports also proved to be an important source of information. These were used both in the traditional hard copy form (e.g. the annual reports of the Administrative Law Division of the Council of State in the Netherlands) as well as in the form of online databases (e.g. Portugal). State-sponsored university data bases have also been used.

Law-suits in the environmental field taken by associations tend to generate a relatively large degree of interest in the legal community of each member state. Many of the decisions discussed were thus found to have been published in law reviews and journals, which were themselves used in many instances as an additional source of information. The same can be said of other publications such as legal commentaries. The fact that within one of the legal

teams involved in conducting the study one member actually heads up an environmental law journal facilitated data collection in that member state.<sup>5</sup>

The numbers of cases reported in most country reports are considered to be very accurate. However, some country reports stress the fact that not every single relevant action brought might have been recorded, due to the difficulties explained. Nevertheless, through the various methods used, a representative picture of the numbers and category of cases was collected and reliable conclusions on the situation in the different countries were able to be drawn. Furthermore, for the purpose of the analysis to be undertaken through this study the most important achievement lies in representing overall trends that are able to be compared as between member states.

## 2 Main empirical findings on access to justice

As has been pointed out, some of the country reports do not contain absolute numbers in the sense that not every case brought by an environmental association or citizen grouping has necessarily been recorded.<sup>6</sup> While this result was to be expected, even the approximate numbers indicated in the country reports lead to very interesting findings when compared against one another.

### 2.1 Overall number of cases

	<b>Belgium</b>	<b>France</b>	<b>Netherlands<sup>7</sup></b>	<b>Portugal<sup>8</sup></b>	<b>Italy</b>	<b>Germany</b>	<b>UK</b>	<b>Denmark<sup>9</sup></b>
<b>1996-2001</b>	<b>146</b>	<b>1197</b>	<b>4000</b>	<b>57</b>	<b>117</b>	<b>115</b>	<b>102</b>	<b>4</b>

Table 1 Estimated absolute number of court cases brought by environmental associations

Most strikingly, the number of actual court cases brought by NGOs in the various member states differs widely. From a rough calculation of the relationship between cases brought by NGOs compared to cases brought by individuals, the Netherlands heads the survey with an

<sup>5</sup> The Belgian law journal *Aménagement-Environnement* is partly directed by CEDRE.

<sup>6</sup> An especially difficult situation was encountered in the Netherlands, where the number of cases brought by NGOs is comparatively high, due i.e. to the high number of local NGOs, but which are very difficult to research because cases are not registered according to this criterion. The latter situation has been identified in other member states, too. Furthermore, it is obviously more difficult to register the 4,000 cases as estimated in the Netherlands than the around 120 as estimated in Germany.

<sup>7</sup> 1997-2001, number based on rough estimations.

<sup>8</sup> The overall number of cases on environmental matters initiated by both NGOs and citizens in Portugal between 1995 and 2001 was 96. In addition around 200 requests for access to administrative documents were estimated.

<sup>9</sup> The absolute number of court cases in Denmark is extremely low, but many appeals are brought to the quasi-judicial appeal boards. For the period between 1997 and 2001 655 appeals were brought by the largest Danish NGO, the *Naturfredningsforening*, to the Nature Appeal Board.

estimated several thousand (around 4000) proceedings for the time period between 1997 and 2001. This means that the absolute number for 1996 to 2001 can be expected to be even higher.

The lowest numbers mentioned in the country reports relate to Portugal (62 court cases brought by environmental associations during the period 1995 to 2001, 96 respectively taking into account court proceedings brought by citizens);<sup>10</sup> to the UK (with 102 cases)<sup>11</sup>; and Germany (118 for 1996 to 2001). The absolute numbers for Italy also appear comparatively low (127 for 1995 to 2001, respectively 117 for 1996 to 2001); and likewise for Belgium (180 for 1995 to 2001, respectively 146 for 1996 to 2001). France seems to lie somewhere in between these “extremes” with a number of 1,197 court proceedings in the period between 1996 and 2001. While the absolute numbers for France might seem substantial, they still do not represent a proportion of the all proceedings in France that seems very large.<sup>12</sup>

A special situation exists in Denmark. The number of court cases for the time period is extremely low, with 4 well-known cases and an estimated additional 10-12 between 1990-2002 by the Anglers’ Association. These low numbers are due to the fact that Denmark has an administrative appeal system with three appeal boards competent in environmental matters. Of these, the Nature Appeal Board and the Environmental Appeal Board play the most important role. These quasi-judicial bodies have decided a large amount of cases over the time-period analysed.<sup>13</sup> The most important Danish NGO (Naturfredningsforening) has brought 655 complaints between 1997 and 2001 before the Nature Appeal Board. The Environmental Appeal Board was engaged in around 470 cases a year brought by the Naturfredningsforening alone. The reason why so few cases seem to come before the courts in Denmark can thus be seen as due to the relatively effective quasi-judicial system. This system clearly led to the courts themselves being relieved of environmental cases. More importantly, the NGOs seem to have little interest in actually bringing cases to court, and they try to solve environmental conflicts at the political level, where a more consensus-oriented procedure can take place.

Furthermore, the actual number of environmental association law-suits is even more revealing when put in perspective against the overall number of court proceedings in a given country. For example, in Germany the number of actions brought by environmental NGOs before the

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<sup>10</sup> The Portuguese number, however, has to be put into perspective by the report’s statement that many proceedings concerning access to environmental information are initiated by the NGOs, not all of which are able to be compiled.

<sup>11</sup> The UK report on “court cases” does not include any of the matters dealt with by way of “administrative appeal” and handled by the Planning Inspectorate (some 14,000 land-use cases a year), nor “environmental appeals” so handled (some 280 [a figure somewhat distorted by the unusually large number of recent water discharge consent appeals), nor the 14,700 or so cases of statutory nuisance notices issued each year. These figures could clearly swell the overall numbers of environmental cases reported as involving environmental NGOs or citizen groupings.

<sup>12</sup> In France the percentages for environmental association law-suits range between 2% before the criminal courts, to 8% as regards urban planning issues, and less than 3% as regards environmental issues before the administrative courts. Both together represent 20% of administrative court proceedings at first instance. It should be pointed out that the French report includes all land-planning cases.

<sup>13</sup> The Danish Nature Appeal Board is estimated to have handled around 8,700 cases between 1995 and 2000.



administrative courts, which are the only venue possible for a public interest action<sup>14</sup> in Germany, represents only 0.0148% of all the cases the administrative courts decided between 1996 and 2001. This result can be seen also in the figures for Belgium. While the Belgian Council of State decided around 30,000 cases between 1996 and 2001, only 101 related to environmental matters brought by NGOs.

But even in countries which provide as a matter of law for a very broad access to the courts in environmental matters, the actual number of cases brought by NGOs is limited.

What is most interesting about the overall numbers collected is the fact that they do not generally – as might be expected - seem to correspond directly with the assessment whether the national legal framework provides for broad or narrow access to justice. For example, it might fairly be concluded that Portugal provides as a matter of law very broad access to the courts by environmental associations, but this does not translate into a heightened number of court proceedings brought by environmental associations (with the exception of proceedings relating to access to information). The different conditions applicable to NGOs bringing legal actions on environmental matters is further analysed in detail below.

In almost all countries addressed in the study, no transboundary actions were identified, i.e. there were practically no court proceedings by environmental NGOs from one member state brought in another member state.

What can be concluded from the overall numbers is the wide empirical disparities between members states with regard to access to justice in environmental matters by environmental NGOs. An important factor for the number of cases is obviously the socio-cultural conditions in the countries. In the example of Denmark, a consensus-oriented society does not give NGOs incentives to sue before the regular courts. France on the other hand, has a rather high number of public interest actions in extremely sensitive areas such as hunting, farming and water pollution, which seems to indicate that no consensus can be found with the competent local, regional or national authorities on these matters. In the case of Portugal, NGOs seem to have little experience with court proceedings on environmental matters.

As a general proposition, it may confidently be said that the introduction of or expansion of the possibilities for environmental associations to bring or participate in such court proceedings will not automatically result in the courts being overloaded, a point so often asserted. No country report indicated that the number of cases brought by NGOs, even where they were considerable, as in the Netherlands, would have this effect. Even though it was announced that the *indirect actio popularis* under Dutch law will be abolished in the Netherlands, this decision seems to be based on the point of view that it is seen as restraining socio-economic development rather than on the fact that the courts are overloaded.

## **2.2 Trends observed**

One would expect the number of actions brought by NGOs to the courts in environmental matters to be growing uniformly based on the fact that the possibilities to bring such as actions have been expanded in many countries and given also the growth in environmental participation activities within the Community. Astonishingly, however, the picture is rather

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<sup>14</sup> For the purpose of this study the term “public interest action” is used to describe an action brought by an environmental association in the defence of an environmental interest of public concern as opposed to an action whereby the association asserts its own personal, such as property, rights.

mixed for the countries analysed. In some countries the number of public interest actions is clearly increasing, e.g. in Portugal and in Italy. In Portugal there is also a rising number of opinions from the Commission on Access to Administrative Documents as well as judicial decisions with regard to access to information or administrative documents. In Italy a twenty-fold increase can be observed if the data for 1994 are compared to those for 2002. In the UK as well, the number of cases has been growing somewhat. However, the member states with growing numbers are those that have tended to have very few NGO actions to start with. In some countries, like Belgium, the number of cases fluctuates, with no clear tendency to an increase or decrease.

However, in these terms, a negative development was observed in the Netherlands. Here a sharp decline both in overall environmental law cases as in cases brought by NGOs can be observed. This is partly due to changes in the law, which altered the procedure for the grant of environmental permits for installations, with the result that these cannot in most cases be challenged any more.<sup>15</sup> The decline in numbers is also attributed to a change in the political climate regarding environmental policy. Furthermore, this number can be expected to decline even further if the planned abolition of the *actio popularis* goes ahead, as envisaged by the Dutch government.

Overall, however, it must be pointed out that the number of environmental public interest actions has been growing considerably compared to the situation in the 1980's. Therefore, this trend should also be seen in a long term perspective.<sup>16</sup>

### 2.3 Outcome of the cases

%	Belgium <sup>17</sup>	France	Netherlands <sup>18</sup>	Portugal	Italy	Germany	UK <sup>19</sup>	Denmark
<b>Won by the NGOs</b>	<b>39.4</b>	<b>56.5</b>	<b>50</b>	<b>46</b>	<b>34</b>	<b>8.2</b>	<b>30</b>	<b>Not representative</b>
<b>Partially Won</b>	<b>9.4</b>				<b>10.3</b>	<b>18.2</b>	<b>9</b>	
<b>Lost</b>	<b>45.9</b>	<b>43.5</b>	<b>50</b>	<b>54</b>	<b>55.4</b>	<b>73.6</b>	<b>61</b>	

**Table 2**

<sup>15</sup> A further decline in 2002 and 2003 was due to the special political situation the Dutch NGOs were in after the assassination of the leader of the right-wing party.

<sup>16</sup> See Martin Führ/Gerhard Roller, *Participation and Litigation Rights of Environmental Associations in Europe*, Frankfurt am Main, 1991.

<sup>17</sup> The total does not reach 100%, because the Belgian statistic also included 5.3% of "partie intervenante".

<sup>18</sup> Estimated – according to the president of the Dutch environmental law chamber, "only" 30-40% of the cases are won by the NGOs.

<sup>19</sup> These figures include 3 cases lost before the lower courts, but won eventually, as well as 3 cases where there was success on the legal point, but a lost overall as to end result, and 2 cases of success before the lower courts but a loss eventually before the higher courts.

As regards the outcome of the cases, it is again difficult to give exact numbers based on the fact that not all data were available in the member states. This notwithstanding, the country reports reveal an interesting picture. While sometimes the reports distinguish between won and partially won cases the numbers give an indication of the high success rate of actions brought by environmental associations. These rates are around half of the overall decisions in France (56.5%), the Netherlands (around 40-50%) and Portugal (46%)<sup>20</sup>. In France proceedings before the criminal courts are even more successful with a success rate of 83.5%, while as regards decisions of administrative courts the NGOs win 50.5%.

In the UK it might be said that the “success” rate of 39% of won or partially won cases is relatively high. Likewise, the success rates in Belgium (39.4%) and Italy (34%) are still very high.

Since only two court cases were decided in Denmark, one of which was lost and one won, the success rate does not have a statistical value. However, the success rates before the appeal boards seem to belong to this middle category. These, nonetheless, still have to be differentiated. The cases initiated by the Naturfredningsforening before the Nature Appeal Board had a success rate of about 50% up to 1999. This number declined to around 24% in 2001. On the other hand, appeals to the Environmental Protection Agency became more successful over the same time period to around 60% for the Naturfredningsforening.

There seems to be only one exception to the rule that environmental associations have a high success rate when bringing actions on environmental matters, which is Germany. Here only 8.2% of cases were won and 18.2 partially won, a success rate that is only slightly higher than the success rate of the overall number of administrative decisions.<sup>21</sup> The success rate of German public interest actions seems thus to have dwindled considerably compared to the findings of a 1991 study.<sup>22</sup>

There are two possible explanations for the low success rate of public interest actions before German courts in comparison to other European countries. On the one hand German administrative courts are generally very reluctant to nullify administrative acts. On the other, the fact that this success rate has been much higher in the past (at least where road projects were concerned) probably also means that the administration has improved its performance with regard to environmental matters.

There seem to be different explanations for the high success rate for actions by NGOs on environmental matters. One is the often-mentioned enforcement deficit in environmental law, a consequence of which would then be decisions or actions being revised by the courts. If the success rate is seen in connection with the rather low number of proceedings, one can furthermore deduce that the NGOs limit themselves to cases considered to involve serious infringements of environmental law.

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<sup>20</sup> It has to be pointed out that due to the low overall number of cases collected, the Portuguese statistics might be distorted, and are therefore difficult to interpret.

<sup>21</sup> The success rate of the administration in Germany is around 80% in all administrative proceedings before the administrative courts. If the partially won cases are included in the overall success rate, this would result in a 26.4% success rate of NGOs, which accordingly means that the administration wins 73.6% of the cases.

<sup>22</sup> The 1991 study identified a success rate of 50% for environmental association law-suits against road projects in Hesse, a location where this right of action among the first to be introduced by the *Länder* in 1980. See Thomas Ormond, Environmental group actions in West Germany, in: Führ/ Roller, supra note 16, p. 77, 89, 91.

Another interesting aspect is the subject areas in which cases are won. For example, in Portugal almost 90% of the administrative judicial proceedings won relate to access to information issues.

In the Netherlands there was a high success rate for cases won on formal grounds, compared with only 30% won on substantive grounds.<sup>23</sup> The success rates in these actions might disguise a somewhat ambivalent picture: for example, if a competent authority corrects its formal mistakes in a new decision and the project in question goes ahead, the overall benefit for the environment might be rather limited. On the other hand, as pointed out in the conclusions of the Dutch report, such procedural success can lead to a more careful application of participatory rights and environmental law in general and thereby enhance the quality of the application of the law. The exact opposite situation can be found in Portugal, where 70.5 % of the administrative proceedings were lost on formal grounds.

In almost all countries actions brought before the courts by environmental associations are more successful than the average law-suit. This might be explained by the fact that due to different reasons – cost risk, lack of resources – NGOs are rather reluctant to initiate legal proceedings. Alternative actions like public campaigns, political influence etc. are often considered as a more efficient or less expensive instrument. Thus, in particular, the “big” cases are chosen to take to court where the chances of success are identified as rather high. The high success rate of actions brought by environmental associations in the public interest also indicates that they fulfil an important function in the enforcement of environmental law and that they are generally brought for legally sound reasons.

#### **2.4 Sectors of environmental law involved**

As regards the sectors of environmental law that the cases identified relate to, there are significant differences between the countries examined. An interesting aspect is the difference in countries that allow access not only to the administrative courts but also to criminal and civil proceedings. The relevant issues seem to differ depending on the venue chosen.

One finding is that nature conservation law plays a central role in law-suits brought by environmental associations in a number of countries. This is the case in Belgium, the Netherlands, France and in Germany. One explanation for this could be that many NGOs have a clear focus on nature conservation, which also is of great interest to their members, and are therefore willing to bring these issues before the courts. However, the differentiation between nature conservation issues on the one hand and infrastructure and urban planning issues on the other hand is not always very clear cut. Often the latter two come into collision with the former.

For example, in Germany NGOs are restricted as a matter of law to raising nature conservation as grounds for bringing an action, and therefore no judgement can be made on the question whether other subject areas would be raised by the NGOs if the law allowed broader rights of action by environmental associations. Within these limitations, the majority of the cases concern the conflict between nature conservation and large infrastructure development projects for which a plan approval decision is required. Another group of cases relates to “dispensations”, whereby sites are removed from nature protection areas (around 18%). Closely connected to the issue of nature conservation are bird protection proceedings.

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<sup>23</sup> See also 4.4, scope of review.

Where these are recorded separately, they feature prominently in criminal procedures, e.g. in Belgium where they comprise some 58% of the law-suits taken by environmental associations before the criminal courts.

A second concentration of cases can be found in an area of activity that might be described as (urban and) spatial planning as well as infrastructure. For example, in France they make up 60% of the administrative court proceedings taken by environmental associations, an estimated 25% of proceedings in the Netherlands, and the majority of cases in Italy. A majority of the Portuguese decisions relates to this subject as well.

About the same overall number of cases relate to installations and permitting. In some countries like France, where criminal proceedings can be instituted by NGOs, these often relate to industrial matters (in the case of France to about 40% of the cases taken by environmental associations). Closely related are cases on EIAs, which make up the majority of such cases in the UK.

Also in many countries, water issues play an important role in the proceedings. This can be observed in the Netherlands (an estimated 45% of the proceedings the subject of this study), Belgium and, but to a lesser extent, in France.

Access to information is not a very widespread subject of court actions, except in Portugal, where it appears that a majority of cases were brought to gain access to administrative documents. In Belgium NGOs are entitled to bring a case before the Walloon Access to Information Commission, which acts as an independent board, and did so in around 30 cases during the time period covered by the study.

There were few cases on air, soil and/or noise issues. It is assumed that these issues are – at least with regard to air and noise – those where legal actions by the individuals affected could be expected and/or by public authorities responsible for controlling such types of interference. The figures from the UK seem to provide a clear case in point.

Finally, very few cases concerning nuclear energy and GMOs were identified by the researchers.

Overall, there do not seem to be clear preferences for NGOs as regards the subject matter of court actions they institute, but rather just points of particular national focus. For example in the UK, the subject areas concerned in the legal actions taken were rather evenly distributed amongst different environmental issues.

One explanation for such different preferences as have been identified might be found in national statutes that might make it easier to bring an action (as in France with regard to water issues) or which effectively limit the actions possible to one subject area (as in Germany with regard to nature conservation issues).

The choice of specific subject areas is also explicable on the basis that a specific issue receives wide public attention in the media of that country. By bringing an action regarding that issue, the NGO can expect public support for the case itself, and raise awareness due to media reports. Also, a “popular” subject matter might help to raise funds to finance the court proceedings where such support is needed. In addition, the choice of subject matter might be directly related to the scope of operation of the association in question. This point has already been mentioned with regard to nature conservation issues in Germany. Another example can be seen from the French report. French fishing associations have a long tradition of bringing court actions and contributing to case law in this area.

Finally, each country seems to have different focal points when it comes to environmental issues. This probably reflects different attitudes and traditions of risk awareness and perception.

**Table 3 Selected subject matters of public interest actions**

Country	Administrative courts						Criminal courts					Civil courts			Other
	Nature	Birds	Industry	Waste	Water	Infrastructure	Nature	Birds	Waste	Industry	Water	Nature	Industry	Water	
Belgium	28%	22%	25%				23%	58%	19%			50%			
Denmark															**
France	8%		14%	7%	5%		19.5%			40%	37.5%	11.8%	29.5%	41%	
Germany	18.3%					53%*									
Italy				3.6	1.5	12									
Netherlands															
Portugal	36%			11%	28%	25%						86%		7%	
UK	24%			41%	15%										

\* In regard to nature conservation law.

\*\* See table infra.

## **2.5 Conclusions on empirical findings**

The empirical data obtained in the study lead to a number of conclusions. The wide disparity of cases in the member states is most striking. It can be attributed to three main categories of reasons.

The first comprises the legal conditions in the member states, and is evaluated further below. Thus it can be seen that the national framework for public interest actions is determined by a set of rules in each member state, which includes access to different courts, locus standi for NGOs etc.

The second could be described as “organisational” and overlaps with the first. Reasons included here cover the extraordinary burden and financial strain for NGOs when instituting legal action in environmental cases as well as the length of proceedings. The latter may have as a consequence that the legal proceedings ultimately address a *fait accompli* before the case is decided.

The third category encompasses societal and cultural differences between the member states that play an important role. This is reflected in the numbers as well as the subject areas involved in the cases. In some countries, there is little experience with public interest actions. In others, a consensus-oriented society prefers to resolve conflicts between public, environmental and economical interests outside the courts. This assessment, however, does not lead to a conclusion that it is not necessary to establish consistent conditions for public interest actions as between the member states. Environmental association might not make equal use of such a possibility to bring legal actions in all sectors of environmental activity, even under unified conditions in the EU. However, providing the possibility for such legal actions can be said to entail a number of benefits, which are further illustrated in the next chapter.

## **3 Benefits of NGO court actions**

Litigation rights of environmental associations, with few exceptions, are placed under various constraints in the EU member states studied. These restrictions, whether legal or factual in nature, seem to reflect a reservation against legal action taken by environmental associations that is widespread among legislators, courts and legal scholars. Many of the arguments raised against providing such litigation rights, such as (the often-supposed) overloading of the courts, can be refuted.<sup>24</sup> To get a more balanced picture, it is interesting to look at the benefits of providing litigation rights for environmental associations.

These benefits can be said to fall into three categories: (1) the contribution to environmental law and its enforcement; (2) democratic aspects, which can be differentiated into benefits in raising public awareness on the one hand, and in public participation on the other hand; and (3) macro-economic effects.

### **3.1 Contribution to environmental law and its enforcement**

#### **3.1.1 National environmental law**

One of the assumptions of this study was that the availability of litigation rights for environmental associations contributes to the effective enforcement of environmental law.

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<sup>24</sup> See *supra* at 2.1.



This view is predicated on the premise that often in conflicts between economic and environmental interests the former tend to prevail. This inherent imbalance of power results from the fact that private (or economic) interests have a stronger position in administrative proceedings, but to which a counter can be provided by conferring litigation rights on representatives of environmental (or public)<sup>25</sup> interests. The mere possibility that a polluter can be sued may already and in itself have a positive effect for the enforcement of environmental law by inducing public authorities and business enterprises to examine more carefully the compatibility of their decisions and activities with environmental law requirements.

The findings of the study support and underline this evaluation of the effectiveness of environmental actions by NGOs in a number of ways.

First, a law-suit obviously has an effect on the subject matter of the action. In many countries public interest actions have an above-average success rate. Since the overall number of cases brought is generally limited, this seems to indicate that NGOs choose carefully the cases they bring to those that they consider indicate clear infringements of environmental or nature conservation law. The ability to bring such cases before the courts therefore corresponds to the possibility of preventing acts that might entail major detriment for the environment. Even if the case is lost by the environmental association, the court might oblige the administration to re-examine its evaluation of the environmental consequences of the activity in issue or to prescribe additional conditions to safeguard environmental interests. Furthermore, it can be observed that some actions that were actually lost before the courts were successful in the sense that the original project at issue was not subsequently carried out, e.g. because the investor realised that there was a strong local resistance to it because of the environmental consequences.

The second and probably more significant effect on the enforcement of environmental law can be seen in the overall influence of the court cases researched on general administrative and even legislative practice.

The Danish Case Study came to the conclusion that “the biggest influence from the case is that authorities in the transport sector have proven to become some of the best performing authorities in the field of environmental investigations and assessments prior to decisions in their sector”. This holds true, even though the legal action taken in the concrete case of the Øresund bridge was lost.

The German Case Study, in which the plaintiff lost, was nevertheless regarded as a success by environmentalists. This was mainly due to the fact that the decision was judged to lead to a change in the administrative practice concerning nature conservation law. In particular, the fact that an interim injunction from the court had initially halted the construction of the motorway in question had the effect of demonstrating that a careful analysis of consequences for the habitats concerned was called for under Community law.

The same result was found in the Portuguese Case Study. According to the Portuguese report, administrative practice changed due to the court ruling described.

As far as administrative practice is concerned it can thus be concluded that administrations are compelled to take account of provisions that would otherwise tend to be regarded as less important, exactly because they might face court proceedings. This kind of indirect enforcement can also be all the more effective because it is often initiated at a local level by groups of citizens who are directly confronted with possible environmental degradation in

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<sup>25</sup> By “public” here is meant the interest that cannot be appropriated to or attributed to any particular person.

their vicinity and who are better equipped to observe possible infringements than the often centralised authorities.

Another finding of the study relates to criminal proceedings. The possibility for NGOs to participate in criminal proceedings, as is the case in, for example, France and in Portugal, is an important instrument for the better enforcement of environmental law. For instance, water and wildlife regulations have been better implemented in France due to the fact that NGOs could seek compensation before criminal courts.

Legal action by environmental associations can have a further important effect, which adds to the enforcement of environmental law. “Landmark cases” in the sense of important legal precedents on environmental law are often the outcome of public interest actions. An example of this can be seen from the German Case Study, which established that the Habitats Directive, even when not yet implemented into national law, had a “pre-influence” which had to be taken into account by the administration. A comparable consequence is described in relation to Portugal, where the courts, going beyond mere interpretation of existing provisions, also made findings with regard to general aspects of environmental law, overall furthering the legal aspects of environmental conservation.

### 3.1.2 Community environmental law

NGO law-suits seem to be of major importance for the implementation and enforcement of Community environmental law. Five out of eight cases studied in the framework of the overall study relate to European Community provisions. While the statistics gathered in the member states by this study do not specify how many NGO law-suits relate to environmental legal issues with a basis in Community law, the Case Studies give a strong indication of the importance of NGO law-suits for the uniform enforcement of European environmental law. In addition, a major part of the national environmental law now is influenced by or represents a direct transposition of EC environmental law. It is therefore justified to state that the effects for the enforcement of environmental law that public interest actions have are just as important on the European level.

The French Case Study points to an additional finding, which is especially relevant from the point of view of the European Community. This action concerned the (deficient) implementation of the EC Habitats Directive. The first court decision described had “without doubt the effect of accelerating implementation of the Habitats Directive on French territory”. As France was about the same time sanctioned for not submitting a list according to Art. 4(1) of the Habitats Directive, such a finding by a national court obviously added pressure for a correct implementation process to be established.

The Dutch Case Study also allows for the same conclusion. The case studied concerned legal proceedings taken by an environmental NGO suing the Netherlands State for not having implemented Directive 91/676/EEC. Besides raising the question whether an NGO can force the legislature to implement a directive, which concerns fundamental issues on the separation of powers, the law-suit drew attention to the incomplete implementation of the Directive, and thus might well have a similar effect as the French decision.

### 3.1.3 Conclusion

In conclusion, although the contribution made by legal proceedings taken by environmental associations to the enforcement of environmental law might be difficult to measure in a quantitative manner, this has been positively observed throughout the countries studied and is generally considered as one of the major positive effects of the provision of litigation rights for environmental associations. The existing enforcement deficit with regard to environmental

law could be tackled more successfully if more extensive litigation rights existed. However, from the point of view of the European legislator this former conclusion also means that enforcement of existing European environmental law might differ between the member states not only due to the different speed of its implementation into national law per se, but also due to the different possibilities themselves for environmental NGOs in different member states to bring legal actions before the courts.

### **3.2 Democratic aspects**

Environmental rights are above all democratic rights. This understanding lies at the core of the Aarhus Convention, which, in addition to access to justice in environmental matters, concerns the right of access to information in environmental matters and of public participation in decision-making. In order to enable citizens to make use of these rights and to further their own consciousness for nature conservation, Article 3 (3) of the Aarhus Convention calls on the Contracting Parties to promote environmental education and environmental awareness among the public.

It can be seen from the country reports that litigation rights of environmental associations contribute towards the democratic endeavours of the Aarhus Convention both with regard to general public awareness building as well as to participation rights.

#### **3.2.1 Public awareness building**

It is self-evident that court proceedings will bring projects, plans and deficits with relevance for the environment, which might otherwise have passed unnoticed, into the limelight. From the country reports, as well as individual Case Studies, it can be seen that legal action by NGOs often attracts public attention. The more important or controversial the subject matter of the case, the more widely publicised it will be. In the example from Germany, the case studied, which concerned the impact of the Habitats Directive, had the effect of making the Directive known to a broader public, thereby contributing to an overall awareness of nature conservation.

The French case was highly publicised because it represented two very controversial decisions that involved the economic interests of vintagers on the one hand and environmental interests on the other hand. It is also an example of a case which resulted in an adverse effect in the sense that it led to a broader overall resistance from one group of stakeholders against the Habitats Directive and failed to reconcile the conflicting interests.

An important point of interest arises also from the Portuguese Case Study. The NGO's proceedings for the protection of swallows' nests was, initially regarded critically by the local population. The NGO therefore combined the court action with a public awareness campaign in the small town concerned. Probably as a result of the publicity around the court decision, which was reported as the first case that an NGO had won against the state, the citizens of a small village in the same region of Portugal alerted an environmental NGO to a similar case.

More generally, environmental associations will often accompany a law-suit with a public awareness campaign, since the latter can also serve to raise funds to cover the costs of the litigation.

Finally, environmental litigation by NGOs may also serve to raise awareness within the association itself. In the German country report mention is made of the fact that mobilisation of the members of the NGO itself might be an objective pursued by taking legal action.

In summary, the possibility for environmental associations to bring actions in the courts will generate public attention. Even if the response of the public in some cases might be to criticise the fact that a law-suit was brought or the outcome of the actual court decision, the fact that the public is thereby informed on environmental issues may be seen already as a benefit of such a legal action.

### 3.2.2 Improving participation

With regard to participatory aspects, a public interest action can be a contributing factor both directly and indirectly.

First, an action is sometimes brought on the grounds of a defect in participation in a decision-making process with environmental consequences. In such cases it was the NGO's or citizen grouping's own participation rights that were neglected by the authorities. This is, for example, the case in the UK, where a considerable number of cases were brought on this basis. Public interest actions thus serve not only to enforce environmental law but also to strengthen the second pillar of the Aarhus Convention.

In some countries it seems that the actions that stand better chances of success are those concerned with infringements of formal, and more specifically procedural, rights (i.e. the participatory rights of citizens or associations), rather than where it is alleged that environmental law has been substantively infringed. This might be due to the fact that the administration considers itself to have a margin of discretion concerning the interpretation of the law and concerning the balancing act to be carried out regarding the environmental and other interests involved. The observance of procedural participation requirements is seen, on the other hand, as a mechanism to ensure that the environmental interests are at least taken into account.

From this fact an indirect contribution to furthering participatory rights can be deduced from (the right to initiate) such legal action. Where administrations might have to face a court procedure if participation rights are ignored, there is a strong motive for respecting participatory rights. In the case of Germany, this has led to the effect that the administration sometimes involves NGOs even regarding procedures in relation to which there are no participation rights prescribed.

### 3.3 *Macro-economic effects*

At a very general level, environmental protection is often seen in opposition to economic development. In this light, law-suits raised in relation to or against economic projects are often seen as a potential obstacle to desirable economic welfare. On the other hand, in recent decades it has become a matter of common sense that protection of the environment and of natural resources represents a fundamental societal need. Polluting activities and huge infrastructure projects can seriously and adversely affect the environment. Environmental damage or harm is increasingly also considered an economic loss to society (notwithstanding that the scientific debate as to measuring environmental impact in monetary terms is still ongoing). It is in this area of "conflict" that the question of restricting or widening access to the courts for environmental NGOs must be addressed.

It is interesting that in some of the countries studied where access to justice for such groups has enjoyed a certain success in recent years in terms of the cases won before the courts the political debate has moved more in favour of restricting access. This may be said to be the case today in the Netherlands, and to a certain degree also in France.

Access to justice for environmental NGOs may well prevent or contribute to reducing damage to the environment and thus also to preventing or reducing economic loss.<sup>26</sup> Although this study was not intended to generate quantitative data in this respect, the large number of cases concerning nature conservation issues show that potential damage to nature was reduced. It is less easy, at present, however, to quantify the economic benefit of this protection (e.g. the benefit of the European Natura 2000 network), whereas direct economic loss can generally be more easily quantified. Thus in the French Case Study, which concerned the Habitats Directive, the economic interest involved (the value of the all vineyards concerned) was about 2 million Euros.

## **4 Conditions for access to justice**

The study highlights the fact that there are great differences in the competences of national courts to review environmental decisions. It is theoretically possible in each member state studied for environmental NGOs to have access to administrative courts for the review of administrative acts relating to the environment, at the very least in certain specifically defined circumstances. In some countries, civil courts do not recognise standing for NGOs; in others, NGOs may bring cases before the civil courts. The situation is even more complex concerning NGO standing in criminal trials. In addition, the conditions for access by NGOs, the necessary prerequisites (registration, court fees), the scope of review permissible, the expected remedies and the related costs diverge considerably. Therefore, access to justice in environmental matters cannot be considered as harmonised in the eight member states. In this respect, this study confirms the results of a recent comparative law study.<sup>27</sup> The problems that different legal traditions, systems and circumstances pose leads to the fact that it is sometimes difficult to compare the quality of access to justice in environmental matters in different member states, as has been pointed out previously.<sup>28</sup>

In what follows, the central aspects regarding the different conditions for access to justice by environmental NGOs are examined further. These relate to the venue for an action (namely the courts before which NGOs can bring proceedings), and the question of standing including registration. Furthermore, the availability of interim relief and the issue of costs in legal proceedings and environmental associations will be touched upon. Finally, even though not exactly a condition for access, the impact of the length of proceedings is analysed.

### **4.1 The competent courts and tribunals**

Due to the different legal systems and traditions in the member states access for NGOs is granted in relation to different courts exercising different jurisdictions. In some member states access is granted not only to administrative courts but also to civil and criminal courts. The main venue for environmental NGOs is the administrative courts, where administrative courts are established as a separate system of courts.

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<sup>26</sup> Cases concerned with preventing adverse environmental effects may actually contribute to economic growth: for example, it is arguable that preventing GMOs being planted may allow for an increase in organic farming free of the risk of being tainted by GMO crops, and thus allow for an increased recovery of the premium chargeable for organic goods.

<sup>27</sup> Jonas Ebbeson (ed.), *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, 2002.

<sup>28</sup> Jonathan Verschuuren et al., *Complaint procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union*, final report, May 2000, IMPEL network, p. 9.

Some member states do not rely on the separation of court branches and consequently have no wholly separate arrangement of courts solely exercising administrative jurisdiction, as it is the case in Denmark and the UK. In such cases, administrative acts can consequently be said to be able to be challenged before the “civil” courts. However, it should be pointed out that there is an Administrative Court in the UK since late 2000. Appeals from it go to the Court of Appeal (Civil Division), and thereafter, or straight, to the House of Lords.

In addition Denmark offers a further, quasi-judicial venue in the form of special judicial bodies that were created in order to decide (among other things) environmental claims. In the United Kingdom, a large number of cases where environmental NGOs may wish to make representations are determined within the administrative system by Inspectors appointed from within the Planning Inspectorate.

#### 4.1.1 Administrative Courts

Administrative courts play an important role in this area of activity in all states, but particularly where a separate administrative court system exists.<sup>29</sup> All countries that have instituted an administrative court system give NGOs access in environmental matters. Furthermore, the overall role of administrative law seems to be increasing in the member states in relation to environmental issues. Nevertheless, there are still major differences as to the criteria for access such as standing and requirements to be met, which are analysed further under Sections 4.2 and 4.3.

An interesting feature exists in France, which can be mentioned here: NGOs can claim damages before the administrative courts for having suffered a moral damage. Thus, in cases where the competent authority did not act (for example, by adopting a regulation) NGOs have successfully claimed compensation. These cases are very rare, but were successful in 80% of actions taken.

#### 4.1.2 Civil Courts

Some countries grant access for NGOs to civil courts (e.g. Portugal, France, Italy, the Netherlands). Two main models should be distinguished here: the first model allows for direct access for NGOs to the civil courts irrespective of whether proceedings are already pending. The second model only allows for intervention in existing proceedings where the objective is to support the claimant (“*se constituer partie civile*”). In other countries access is simply excluded. In Germany, for instance, access to civil courts is excluded unless interference with a personal right of the association is in issue (for example, as landowner).

##### Direct access to the civil courts

Direct access to civil courts is granted in the Netherlands, in Portugal and France, as well as, but in a more limited fashion, in Belgium.

The Dutch Civil Code grants environmental NGOs access to civil courts to request the competent administrative authorities to enforce environmental legislation as well as to allow the NGOs to sue polluters. Therefore, NGOs may ask for a judicial injunction or prohibition against the administration and private parties (see in particular the Dutch Case Study). They can even claim compensation for clean-up and restoration costs. Law-suits before civil courts increased in the Netherlands after the New Lake-decision of the Hoge Raad of 27 June 1986

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<sup>29</sup> Note that the UK only relatively recently established a specific Administrative Law Court (2 October 2000). Between 1995 and 2000, the Crown Office was competent to decide challenges to the exercise of public authority powers.

granting standing to environmental NGOs in relation to civil legal procedures.<sup>30</sup> A further step was the acceptance of a right to claim damage in the “Borcea-case”.<sup>31</sup> Nevertheless, the Dutch civil courts have never been used much by environmental NGOs; the majority of legal actions take place before the administrative branch of the Council of State. This is mainly due to the high cost risks for claimants before the civil courts.

Under Portuguese law, NGOs also have the right to bring an action before the civil courts directly against a polluter or an administrative authority with a view to stopping illegal activities or to claim damages (see in particular the Portuguese Case Study).

In France civil law-suits have a role to play, but they are clearly inferior in number compared to criminal and administrative proceedings.

A special venue for environmental cases, with rights of access for environmental NGOs was introduced under Belgian law in 1993. Here, a specific action before the President of the court of first instance was created. The ruling given is comparable to summary proceedings and thus may result in the imposition of an injunction to order cessation of an act wrongfully causing environmental damage.

By way of overview, the possibilities for NGOs to bring law-suits before the civil courts are rather limited. Even where such a possibility exists, the number of civil cases is low, which can partly be contributed to the fact that these proceedings carry a higher costs risk. However, where such proceedings have been instituted before the civil courts they have a very high success rate.

#### Intervention before the civil courts

It may also be the case that registered NGOs are allowed to intervene before the civil courts to support the suit of another plaintiff. This is the case in Italy, where registered NGOs may participate in civil claims for the restoration of environmental damage as supporter of the petitioner. This can be especially interesting in the case of the innovative action specifically regulated by Italian legislation, which allows the state, regions or local authorities to claim restoration of environmental damage irrespective of their ownership of the asset damaged. However, such cases were not considered explicitly in this study.

#### 4.1.3 Criminal courts

Generally speaking, members of the general public as well as public interest groups may not act as private prosecutors or joint “plaintiffs” in environmental crime cases, except where they themselves have suffered damage to health or property (e.g. where an NGO owns a nature sanctuary suffering environmental harm). An exception in formal terms is the UK, where it is in general open to any citizen to bring a criminal prosecution, although such cases are themselves a rarity. However, in most countries associations can intervene as a third party in criminal proceedings.

French, Portuguese and Italian legislation each provide for NGOs registered in their respective countries to intervene in national criminal proceedings and to claim (for the benefit of the general state budget in Italy) compensation for environmental damage.

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<sup>30</sup> Marga Robesin, Participation of environmental organizations in legal procedures in the Netherlands, in Führ/Roller, Participation and Litigation Rights of Environmental Associations in Europe, Frankfurt am Main, 1991, p. 115-119.

<sup>31</sup> Marga Robesin, Another Step forward in Dutch civil case law, ELNI-Newsletter 1/91, S. 18-19.

For instance, in Portugal, NGOs may act as assistants to the prosecution in proceedings relating to environmental crimes. They can inform the public prosecutor of any act that might constitute an environmental crime. After the opening of the criminal investigation, NGOs can also become a private prosecutor (assisting the public prosecutor or even contradicting him, where for example the public prosecutor decides not to proceed to a prosecution). Italian registered NGOs may take part in criminal proceedings on environmental matters requesting damages on behalf of the citizens involved or in relation to the specific environmental interest pursued by the NGO.

In the UK it is open to any person to undertake a criminal prosecution, however, environmental groups do not usually prosecute environmental offences themselves.

Criminal proceedings brought by environmental NGOs seem to play a role of some significance only in France. There, the number of such cases (210 cases in 1996-2001) brought to the courts is clearly higher than the civil cases (34 in the same period) but inferior compared to the administrative law-suits (954). In France, the success rate in criminal proceedings is extremely high: in 83,5% of such cases the prosecuting association obtained a decision favourable to themselves.

#### 4.1.4 Other review bodies

A particular system of legal control exists in Denmark. Besides the existing court system, the Danish appeal boards operate on a basis which is comparable to administrative court procedures. The appeal boards are functionally independent from the Ministry of Environment, and the activities of the boards are defined by law. While it seems questionable whether these boards can properly be considered as independent and impartial bodies in the sense of Art. 9(2) of the Aarhus-Convention, the Danish experience with these boards shows that they have an important function in environmental law control. The Nature Appeal Board in particular deals with a huge number of cases every year, thereby also providing some relief for the court system itself. But it should be noted also that appeals to the National Environmental Protection Agency are more frequent than the overall number of cases in other countries. By way of contrast, actual law-suits before the ordinary courts are extremely rare. This situation leads to the conclusion that the appeal boards are highly accepted among environmental associations.

An institution of some similarity to those in Denmark exists in the UK in the form of the Planning Inspectorate. It is considered that the majority of cases where there might be some form of representation sought by local environmental groups or NGOs are dealt with within this system.<sup>32</sup>

#### 4.1.5 Conclusion

Clearly, the fact alone of having access to different courts cannot necessarily be interpreted as conferring on NGOs a more or less powerful position in the concrete political and judicial framework. Whether such a result pertains depends very much on the legal traditions applicable: In Germany for example legal control of environmental activities is traditionally exercised under administrative law. Therefore, a case like the Portuguese swallow case would have been treated in the administrative courts in Germany, not before the civil courts as was in fact the case in Portugal. Such differences must obviously be borne in mind, and therefore the differences in access to the individual branches of the court system in the member states

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<sup>32</sup> It is estimated that the Planning Inspectorate handles about 200-230 environmental appeals per year, with some 14,000 land use appeals every year.



must be interpreted cautiously and considered in the light of the rights of access to justice more generally.

Looked at broadly, access to the civil courts entails more risk to the plaintiff because of higher cost risks. Therefore, the civil courts tend to be used less by associations, notwithstanding that in some countries the success rate of cases in these courts is high (over 50% in France).

Overall, specialised administrative courts or special chambers in the ordinary courts (as in the UK) play the most important role with regard to actions by environmental associations on environmental matters. However, proceedings before other courts can contribute to the general objective of public interest actions intended to further the enforcement of environmental law. For instance, the success rate of proceedings before the criminal courts in France could be taken as an indication that the NGOs have contributed to proof of the commission of an offence against the environment in the particular cases in hand.

Finally, a quasi-judicial system, like that operated in Denmark, can guarantee a quality of review of decisions concerning the environment that seems to be satisfactory also for NGOs.<sup>33</sup>

## 4.2 Standing

### 4.2.1 Different approaches to standing before administrative courts

The position as regards standing for environmental associations differs greatly between member states. In the main, these differences are a result of there being different legal systems and traditions in these countries.

The question of access to justice in Europe is a highly complex one due to this diversity of current conditions and traditions. In order to establish relevant findings of a more general nature, it is thus necessary to focus on the main approaches identified in the members states studied. Conditions additional to these main elements as to the admissibility of actions by associations in environmental matters will then be highlighted in the following section. In this section, the analysis is restricted to proceedings before the administrative courts, the possibilities for actions before the criminal and civil courts having been examined above.

Overall, three principal positions were identified: (1) the extensive approach in the form of an *actio popularis*; (2) the restrictive approach, according to which a “subjective” right is required in order to be able to bring an action before the courts; and (3) the intermediate approach, which can be characterised by the presence of a requirement that a sufficient “interest” in the subject matter in issue be demonstrated.

An interesting phenomenon is that the strict distinction between the different systems becomes more difficult leading to “mixed systems”.<sup>34</sup> One contributing factor to this development can be found in the influence of European Community legislation on the administrative systems of the member states.

#### The extensive approach

The most extensive approach to permitting public interest actions to be brought, namely that in the form of an *actio popularis*, meets with strong resistance in most member states. Both

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<sup>33</sup> This, however, does not answer the question whether the Appeal Boards represent independent and impartial bodies in the sense of art. 9(1/2?) of the Aarhus Convention. See with regard to the aspect of independence here, Astrid Epiney, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht*, Umweltbundesamt Berlin, 2002, p. 251.

<sup>34</sup> Epiney, p. 300.

courts and legislators fear that unrestricted access to the courts in environmental matters will be detrimental to the functioning of the judicial system. In addition, the idea of an *actio popularis* often contradicts fundamental principles on access to the courts that exist in the different member states. Only Portugal has provided for broad access for NGOs to review decisions and to claim compensation on behalf of the aggrieved party in order to preserve the environment (Art. 52(3)(a) of the Portuguese Constitution). However, this seemingly unrestricted right is in fact qualified in Art. 2 of the Portuguese Popular Action Law with requirements that environmental associations have to fulfil in order to be allowed to initiate proceedings before the courts.

In the Netherlands there is a so-called “indirect *actio popularis*” operable in the case of procedures against permits which are regulated by an extensive public participation procedure. This approach is broader than requiring an “interest” in the subject matter (see infra section 4.2.4) because it is sufficient that one has been involved in the decision-making process earlier in order to be able to sue. This specific right of action, however, is about to be abolished.

A special situation exists in the UK in comparison with continental law systems. Whilst the situation in the UK resembles that requiring that a “sufficient interest” be demonstrated before an environmental association may have standing before the courts, the fact that this is a common law system means that case law has a major role. Through developments in the case law the position regarding standing for NGOs has recently been considerably expanded. In the case of well-established environmental associations, standing is sometimes taken for granted and not questioned further by the courts. In this regard, the approach in the UK could be categorised as extensive, even though it is far from representing an *actio popularis*.

### The restrictive approach

Under the restrictive approach as identified above, the focus is on protection of individual rights. Standing is only granted where violation of a right is asserted that is (at least also) intended to protect the plaintiff and not general interests. Germany is a case in point as is, but to a lesser extent, Italy with its traditional requirement for an “*interesse legittimo*”. This requirement has been called the “protective norm doctrine” in Germany. Therefore an Italian or German NGO does not have standing to defend general environmental interests before the administrative courts unless they are specifically empowered to bring such an action by legislation.

With regard to “public interest” actions here an NGO must thus be able to demonstrate a breach of one of its own rights. In other words, the NGO must demonstrate a private interest in the case: it must prove direct injury to its financial assets or its property. For instance, this would be the case where an NGO owned a nature protection area that is said to be encroached upon by a development project. Where an administrative decision with adverse effects on the environment does not directly affect the property or the assets of the NGOs, no judicial review will take place at all. In this respect, law-suits to preserve collective or diffuse interests are usually not accepted before the courts.

Several explanations can be given for such a restriction. One relates to the assertion that there is a lack of democratic legitimisation on the part of NGOs. It may be said that there has always been a general aversion from lawyers against “self-appointed guardians of the public

interest”, especially in Germany.<sup>35</sup> Also, the legal community fears that the courts will be overloaded if the conditions for standing are relaxed.

In legal systems where the restrictive approach applies, under general administrative law, actions by environmental associations solely based on the representation of environmental interests by NGOs are not possible. In these legal systems it is thus necessary to provide explicitly in statute for a specific right for NGOs to bring environmental matters before the courts in a public interest action. In Germany, a number of *Länder* nature conservation acts (eg that of Bremen as the first *Land* in 1979) and the Federal Nature Conservation Act (from 2002) have introduced provision for special NGO law-suits in the field of nature conservation. In the case of Italy, the rigid approach was already being challenged before the administrative courts, leading to a broader interpretation on a case-to-case basis before the Law on public interest actions was introduced in 1986. In both Germany and Italy requirements for official recognition for NGOs were introduced to allow such NGOs to avail themselves of these new rights of access.

Thus it can be seen that it was the legislature that intervened to broaden the right of access to the courts. As will be seen, in countries with an intermediate approach, where standing was construed rather narrowly, laws have been adopted to broaden access to the courts by NGOs.

### The intermediate approach

Most countries follow what could be called an intermediate approach regarding the admissibility of law-suits before the administrative courts in general and access by environmental associations in particular. In most cases the exclusion of an *actio popularis* is ascertained by demanding an “interest” in the subject matter of the action. This concept of “interest” is broader than the requirement of a subjective right, but still ensures that a connection exists between the plaintiff and the cause of action.

In order to seek review of administrative acts, administrative courts in most member states do not require the NGOs to demonstrate the violation of a subjective right (France, Netherlands, Belgium). The NGOs only have to demonstrate their interest in the case, i.e. the connection between their objectives and activities on the one hand and the interests at stake on the other hand. In other words, the action’s admissibility is determined before the French, the Dutch and the Belgian administrative courts using more flexible criteria than in ordinary actions before the civil courts where the petitioners have to demonstrate the violation of a subjective right.

In the case of France for example, even an environmental association which is not recognised (*association agréée*) and therefore does not automatically possess a *locus standi* in front of the administrative courts can bring a public interest action, if it has an “interest to act” (*intérêt à agir*). This interest necessitates that there be a direct connection between the objectives of the association and the administrative decision in question. Therefore, the NGOs must always demonstrate their interest according to their statute. As a consequence it is possible that an NGO whose goals are limited to the preservation of wild birds will be refused access to the courts if the issue of the action regards mammals. In addition, the necessary interest can also relate to the geographical scope of the NGO’s operations and activities. In the example of

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<sup>35</sup> Eckhard Rehbinder, Germany, in: Jonas Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU*, Kluwer Law International, 2002, p. 248.

Belgium, an association acting nation-wide can be barred from bringing a legal action relating to the local level, if the act in question affects only the immediate surroundings.

Nevertheless, the example of the national reports of the countries that follow an intermediate approach highlight great differences in the extent to which environmental NGOs have access to administrative courts.

- In the Netherlands, the legislature provides access to administrative courts to a rather wide extent when a legal action against permits is concerned. Anyone who participates at the public preparation stage in the decision-making process for a permit is entitled to lodge an appeal to the Administrative Law Division of the Council of State. In other words, an NGO which has been participating has a right to challenge the final decision before a court.
- In the same vein, French environmental NGOs have standing before the administrative jurisdictions. According to a law of 1995, when an NGO has received formal recognition as a defender of the public interest, it may generally challenge administrative decisions in accordance with their i.e. the NGO's by-laws. Even if the NGO is not registered, it can sue if it succeeds in demonstrating that the administrative decision affects its objectives.
- In Belgium, NGOs must demonstrate that the contested administrative decision is intended to apply to the petitioner or that it would prejudice their objectives.
- An interesting example is provided by the UK. Here, the "sufficient interest" test serves primarily as a filter against vexatious applications. The approach is a liberal one and intended to reject claims by "meddlesome busybodies".

Generally speaking, an "interest" can be defined rather broadly by the courts, as is the case in the Netherlands, or rather narrowly, as can be seen in Belgium. In the latter case, the pertinent court decided that the "fact that a legal or natural person pursues an aim – even a statutory aim – does not entail the creation of a particular interest."<sup>36</sup> Neither the French nor the Belgian legal systems provide for an *actio popularis*. For instance, for an NGO to be able to act before the French and the Belgian Council of State its interest in the case must still be sufficiently individualised and distinct from that which any citizen could have in respect of the legality of the act in question. Therefore, the NGOs must always demonstrate their interest according to their by-laws (the principle of specificity of legal entities or in French "*principe de spécialité des personnes morales*").

#### 4.2.2 Specific requirements for standing of NGOs

Besides the more general distinction used above, standing in each country is further qualified according to the member state's legal tradition. The categories introduced above are thus useful to distinguish the different approaches, but only serve to give an indication of the overall view that can be anticipated in any given system towards public interest actions.

Additional requirements exist in nearly all the countries studied for NGOs as regards standing. Here a differentiated can be made between further requirements introduced by legislation and conditions introduced by the courts (generally to be able to determine whether an NGO has a sufficient interest in the case).

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<sup>36</sup> By an act of 1993, the Belgian legislator established a right of action in the field of environmental protection, which has considerably been easing the conditions for standing for NGOs by creating a specific action before a civil court.

### Case law requirements for standing

Traditionally, it has been the courts which have introduced additional specific requirements in the member states studied. In some countries, as in the Netherlands, these requirements have later been transposed into legal provisions. On the other hand, in countries where public interest actions have been addressed critically by the courts, it was legislation which created the opportunity for NGOs to bring law-suits on environmental matters (see *infra* 4.2.2.2). Finally, in a number of countries, as in the UK and Denmark, specific requirements for public interest law-suits are determined almost exclusively by the courts.

Typically, case law requires that there be a connection between the issue at stake in the law-suit and the statute of the environmental association in question. This was the case in the Netherlands in proceedings not directed against permits (where, as mentioned, a quasi *actio popularis* exists) up to the introduction of a corresponding provision in the General Administrative Law Act (GALA) in 1993. This can be seen as a specification or proof of the general “interest” condition already discussed. It is almost uniformly called for in the member states. For example, in Belgium the Council of State demands that the association act within the limits of its statutes. Also, in France an association that is not recognised (*agr  e*) by the state has standing according to case law if the aims of the association and the content of the decision are congruent.

One example of rather broad admissibility terms for NGO actions is the UK, where case law stresses the importance of the fact that the case concern a public interest. This is an approach somewhat different from those in the continental systems studied, where it could be said that the more general the issue is, the least probable it is that an association will have standing before the courts. In recent times, the UK courts often take the standing of associations for granted if they have been active in a particular area of law and policy. The intention here is to avoid a “lacuna” of unchecked illegality for want of a challenger otherwise unquestionably with standing, something that other legal systems such as the German accept, if the narrow criteria for standing would exclude a claim. Considerations of ecology and protection of the environment are thus given particular weight.

Another case could be found in Denmark, where it is only recently, i.e. since 1994, that the courts have recognised standing for NGOs when acting in the public interest.<sup>37</sup> Again, the cause of the actions has to reflect the aims of the organisation’s statute.

Case law in Belgium and France on the admissibility of legal actions contains additional standing requirements, such as the fact that the association have legal personality, be a non-profit organisation or have a certain geographical reach.

Most of these requirements are also found in statutory provisions in other countries and will therefore be discussed in detail under 4.2.2.2.

### Requirements set up by legislation

Statutory provisions with regard to standing as a rule were introduced in countries, where the access to the courts for NGOs was extremely restricted or non-existent. Examples are the 1986 Italian law, the introduction of public interest actions in different German *L  nder* since 1980 and the Belgian act of 1993 creating a specific legal action for NGOs in environmental matters before a civil court. In these countries, there was either no possibility of bringing a public interest action for NGOs at all, or it was very restricted by the courts, such as in Belgium. The introduction of such provisions can thus be seen as a positive step to allow

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<sup>37</sup> Standing before the different Danish appeal boards has been recognised by the law since 1984 for an enumerated number of environmental associations of nation-wide importance.

environmental associations to act in the public interest. However, the general scepticism towards public interest actions in these countries is reflected to some degree in that further requirements concerning NGOs are rather strict.

In other countries, laws relating to public interest actions either served to codify existing case-law, s like in the Netherlands, or to specify litigation rights, as in Portugal.

To allow for a systematic approach, the existing criteria or requirements for standing will be discussed successively.

All countries analysed, with the exception of the UK, require that the environmental association possesses some specific form of legal personality.<sup>38</sup> This requirement reflects the need of a legally responsible person before the court. Even though it might restrict to a certain degree ad-hoc associations, it also seems reasonable, because costs might have to be recovered that could be difficult to realise unless there were a single legal entity that could be made liable for them. Interestingly, the English courts do not require the claimant in a public interest action necessarily have such specific legal personality. Incorporated as well as unincorporated associations such as pressure groups have standing in the UK. For the time-period analysed as many ad-hoc groups as incorporated groups brought actions.

Often, the association also has to be non-profit, respectively should not have other professional activities competing with activities of companies or self-employed persons. The latter requirement can be found in the Portuguese Popular Action Law. It reflects the fear that law-suits will be brought by competitors in order to obstruct investments or otherwise harm economic rivals. The non-profit requirement, which for example exists in Germany and Belgium, reflects the “public interest” of the legal action, and will add to the credibility of these kinds of law-suits.

As mentioned above a condition found widely is that there be a connection between the subject matter of the case and the goals of the NGO, as reflected in its statute. This criterion is also used to identify the “sufficient interest” of the association. In most instances, this requirement includes that the interests at stake have to be reflected in the statute of the association. This is the case with art. 2 of the Portuguese Popular Action Law, which states that the internal regulation of the NGO should mention the defence of the interests at issue as a goal or competence of the association. The same requirement can be found in Germany and in France. While it might seem convincing at first sight, it can also serve to limit the possibilities for NGOs to bring such law-suits. A too narrow definition of the goals of an NGO in its statutes, which might no longer reflect its actual field of activity, can then result in rather unnecessary limitations of its litigation rights. The opposite can happen in Belgium: a too broad definition of the association’s objectives can foreclose the litigation rights of an environmental NGO. This happened in the case described in the Belgian case study, where the objectives of the NGOs was found to be insufficiently specific.<sup>39</sup>

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<sup>38</sup> In the UK unincorporated associations may bring an action in their own name, but it is the individuals in the association who may be made liable for any adverse costs order.

<sup>39</sup> The court found that “la gestion, la protection et la conservation de l’environnement constituent un objet social à ce point large qu’il ne saurait être spécifique à l’association requérante; en effet, vivre dans un environnement sain est une préoccupation qui n’est étrangère à aucun être humain.” Arrêt A.S.B.L. Greenpeace Belgium et Schmit, C.E. n° 46.786, 30 March 1994.

These criteria are the most common identified and generally seem reasonable to ensure that only public interest actions in the proper sense of the word are admitted.

Another criterion found in some member states is that of a minimum time period of existence of the NGO, generally 3 years. This requirement can for example be found in Germany and Belgium. Obviously, the objective is to ensure that only those associations that guarantee to have some experience and importance as well as connection to environmental goals can so act before the courts. It has to be pointed out, however, that this requirement represents a considerable hindrance for associations that are constituted as a reaction to a recent specific environmental problem. The French case law can be seen as a reaction to this problem, since associations, which are not registered, can bring actions also when they have been set up to attack a specific administrative act. The necessity for a 3 year existence also is open to question, because the intention of making sure that the NGO possesses sufficient experience can be served just as well by a shorter time period.

Rather common are criteria relating to the territory covered by the activity of the NGOs. There are diverging provisions in the member states concerning the requirements for a territorial connection. In Italy and Germany the requirement is that the activity of the NGO cover a minimum territory. In the case of Italy, the activities in question must be nation-wide. Such a requirement as the latter may effectively limit the possibilities for NGOs to bring actions before the courts. Thus, it is doubtful whether only the national representatives of an association can bring a legal action as opposed to the local branches of the same organisation. The consequence of this interpretation is that many legal actions will not be brought, because of strict time limits imposed, which might expire if the local level is not able to act. In Germany the legal actions of the NGO have to concern at least one *Land*. The opposite requirement can apply in France to non-registered associations: Here the administrative act has to concern a territory that is the same as the territory the NGO is acting on. This leads to the effect that a regional NGO might not be able to bring an action against a local problem, because it should only act in relation to regional problems.

Closely related to the question of standing is the issue of recognition of environmental associations. In many countries, an environmental association has to undergo some kind of recognition procedure in order to be able to act as a party in court proceedings. From the countries covered by the study the Netherlands, France, Portugal, Denmark and the United Kingdom have no formal recognition requirement for associations that wish to bring a court action. From the requirement of a formal registration one has to distinguish the fact that the association has to fulfil certain criteria in order to be allowed to act before a court on a public interest, e.g. Portugal and United Kingdom, as seen above. Finally, there are cases, in which recognition is optional but not obligatory in order to bring an action. For example in France obtaining recognition is possible and does bestow the association certain advantages, e.g. to be a party in a civil proceeding representing public interests. However, in almost all court proceedings the environmental association can act without being registered.

In a number of countries, NGOs may only act in the public interest if they are recognised by the state (in the case of Germany, formal recognition can be obtained at *Länder* level). Further, there may be different criteria that an association must fulfil in order to be registered. These various requirements are reflected in the general criteria for standing, as explained above.

However, the criteria that are set up for recognition tend to be even more strict than those for standing in general. In the case of Belgium further proof has to be furnished through reports on the NGO's activities. A similar condition can be found in the German legislation, which requires proof indicating that the association is able to pursue its objectives adequately, such proof generally being based on the nature and scope of the association's past activities, as well as on its membership composition and its past effectiveness. Another criterion is that the NGO has to be open to all persons who support the objectives of the NGO.

In Italy there is a current debate whether the public recognition procedure is intended to strictly limit standing to the associations recognised or whether other organisations might also have the right to bring an action.

It can be concluded that the recognition requirement is intended to provide that only associations that have a certain amount of experience may bring such actions before the courts. This, however, excludes ad hoc organisations, especially local associations that are formed for the very purpose of bringing an action motivated by immediate development proposals such as the construction of a waste disposal site.

In summary, an obligatory recognition, especially where linked to extensive requirements, seems to constitute a rather far-reaching restriction on bringing public interest actions. Contrariwise on the other hand, the supposed benefits of an obligatory registration system are not very clear. A comparison between member states shows that misuse of the right for NGOs to bring law-suits is not to be expected simply because there is no requirement for some formal recognition.

#### 4.2.3 Conclusions on standing

Very different conditions apply with regard to standing in the countries analysed. While most countries follow what could be called an "intermediate approach", in fact the conditions for the admissibility of public interest actions vary. A useful example is the comparison between Belgium and France where the relevant legal provisions are similar but have been interpreted by the courts with radically different results.

The prerequisites for standing can strongly limit access to justice on the part of NGOs. This is the case in Germany, where almost exclusively only nature conservation law can be the basis for a public interest action.

The legal systems examined seem not very open to access to the courts for ad hoc associations, with the exception of Denmark, France and the UK. Generally a prolonged period of existence is required of the association. This can exclude local organisations constituted specifically to act against local environmental threats. On the other hand, it must be recognised that local residents will under most systems be able to take legal action in respect of planning decisions or installations where they are immediate neighbours.

In sum, all countries limit access to the courts by NGOs through various standing requirements. These requirements are formally similar in some cases but often interpreted differently by the member states' courts. However, the diverse requirements for granting standing to an NGO in public interest actions effectively represents a hurdle to sue in many countries, see particularly the case in Germany and Italy.

Most interestingly, apparently similar conditions, such as the link between the NGO's objectives and the subject matter can be interpreted in radically different ways in different



member states. Thus a fact that presents an advantage in one member state can preclude an NGO from taking court proceedings in another.

The standing requirements can also represent a barrier for transboundary actions by NGOs. In most member states it is currently not possible for NGOs from one member state to bring an action in another member state. The exception is France where Dutch as well as Swiss NGOs have been able to go to court. Another case may be said to be the Netherlands (although no case was recorded), where the indirect *actio popularis* could include non-national-based plaintiffs. The situation is less clear in Portugal, as the Popular Action Law does not answer this question. The UK case law recently widened standing also on issues where foreign territory was involved. It is unclear whether this might be interpreted as an opening also for foreign associations. A further hurdle for transboundary legal action is the above mentioned divergent interpretation of apparently similar requirements for standing.

### 4.3 Scope of review

When reviewing an administrative decision, courts can apply different scopes of review that relate to the depth of the judicial control.<sup>40</sup> Furthermore, a differentiation between the review of procedural and substantial law can be made.

Procedural provisions at issue in actions brought by environmental associations in most countries relate to the same issues. These are generally:

- Insufficient environmental impact assessment procedures
- Lacking/insufficient public information, consultation or participation.

In France it was found that half of the decisions in favour of the NGOs were won on procedural and half on substantial grounds. With regard to administrative decisions, Dutch court decisions were decided rather on formal grounds. There, it was also pointed out, that the consequences of such a judgement might be of limited extend: it will often leave the administrative authorities the possibility to adopt a new decision, after having gained more or better information concerning relevant facts and interests to be weighed. The situation is even less satisfying for the NGOs in Germany. Here, a formal requirement, such as access to information by the NGOs is only relevant, where the administration would have reached a different conclusion, if the mistake had not been committed.

Between the member states, substantial provisions are reviewed to a different extend. While in some legal systems the courts generally restrict themselves to a consideration of the legality of the administrative decision, others include a scrutiny of whether the discretionary power of the authorities was correctly executed and also control the weighing of interests done by the authorities. It is generally assumed that in countries with a broad access to courts, such as the Netherlands and France, the courts tend to show more judicial restraint with regard to the depth of control. This can also lead to the result that even though wide access is granted, the actual effectiveness of court proceedings is considered to be low. An indication for this can be found in the Dutch report, which states that when an administrative decision is well-prepared from a formal point of view, the administrative courts test it only in a very marginal way.

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<sup>40</sup> In the French administrative court system for example a differentiation is made between minimum, normal and maximum control. See Epiney, p. 140 – 152.

Thus, the result of the court case is perceived to be very limited. This was regarded as one reason in the Netherlands for the dramatic decline of court actions by NGOs.

A special situation exists in Germany, which is seen as a country with an in-depth judicial control of administrative decisions. The administrative courts generally tend to review not only the strict legality of a decision but also the execution of discretionary power and the weighing of interests by the administration in cases brought by individuals. While this will be the case of court proceedings based on the assertion of a subjective right, different conditions apply to public interest actions. Due to the statutory provisions, limitation of public interest actions are with few exceptions in some *Länder* limited to questions of nature conservation law. As a consequence, the courts will restrict their scope of review and scrutinise decisions only according to nature conservation law. With regard to the overall weighing of aspects, the courts will only analyse whether nature conservation law was taken into account at all.

In conclusion, courts are often willing to repeal decisions based on mistakes in procedural provisions such as participatory rights. However, these judgements mostly allow to repeat certain steps, e.g. to base administrative decisions on a better reasoning. Effectively, this can lead to the situation that the project in question will be executed anyway only based on a better assessment by the authorities.

Finally, as the French report points out, it can also be very difficult to distinguish between proceedings with strictly procedural or substantial content, because the scrutiny of procedural shortcomings will often also reveal substantial mistakes made by the authorities.

In most member states the courts cannot substitute a decision of the administration by a new one but only modify it or order the administration to reach a different decision. This is however different in the Netherlands, where the Council of States can besides squashing the decision also take a new decision if the case is clear enough to do so. The same is true for France. Here, the administrative court can also substitute their own discretion to that of the administration or impose new technical standards.

#### **4.4 Interim relief**

The question of interim injunctive relief is an important one in many environmental cases: often a decision with environmental consequences can not be revoked once it was executed. This is often the case of planning and construction projects, decisions concerning water use, nature conservation or waste. Therefore an effective injunctive relief procedure will ascertain that the principal decision can still have an impact on the actual situation and not be limited to the finding that the decision should have been different, without entailing material consequences.

This said, it seems that injunctive decisions are issued only very reluctantly or in special cases in most countries. Generally, filing an action in the member states does not have the automatic effect of suspending the decisions, the exception being Germany. However, the automatic suspensive effect of bringing an action there is excluded in a number of important cases (see as an example the Case Study Germany). In Denmark the constitution provides that somebody bringing of a case to court shall not be allowed to avoid compliance with the orders given by the executive power. This provision excludes the granting of injunctive relief. Still, there are a few exceptions to that constitutional rule, where automatic injunctive relief is explicitly granted. In all other cases courts and appeal bodies can issue an injunction if considerable damage is to be expected. The same is true for the Netherlands, where it is possible to apply for injunction for the suspension of an act. In France injunctive relief is granted only under narrow conditions, even though the Conseil d'Etat now applies the conditions somewhat more

generously.<sup>41</sup> Similarly, under the Italian system an injunction will only be issued if not doing so can result in a grave damage that is difficult to compensate later. This, however, seems to be case rather often due to the length of the main proceedings. Interestingly, Portuguese judges can grant an injunction even if procedural law does not provide for it. This is based on Article 18 of the Popular Action Law, which enables the judge to grant suspensive effect to a judicial appeal. However, the interpretation of this rule is not consensual, since some courts uphold it is a provisional remedy that applies to administrative judicial proceedings in the first instance to obtain the annulment of the administrative act while others consider it only to apply to appeals in the strict sense of the word, i.e. a request before a higher court to reverse a decision of a court of first instance.

In sum, conditions with regard to interim injunctive relief differ considerably between the countries included in the study. Due to the fact that in environmental cases irreversible facts will often be the result if the end of the court proceeding has to be awaited to halt the execution of a decision, this could be an important factor to ensure the effective enforcement of environmental law in the member states. This holds especially true if the case is pending for a long time (see chapter 4.6).

#### **4.5 Costs**

An important factor for environmental associations when considering whether to bring an action is the question of the expenses it might face at the end of the proceeding. Among the costs, one can make a distinction between :

- court fees
- expert and witnesses fees
- fees of party's own lawyer
- winning's party lawyer's fees if the petitioner is loosing the case (e.g. Denmark, Germany, United Kingdom, the Netherlands in civil cases).

Only the Portuguese and the Danish legislation exempts NGOs from court fees (in Portugal in the proceedings where they take part as plaintiff or assistant to the prosecution; in Denmark before the appeal boards). In the UK, it is possible that the courts will make no order as to costs against an environmental NGO if they consider the action to be in the public interest.

Generally, the court fees do not pose a major problem because they are rather modest or at least affordable in all countries. It is especially the fees for lawyers and experts, where needed, and the "loser pays principle" that have a decisive impact on the costs of a claim. For example in the UK, having to pay the costs of the other side in the event of losing the case was called the single most effective barrier to access to justice in environmental cases. Sometimes lawyers or experts are working pro bono for environmental NGOs (Portugal and the UK) but this is not the rule. Further cost, that are not included in this picture are the costs linked to the substantial work to prepare the case that is generally done by members of the associations. The fact that NGOs often lack resources to do this work constitutes a further restriction to initiate court procedures. The court and the lawyers fees are different from one type of courts to the other. For instance, the costs of litigation before the civil courts are much higher in the Netherlands, than the costs of an administrative appeal.

Thus, in practice the costs are one of the main obstacle for NGOs to sue polluters or to seek redress. If the procedure is too expensive or entails the risk for the NGOs to pay the costs for

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<sup>41</sup> See also Epiney, p. 123.

the counter party in case of a loss, the NGO will seek other means to solve the problem. For instance, the fact that there are only few civil actions brought by Dutch NGOs is due to the considerable risk to compensate the winning party. In Germany and the UK, bringing public interests actions has also involved a high risk of costs for NGOs.

Costs have thus a high impact on access to justice of NGOs that is at least as important than the restrictions brought by the case law on the issue of interest, the effectiveness of the remedies and the scope of review. Shortage of funds may explain that very few actions have been brought in some member states to the courts even though the conditions for standing are rather flexible.

#### **4.6 Length of proceedings**

The time factor in court decisions – the length of proceedings - does not represent a condition for bringing an action by environmental associations in the strict sense. However, they have a rather large influence with regard to the effectiveness of public interest actions. Again, there seem to be large differences concerning the length of proceedings in the member states. From the case studies it can be concluded that important cases as the ones presented in the case studies often will take several years to be decided, especially where several instances of courts are involved. The rapid decision in the German case study was also due to the fact that only the highest instance was involved, which is generally not the case. In some cases explicit reference was made to the long delays in proceedings in the country reports, i.e. in Portugal. In the case of Italy the average length of proceedings has been called “unbearable” already in the past.<sup>42</sup> The extended length of proceedings in civil courts was mentioned for the Netherlands, while administrative decisions seem to be delivered rather expeditiously.

Long duration of proceedings are a widespread problem in most member states.<sup>43</sup> However, the considerable differences in the length of time a public interest action will take in different countries, have a large influence on its effectiveness.

The length of time that court procedures can take can have a major economic impact. If court decisions are taken only several years after a licence has been issued, either the court will not decide against the project exactly because of the economic investments already undertaken (often considered as “third party interest” in disputes between an environmental NGO and the licence granting authorities), or the investment will have been in vain.<sup>44</sup> In this context, injunctive relief may play an important role. It seems clear that the reluctance of the courts in issuing interim injunctions that was observed in the member states studied is due to the economic consequences such an injunction might often have. However, it can also be concluded that there were no indications that NGO law-suits delayed projects where it was held that there were no legal grounds for the application to the court. On the other hand, if the application to the court were based on good legal grounds, an injunction could in certain cases

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<sup>42</sup> Michel Prieur, Complaints and appeals in the area of environment in the member states of the European Union, European Council on Environmental Law, study for the Commission of the European Community DG XI, March 1998, p. 52.

<sup>43</sup> The study by Michel Prieur, see supra, indicated an average duration of judicial proceedings against the administration of 1-2 years at the first instance and 2-3 years at the second instance, p. 67.

<sup>44</sup> This was the case of the “Mülheim-Kärlich” nuclear power plant in Germany. A private person (NGOs do not have rights of access under the Atomic Energy Act in Germany) claimed and won a legal process before the Federal Administrative court in 1988, 15 years after the licence was issued. At that time the nuclear power plant had already been built and operated for a couple of month. The administration was not able subsequently to issue a lawful licence and the plant never returned to operation. The investment costs were over 1 billion DM, all of which were wasted.

also prevent large amounts of money being pointlessly invested should the court decide in favour of the claimant some years down the road.

## 5 Conclusions

In conclusion, the main findings of the study can be summarised as follows:

**NGO actions play an increasing role in environmental law but are still few in number compared to the overall number of law-suits.** Major changes can be observed compared to the situation prevalent in the 1980s: First of all, jurisprudence or legislation in the member states have opened the door for environmental law-suits to be brought by associations in different ways and to differing extents. In addition, the number of such law-suits has increased and is still increasing in most member states. Nevertheless, with only one relevant exception (the Netherlands), the absolute number of public interest actions is still very limited. This is so even where the grounds upon which the admissibility rules for bringing legal actions is broad, as in the case of Portugal for example. Compared to the overall number of actions brought before the courts in the member states studied the relative figure itself is low, and sometimes even at a level that is insignificant. This study thus clearly refutes the argument that environmental public interest actions lead to an overload in the courts.

**Legal actions taken concern all sectors of environmental law.** There is a very mixed picture concerning the sectors of environmental law in which public interest actions are brought. Rather prominently to the fore in this regard in many countries are law-suits in the field of nature conservation, and often linked to infrastructure and planning issues. Water issues have a significantly profile as well. These cases apart, the sectors which feature thereafter differ considerably between the countries studied, a result which might reflect divergence in risk perceptions and environmental concerns in the member states.

**NGO law-suits are successful.** In almost all countries public interest actions have a high success rate, with variations concerning the countries and the courts involved. This can, on the one hand, be credited to the rather careful choice made by associations as to which cases to bring to court. However, and more importantly, it also points up the fact that NGOs do fulfil an important function in enforcing environmental law. The fact that the success rate in the member states studied is – with one exception – very elevated points to the fact that the cases taken are well founded and were effectively needed as a counter to the administrative decisions themselves, but also as regards activities by individuals that are detrimental for the environment.

**Public interest actions entail considerable benefits.** One of the most notable features to come out of this study is the important contribution that public interest actions on environmental matters make to the enforcement of environmental law in the member states. This is so notwithstanding that the number of cases in absolute terms is quite limited. This effect, though it may be said is one difficult to quantify, was confirmed throughout and in each of the countries included in the study. Moreover, this result holds true in relation to enforcement of national as for European Community environmental law.

Furthermore, public interest actions are also an appropriate means indirectly supporting the enforcement of European environmental directives. This latter effect can be observed even where the court proceedings themselves were not won by the environmental association. Public authorities respect environmental law more and consequentially the quality of their decisions improves when there is a fear that the decision can become subjected to legal control by the courts. The mere possibility that a public interest action can be instituted thus

seems to further the adherence to environmental standards and laws by the administration. This particular effect was observed in many countries and is probably the most important outcome of an environmental association taking legal proceedings.

An important finding additionally is that not only is the enforcement of environmental law furthered but that litigation rights for NGOs acting in the public interest also contribute to public awareness building and to improving participation rights themselves. This finding is even more relevant with regard to the argument often presented that NGOs lack democratic legitimacy to bring an action in the public interest. While it could all the while be argued that this line of reasoning reflects in any event an antiquated understanding of democratic rights, it also and more fundamentally neglects the fact that public interests such as in relation to the environment will often not be represented in the courts except by way of some form of public interest litigation.

Yet again, access to justice for environmental NGOs can act to prevent damage to the environment and thus contribute also and thereby to preventing or reducing economic loss. Although the study was not intended to generate quantitative data on this aspect, the large number of cases concerning nature conservation issues show that potential damage to nature was reduced. It may be argued, on the other hand, that access to the courts for environmental associations in some countries is seen as a potential obstacle to economic development. The findings of this study do not confirm this fear in general. It may be said that the study has indicated that investment may be blocked in a timely fashion by a law-suit. It was only in the Netherlands, however, that a coherent position in this regard seems to be emerging from the ongoing discussions there. It should also be said that the fact that the courts are extremely reluctant in ordering injunctive relief, including on an interim basis, leads to the conclusion that economic interests are thoroughly taken into account in the decisions in question.

**The conditions under which NGOs may bring public interest actions differ considerably between the member states.** While the study highlights the fact that it is theoretically possible in each member state for environmental NGOs to have access to courts in order to review administrative acts related to the environment, there are great differences in the extent to which national courts in fact have jurisdiction to review environmental decisions.

As set out above, some differentiation as regards these conditions is possible. First, NGOs in the member states have access to different courts to bring public interest actions. While all countries allow access to administrative courts (where in fact a separate administrative court system exists), access to the civil courts is more restricted. Also, the possibility for NGOs to act as a prosecutor in criminal proceedings or to intervene in criminal proceedings exists only in some countries.

With regard to administrative courts, a forum open in all countries to NGOs where such courts exist, the conditions for standing differ considerably. Generalising, one can distinguish between an extensive, a restrictive and an intermediate approach here. However, within these categories there are differences due to the imposition of additional requirements that must be fulfilled by environmental NGOs in order in fact to be able to bring public interest actions. These additional requirements are introduced either by the courts or by the legislator. From a systematic point of view, the introduction of legal provisions in most cases represents an attempt on the part of the legislator to broaden litigation rights for NGOs, which were either non-existent or extremely limited previously. In other cases, it is the courts that have set up certain conditions before or only in accordance with which NGOs can bring legal actions in environmental matters. While some of these criteria are similar as between different member states, such as a requirement that the environmental association have legal personality, they

can effectively be interpreted by the courts in such a way as to allow for either broad or narrow access to the courts.

**There are considerable constraints on NGOs bringing legal actions on environmental matters.** As is highlighted by the study, restrictions on access to justice here can be of various kinds. All member states, save the UK, have restrictions on standing that exclude e.g. ad-hoc groups. If compared to one another, these restrictions may be seen as sometimes arbitrary, e.g. in the one case allowing only nation-wide associations to act, in the other case only local groups. Differing criteria for the purposes of meeting registration requirements are a further widespread such instrument.

A decisive point is that relating to costs, in particular as regards lawyers' and experts' fees, and also as regards the risk of having to pay costs of the other side if the legal action is unsuccessful. In some countries there are exemptions for court fees, but these generally are not the most important factor. A further shortcoming identified in all the countries examined is the fact that interim relief, although generally available, is very seldom granted by the courts in these cases. This reality in practice also was identified – at least in some countries – as an obstacle in fact for NGOs to go to the courts given that the presumed outcome of the action would be too late to effectively prevent or reduce environmental deterioration.

**Differences in the admissibility and number of public interest actions between the member states will as a consequence also lead to differences in the enforcement of (European) environmental law.** From the conclusions set out above, it can also be deduced that the extent to which litigation rights by environmental NGOs contribute in fact to the enforcement of (European) environmental law differs considerably between the member states. As also mentioned above, one of the most important effects of a public interest legal action by an environmental NGO can be to further the general adherence to environmental standards and laws. Since the number of and conditions for such actions are very different between the member states, the effect of furthering the enforcement of environmental law will accordingly be correspondingly very unequal. From this it can therefore be concluded that the general enforcement of (European) environmental law will profit from uniform conditions for NGOs to bring public interest actions, on the premise of an equalising up in terms of such conditions.

## 6 Policy recommendations

### (1) European and national environmental law should be aligned with the Aarhus-Convention

The Community is in the process of taking important steps in order to align Community law with the Aarhus Convention by its adoption of a new directive “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”.<sup>45</sup> This directive entered into force in May 2003. It is an explicit objective of the directive to ensure that Community legislation, in particular the EIA-Directive and the IPPC-Directive, is fully compatible also with the provisions of the Aarhus Convention that provide for access to justice, in particular Articles 9(2) and (4) thereof. To this end, in each of these two directives (the EIA and the IPPC Directives) a provision is to be introduced that provides for access to the courts or another independent and

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<sup>45</sup> See supra note 2.

impartial body for members of the public having a sufficient interest, or alternatively, asserting impairment of a right of theirs, where administrative procedural law of a Member State requires this as a precondition to access. It has been clarified that NGOs will be considered to fulfil these requirements, even though the member state might establish criteria that the organisation has to meet. Such criteria must, however, be consistent with the objective of providing the public concerned with wide access to justice. It may be open to doubt whether all existing criteria for registration in the member states, for example those in Italy or Germany, are compatible with this provision.

Furthermore, it is clear that restrictions as to the extent of control exercisable over the substantive legality of decisions, acts or omissions subject to the public participation provisions of the EIA or the IPPC directive will not be in line with the new directive. Thus, German law regulating access to justice which restricts the substantive court control to nature conservation law will have to be modified substantially.

## **(2) Further action on the European level is needed**

Directive 2003/35/EC is to be considered as a major step forward to improving legal control regarding (European) environmental law by environmental associations. Nonetheless, further Community action that goes beyond the scope of this directive seems to be required.

Access to justice under this directive is connected to a participation right under the EIA or IPPC directives. As a consequence, any injury to the environment that does not fall under the scope of these directives will therefore not be within the scope of these provisions providing for access to the courts. Thus, the Portuguese swallow case or the French habitat case would not be covered by the new directive, because in these cases neither an environmental impact assessment nor a licence under the IPPC directive was in issue. Generally speaking, all breaches of the Habitat or the Birds Directive that are not caused by an EIA or IPPC project would not be so covered.

A further shortcoming is that all product-linked impacts on the environment are also not covered. This holds true, too, for the current intensively discussed issue of GMOs (see cases in the French report).

## **(3) The legislative Community framework should be supplemented by a further directive**

As far as Community action is concerned, it is proposed that the existing legislative framework be supplemented by a further directive that would respond to the still existing shortcomings concerning access to justice in environmental matters. A further directive would allow, to a certain extent at least, for differences in the enforcement of environmental law in the member states, insofar as they result from differences in the conditions for bringing public interest actions, to be avoided.

This new directive would provide for access to the courts whenever environmental laws are not respected, independent of existing administrative procedures (EIA or IPPC). There are different opinions in how far, under the principle of subsidiarity, Community action should itself go concerning the application of European environmental law. The question of the competences of the Community - which is required to transpose the Aarhus Convention into Community law - to adopt a directive on access to justice was not the issue of this study.

In the view of the authors of this Final Report, it is strongly arguable that the Community mandate in this regard goes far beyond existing substantive EU legislation, given that the Convention concerns, pursuant to its Art. 6(1)(b), all activities that may have a significant effect on the environment. The exercise of such a mandate would certainly be appropriate in



order to strengthen environmental protection and enforcement of environmental law Community-wide.

#### **(4) The directive should give access to the civil courts**

Article 9(3) of the Convention envisages that members of the public shall also have access to administrative or judicial procedures to challenge acts and omissions by private persons in contravention of provisions of national law relating to the environment.

At first sight, it might appear open to question whether it is appropriate that there be NGO actions motivated in the public interest under civil law. There is a prevailing opinion that civil law basically serves the protection of individual rights. This study has shown that in several countries (France, Netherlands, Portugal and Belgium) civil law-suits have in fact an important role to play here not least because they are rather effective, albeit limited in number.

There are strong arguments in favour of the idea that a new directive should provide also for the possibility for direct legal action against polluters. This solution could enhance respect for environmental law, including where provided for also in cases where the environmental authorities themselves do not act. Thus, civil lawsuits could have a supplementary role in terms of enforcement. Furthermore, one could argue, that in the particular field of environmental liability law the individualistic focus of civil law should be supplemented by the interest of society in environmental protection. Civil law could thus, for instance, also pursue the objective of protecting against impairment of natural resources not owned by any particular person.

It should be noted, however, that legal traditions in some countries are somewhat sceptical towards such an approach. In Germany, for example, remedies against polluting activities are envisaged under administrative law, not under civil law.

The question is whether there should be (further) EU harmonisation in this field. There are three options: (i) a new directive could leave the question to the individual member states to decide; (ii) the new directive could provide for a general right of access to the civil courts in this sphere; and (iii) the directive could provide for access to civil courts but only under certain conditions.

In accordance with the principle of subsidiarity, it seems appropriate for a new directive to provide for access to the civil courts in cases of significant infringement of environmental law where the competent authority fails to act. The plaintiff should then have access to remedies to be able to stop a polluting activity that constitutes such a breach of environmental law. In any event, the new directive should not lead to restrictions on existing rights of access in the member states.

#### **(5) NGOs should be allowed to intervene in criminal proceedings**

There are good arguments for providing for NGOs to be able to intervene in criminal proceedings (enabling NGOs to act in criminal proceedings is a further step towards better enforcement of environmental law). In France, where such a right is widespread, it has proved to be very successful.

#### **(6) Standing requirements in administrative proceedings should be relaxed**

With regard to the litigation rights of NGOs against administrative acts the Aarhus-Convention contains a mandatory provisions in the form of Art. 9(2), subsection 3, which provides that NGOs that meet the requirements of Art. 2(5) shall be deemed to possess a “sufficient interest” or an “impairment of a right” in order to bring proceedings regarding

infringements of environmental law. Since one of the findings of this study is that the provision of litigation rights for NGOs in environmental matters will reduce the enforcement deficit also with regard to Community environmental law, it seems advisable that a directive on access to justice should ensure that standing requirements are not overly strict. The directive should at least provide for the “intermediate approach” described above to be catered for.

**(7) Further requirements introduced by member states to limit access to the courts should not make it impossible for NGOs to bring actions before the courts**

The Aarhus-Convention allows for specific requirements that NGOs have to meet in order to obtain the right of access to be retained or introduced by providing that the “public concerned” is to be understood as including “non-governmental organisations promoting environmental protection and meeting any requirements under national law” (Article 2(5)). It is thus clear that the member states are not precluded from stipulating, for these purposes, that environmental associations satisfy certain requirements.

However, the Convention also requires that the procedures created provide adequate and effective remedies and be fair, equitable and timely (Art. 9(4)). From these conditionalities it can be deduced that any requirements introduced by a member state should not result in it being impossible in fact for NGOs to bring public interest actions. Similarly, a uniform application of Community environmental law would also entail the result that any requirements not be too strict.

The new directive envisaged might therefore provide for criteria that may be provided by national legislation, which itself should reflect to some degree the criteria existing in the member states. As set out above, these existing criteria are comparable to a certain extent. A number of criteria as to standing identified in the member states serve purposes that reflect interests that are easily understandable. One such example would be a requirement that environmental associations possess legal personality (this is important for the purposes of meeting any financial liability for costs in a law-suit) or that it be a not-for-profit organisation (to avoid the pursuit of commercial interests under the guise of a public interest action).

**(8) Territorial restrictions and minimum time periods for when the association should have been in existence should not be within permitted criteria**

Conflicting requirements as to standing such as that in Italy that an association have nation-wide activities as compared with that in France that the relevant activities be local can present difficulties in any harmonization steps. When one looks at the findings in different member states, it seems moreover seriously open to question whether criteria concerning the territorial spread of an NGO are of assistance in ensuring that NGOs do not abuse their litigation rights. However, it does seem clear that requirements such as these represent a major hurdle to NGOs being able to bring public interest actions, while at the same time these requirements do not seem to serve their own objectives well. It might be argued that the fact that an NGO acts on a nation-wide basis is not pertinent when the problem in issue is only local. On the other hand, if only NGOs operative on the local level are able to take action, important resources and knowledge that might only be available at a national level would be excluded in an resulting law-suit (should one happen at all, rather than not). It is for that reason recommended that territorial restrictions should not be allowed to be included in any criteria permitted as qualification for obtaining standing.

A similar observation can be made as regards minimum time periods for an NGO to have been in existence. It is not an obvious factor that such a criterion contributes to the quality of

any potential actions that might be brought, or has been a relevant factor where the association actually permitted to bring an action has not been existence for a long time.

Any new directive should ensure that member states do not combine any such criteria in a manner that renders effective access to the courts for most associations impossible.

**(9) An obligatory recognition procedure by the member states should not be foreseen**

The findings of the study also advise against allowing member states to provide for some “obligatory recognition procedure”, that is, that access to justice be determined on a prior procedure whereby an association gains official recognition of an environmental interest, whether this is predicated on there being some territorial link or not. The benefit of such a requirement seems somewhat obscure as there is no indication that law-suits brought by environmental associations are otherwise frivolous or abusive in member states absent such an official recognition requirement. On the other hand, a recognition procedure can clearly raise hurdles or pose a barrier in any given case for NGOs wishing to initiate a law-suit. Such a procedure may also, obviously, represent a hurdle for NGOs from other member states seeking to bring an action, not least if they will not be able to obtain recognition in a country because to a requirement for a territorial link with that country.

**(10) The directive should not require member states to introduce any additional standing requirements where they do not exist already**

Most importantly, any such new directive should not require member states to introduce any standing requirements in addition to those then existing in that member state. Were this otherwise, member states that allow NGOs wide access to the courts would be forced to introduce restrictions on standing even though they had no wish to do so. Such a result would be especially undesirable because the results of the study show that even in countries with broad access to the courts, as in Portugal, the actual number of public interest actions is often quite limited. By introducing additional requirements at Community level, the number and effectiveness of NGO law-suits would be further restricted, an outcome that would run counter to a general goal of enhancing enforcement of environmental law.

It may also be pointed out that introducing additional requirements for standing is not required under the principle of subsidiarity.

**(11) The new directive should provide for the right to extensive review of environmental acts and decisions from a procedural as from a substantive point of view**

Another finding of the study is that the actual scope of review in the various member states differs considerably. It is thus recommended that the new directive provide for an extensive review of environmental acts and decisions both from a procedural as well as from a substantive point of view.

This recommendation is intended to ensure that public interest actions in the member states cannot be limited only to considerations of strictly procedural issues.

However, it is recognised that, taking into account the different legal systems and traditions in the member states, it may prove difficult to ascertain or prescribe the breadth of review before the member states’ courts. This is perhaps a matter for further reflection.

**(12) The new directive should clarify conditions for granting interim relief**

A point of some importance with regard to the effectiveness in practice of public interest actions concerns the possibility for the courts to order an interim injunction in pending proceedings.

As has been indicated above in the body of this Report, interim decisions of one nature or another are often the only chance in practice to avoid lasting environmental damage or harm. All the countries covered in this study provide for some form of interim relief.

Providing for the possibility of interim relief in the new directive on access to justice will thus not introduce a new concept in the member states. However, it may be noted that the courts in most member states are generally quite reluctant to grant interim relief, not least where there is no protection to a developer in the event that the application for relief, including an injunction ultimately fails. The new directive should therefore clarify the conditions for granting interim relief.

The goal of such a clarification should be twofold: first, to ensure that member states do not act in the future so as to abolish their provisions for the grant of interim measures; secondly, by including such a provision/clarification in the directive, the effective application of interim relief will be subject to a more uniform application in the member states.

**(13) Costs for public interest law suits have to be reduced**

One finding of this study is that costs can represent a major hurdle for environmental associations wishing to bring public interest actions. This is especially the case in countries where the losing party has, in principle, to bear the costs of the winning party, as the perception of NGOs can well be that the risks in bringing a law-suit are too high.

It may be said that it is open to question why NGOs should have to bear costs in public interest actions as in these proceedings they represent interests of the general public as opposed to private interests.

A new directive should provide that NGOs do not have to bear the fees of the other side if the action is lost. It may be noted that the minimum requirement of Art. 9(4) of the Aarhus Convention that forbids “prohibitively expensive” procedures has a particular resonance for environmental associations which rely on donations and membership fees to finance law-suits.