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EC rules on public participation in environmental decision-making operating at the European and national levels

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***E.L. Rev. 839** *European Community rules require the consultation of civil society groups at an early stage of environmental decision-making, both at Community and national levels. However, the eligibility criteria to be met by interest groups intending to participate in consultations prescribed by EC measures differ significantly with regard to the level of environmental decision-making. The EC rules requiring and guiding consultations with civic groups in the process of national environmental decision-making are inconsistent with the standards regulating European level public consultations on environmental matters. This paper highlights the disparities between conditions for carrying out European and Member State level consultations with civic groups for the purpose of fulfilling EC environmental impact assessment standards. It calls for a streamlining of the EC requirements for consulting interest groups at the European and national levels on environmental issues and makes recommendations for achieving this goal.*

Introduction

European Community (EC) rules require the consultation of civil society groups at an early stage of environmental decision-making both at the EC and national levels. However, the eligibility criteria to be meet by interest groups intending to participate in consultations prescribed by EC measures differ significantly in regard to the level of environmental decision-making. The EC rules requiring and guiding consultations of civic groups in the process of national environmental decision-making dissent from the standards regulating European level public consultations on environmental matters. European law does not adopt a coherent and holistic approach in prescribing the requirements for conducting European and national level consultations on environmental issues with interest groups.

This paper highlights the disparities between conditions for carrying out European and Member State level consultations with civic groups for the purpose of fulfilling EC environmental impact assessment standards. It calls for streamlining the EC requirements ***E.L. Rev. 840** for consulting interest groups at the European and national levels on environmental issues and presents recommendations for achieving this goal.

Disparities between EC rules governing national and European level consultations with interest groups on environmental matters prior to EC accession to the Aarhus Convention

Prior to concluding the Aarhus Convention,[1] a multilateral treaty based upon international law, which introduced compulsory public participation in environmental decision-making and envisaged the mechanisms for the enforcement of participatory rights by eligible parties,[2] the EC had already put in place some measures intended to foster public participation in environmental decisions. The Community instruments provided for public participation in environmental decision-making both at the European and national levels.

At the EC level, civil interest groups have been involved in the process of governance since its creation. However, their structured incorporation in European policy formation is of relatively recent origin.[3] The European Community has begun to formalise the participation of interest groups in its decision-making as a part of its major undertaking to improve its governance, and in particular its efficiency and legitimacy.[4] The commitment to wider opportunities for stakeholders to take part actively in EU policy-shaping is one of the “Strategic Objectives 2005-2009” with which the European Commission launched a “Partnership for European Renewal”. In this context, the Commission emphasised, in particular, that “inherent in the idea of partnership is consultation and participation”.[5]

The Commission formalised the dialogue with civic groups by virtue of the adoption of minimum standards and general principles for consulting interested parties (hereafter the minimum standards).[6] Those standards are as follows: a) clear content of the consultation process: all communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses; b) consultation target groups: when defining the target group(s) in a consultation process, the Commission should ensure that the relevant parties have an opportunity to express their opinions; ***E.L. Rev. 841*** c) publications: the Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the internet and announced at the "single access point"[7] ; d) time limits for participation: the Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least eight weeks for reception of responses to written public consultations and 20 working days notice for meetings; and e) acknowledgement and feedback: receipt of contributions should be acknowledged. Results of open public consultation should be displayed on a website linked to the single access point on the internet.[8] Standards should be applied together with the following general principles: participation, openness, accountability, effectiveness and coherence.[9] Those principles and minimum standards stipulate that interest groups must fulfil particular criteria in order to participate in EC consultations of stakeholders and in-depth impact assessments carried out by the Commission prior to the drafting of legislative proposals or the open method of co-ordination (OMC) guidelines. The involvement of all interest groups in EU governance is subject to their compliance with principles of good governance[10] : representativeness, accountability and transparency.[11]

Those Commission consultation standards have been applicable since 2003 to the Commission impact assessment mechanisms, which precede drafting of its proposals in all major initiatives, i.e. those which are presented in its annual policy strategies or work programmes,[12] including proposals on environmental issues. The impact assessments should identify the likely positive and negative impacts of intended or proposed policy actions. The minimum standards are used as a tool to gather different opinions and views of interested parties, the consideration of which would enable the Commission to assess the impact of any legislative or policy co-ordination measures.

Those consultation standards applied by the Commission for the purpose of collecting public views in the process of impact assessment of its initiatives, including those on the environment, significantly differ from the conditions for the participation of interest groups in the preparatory stage of national environmental decision making prescribed by EC law. For example, the EC Directive on Genetically Modified Organisms ***E.L. Rev. 842*** (GMO)[13] ; the Strategic Environmental Assessment (SEA) Directive[14] ; the Greenhouse Gas Emission Directive[15] ; and the Water Framework Directive (WFD)[16] stipulates that national authorities are required to consult interest groups on draft decisions before the adoption of plans or programmes subject to those Directives or their submission to the legislative procedure. In some cases, the consultation of the public is required not on a regular basis but only "if appropriate".[17] Those Directives impose only the general duty upon Member States to consult interest groups prior to taking decisions in particular areas while leaving to the discretion of national authorities to determine the detailed arrangements and requirements for consultation of interest groups. Since the conditions for the participation of interest groups in national consultations vary from Member State to Member State, there is no common standard for the participation of interest groups in national consultations prescribed by EC law. Those national consultation standards are also not in conformity with the Commission requirements for the participation of interest groups in consultations carried out at the EC level in the process of assessing the impact of the Commission's proposals described above. For example, while the Water Framework Directive stipulates that states should only encourage the active involvement of all interested parties in national decision-making on issues covered by the Directive,[18] the Commission is compelled to apply the minimum standards during its impact assessment process as already explained.[19] Secondly, while the Directive prescribes that Member States should allow at least six months to comment on the draft national legislation,[20] the minimum standard D declares that the consultation period should not exceed eight weeks. Furthermore, the Commission consultations can be held in the form of written public consultations or a meeting with interested parties can be organised.[21] The Water Framework Directive prescribes that the submission of written comments is the only form of public participation in consultations.[22]

Thus, although the EC required, before its accession to the Aarhus Convention, both national and European authorities to conduct consultations with interested parties before adopting environmental decisions in some areas, it did not set up a single set of standards for the purpose of their execution. The eligibility criteria to be fulfilled by civic groups ***E.L. Rev. 843*** participating in national level

consultations imposed by EC law are significantly different from the European level consultation requirements.

Disparities between EC rules governing national and European level consultations with interest groups in the area of environmental decision-making subsequently to the EC accession to the Aarhus Convention

The disparities between the eligibility criteria for the participation of interest groups in national and European environmental decision-making prescribed by EC law have become even greater since the process for the transposition of the Aarhus Convention into EC law was set in motion.

Transposition of the Aarhus requirements in EC law

The Aarhus Convention encompasses three pillars: access to information, public participation in decision-making and access to justice. Our analysis is confined to the public participation rules and the access to justice prescriptions as far as they affect the enforcement of Aarhus public participation rights. Those public participation standards are not applicable in all areas of environmental decision-making but only to specific environmental decisions, i.e. granting of permits,[23] plans, programmes and policies relating to the environment,[24] and the preparation of executive regulations and/or generally applicable legally binding normative instruments.[25] The Aarhus public participation pillar relates to administrative acts, while it does not cover measures of a legislative nature.[26]

The conclusion of this Convention obliges the EC to align its legislation to the Aarhus requirements. The Aarhus provisions on participation affect both European laws directed to the Member States and EC rules applying to the Union institutions.[27]

As regards the legislation directed to the Member States, of relevance for our analysis is Directive 2003/35 providing for public participation in national decision-making relating to the issuance of permits.[28] This Directive amends, with regard to public participation and access to justice, Directive 85/337 on the assessment of the effects of central public and private projects on the environment (EIA Directive)[29] and Directive ***E.L. Rev. 844*** 96/61 on public participation in plans and programmes (IPPC Directive).[30] The other two European Directives providing for public participation in environmental decision-making, the Strategic Environmental Assessment (SEA) Directive[31] and the Water Framework Directive (WFD)[32] are considered to be already in compliance with the Aarhus Convention.

As regards the application of the Aarhus Convention to EC decision-making, the Regulation on the application of the Aarhus requirements to the EC institutions and bodies (hereafter the EC Environmental Consultations Regulation)[33] builds upon the provisions which already exist in this area and which are described above.

Both Directive 2003/35 and the EC Environmental Consultations Regulation give the right to individuals and civic society associations to express their opinions on environmental issues falling within the scope of the application of the Aarhus Convention.[34] They give interested parties a voice, not a vote. Those documents do not specifically lay down the modalities for public participation, but oblige national authorities and EC institutions respectively to make practical provisions to that end. Both types of EC measures stipulate that public participation should be realised through commencing of consultations with civil interest groups by the Member States authorities and the EC institutions respectively prior to environmental decision-taking. However, the operationalisation of these requirements leads to the establishments of different sets of standards for carrying out consultations at the European and national levels.[35]

Consultation standards

Directive 2003/35 expressly states that the Member States reserve the competence to identify the stakeholders to be consulted in accordance with nationally stipulated requirements and that they are also entitled to develop detailed arrangements for conducting those consultations.[36] Following the same logic, the EC Environmental Consultations Regulation envisages that for the purpose of European level consultations, the EC institutions are entitled to identify organisations, which may participate and establish the communication standards.[37] Contrary to the situation in the Member States, apart from the Commission, the EC institutions do not have their own consultation standards requiring them to identify the public affected or with an interest in particular ***E.L. Rev. 845*** environmental decisions envisaged by the EC institutions, although such common standards might be

developed in future.[38]

As far as the Commission is concerned, the EC Environmental Consultations Regulation stipulates that it should provide for public participation at the preparatory stage of its proposals, but it does not refer to its already developed general principles and minimum standards for consultation of interested parties in the impact assessment process, which were described above, as being appropriate for the application of the Aarhus requirements.[39] The Commission's document on the minimum standards explicitly emphasies that they are not applicable to consultation requirements under international agreements.[40] The Commission therefore acknowledges the fact that implementing the Aarhus Convention might require additional measures.[41] Moreover, the minimum standards are not applicable to all consultations conducted by the Commission, but only to those organised within the impact assessment process.[42] On the other hand, it is very unlikely that the minimum standards are not going to govern the Commission's consultation obligations imposed by virtue of the Aarhus Convention because, like the Aarhus public participation requirements, they are designed for the purpose of consulting civil society organisations in the period preceding the adoption of its decisions, that is to say, for the purpose of exploratory consultations.[43] It is difficult to imagine that all the Commission's impact assessments conducted in the process of preparation of its proposals are to be governed by the minimum standards except for initiatives dealing with the very limited number of environmental matters falling with the scope of the application of the Aarhus Convention. Indeed, since Art.9(1) of the EC Environmental Consultations Regulation requires the Commission to carry out the Aarhus consultations in the preparatory stage of its proposals, it is improbable that the Commission will adopt the other set of rules for this narrow area of its impact assessment policy. This is the reason why we shall assume that the Commission's minimum standards are relevant to the fulfilment of the Aarhus requirements by this institution. In addition, the Commission's proposal for the EC Environmental Consultations Regulation submits that it should adapt to the Aarhus requirements its already developed general principles and minimum standards for consultation of interested parties not only in environmental decision-making but in all major policy areas for which an extended impact assessment is required.[44]

***E.L. Rev. 846** The Commission's standards for consulting interested parties prior to drafting its proposals do not resemble any national set of conditions for carrying out consultations in environmental decision-making falling within the Aarhus area of application. For example, the minimum standards rule that all communications relating to consultations should be clear and concise cannot be found in any national set of conditions for conducting the Aarhus inspired consultations by national authorities.

One of the striking discrepancies in this respect concerns the respective competences of the Member States and EC to identify entities which are entitled to participate in specific consultations. While the eligibility criteria to be met by interest groups in order to participate in the exploratory consultations established at national level are deployed for the purpose of granting to interest groups the access to those consultations, the aim of the eligibility conditions introduced by the Commission's minimum standards is of an entirely different nature. They are not used for the selection of parties entitled to participate in consultations launched by the Commission. In contrast to the practices of national authorities, the Commission does not make access to consultations subject to a prior eligibility check. The minimum standards also do not introduce any accreditation rights for civic groups taking part in Commission consultations.[45] Indeed, they are intended to ensure that “every individual citizen, enterprise or association will continue to be able to provide the Commission with input”.[46] The eligibility criteria introduced by the minimum standards are applicable at the later stage when the Commission assesses the relevance or quality of comments expressed during the consultations.

Furthermore, although both Directive 2003/35 and the EC Environmental Consultations Regulation restrict the Aarhus public participation requirements to the duty of national and EC authorities to provide a timely opportunity for civil interest groups to express their opinion on particular regulatory proposals, and grant them no decision-making rights, it seems that the obligations placed upon the Member States are stricter than those expected to be complied with by the Community institutions. Notwithstanding that both national and European level environmental decision-making bodies are not required to follow, but only to take into due account, the results of the public participation,[47] the Member States ***E.L. Rev. 847** seemingly bear the greater responsibility for ensuring adequate participation of interest groups in consultations than the European Commission. It seems that national authorities are required to make special efforts in order to ensure the participation of interest groups in consultations. Directive 2003/35 instructs the Member States to develop detailed arrangements for both informing and consulting the public concerned for the purpose of fulfilling the Aarhus requirements. It stipulates that those arrangements can, for example, take the form of written

submissions or public inquires.[48] No comparable instructions are detectable in the EC Environmental Consultations Regulation or in the minimum standards, which will probably serve as a document for the operationalisation thereof. By contrast with Directive 2003/35, the EC Environmental Consultations Regulation only requires EC institutions to ensure that the public is informed and that the opportunities for public participation are available, but it does not oblige those institutions to ensure that the public is actually consulted.[49] The minimum standards also do not oblige the Commission to ensure participation of all interested organisations of civil society.[50] The European Ombudsman, who by virtue of Art.195 EC is empowered to investigate complaints by individuals relating to the implementation of the minimum standards,[51] has found that the Commission cannot be held responsible for the fact that input was not higher from non-governmental organisations in one of its consultations to which minimum standards were applicable.[52] This stands in sharp contradiction with the undertaking expressed in the Sixth Environmental Action Programme that as far as European policy-making is concerned:

"[R]eal efforts are to be made to ensure that the full range of interested groups are given the opportunity to influence decision-making."[53]

In addition, while the Member States in some instances are compelled to provide individualised feedback to organisations participating in consultations on how their contributions and opinions have affected the eventual policy decision and to show explicitly what the influence of the opinions brought forward in the participation process has been,[54] neither the EC Environmental Consultations Regulation nor the minimum standards place such an obligation upon the Commission. This is confirmed by the Ombudsman which is of the opinion that the publication of the results of EC consultations with civil groups on the webportal "Your-Voice-in-Europe" is an appropriate means for the fulfilment of the minimum standard C on publications.[55] However, those internet based appraisals do not contain any information on the impact of solicited contributions upon the draft proposal. Recently, the Commission recognised the need to provide better ***E.L. Rev. 848*** feedback, to explain how and to what extent it has taken comments into account and to ensure that a plurality of views and interests are expressed in consultations.[56]

The enforcement of participation rights

The most significant difference between rules governing the Aarhus-induced consultations at the national level and those applying at the EC level concerns the enforcement of participation rights by interest groups.

(a) The internal review

While access to courts at the EC level for the purpose of protecting Aarhus participation rights is conditioned upon the exhaustion of the possibility to request the EC institution for internal review, the corresponding national action is not subject to such a requirement. The EC Environmental Consultations Regulation applying the Aarhus participation standards to Community institutions states that only non-governmental organisations (NGOs), which made the request for internal review, may institute proceedings before the European Court of Justice (ECJ).[57] Directive 2003/35 does not exclude the possibility of a preliminary review procedure before an administrative authority where such a requirement exists under national law but it does not require that the exhaustion of such a procedure preconditions the recourse to judicial action for protecting Aarhus participation rights.[58] Though some national legal systems require potential appellants to exhaust an interim review procedure before they can access the courts, it is not requested in all Member States.[59] However, the Commission proposal currently under consideration for the implementation of the third Aarhus pillar on access to justice in environmental matters envisages a preliminary interim review procedure as a precondition for the institution of environmental court proceedings.[60]

Furthermore, while Directive 2003/35 does not designate the conditions for requesting an internal review to a public authority but leaves this to the Member State to determine, the EC Environmental Consultations Regulation establishes the conditions which should be met by NGOs that wish to make a request for internal review to the EC institution or body that has adopted an administrative act under environmental law or, in the case of an alleged administrative omission, should have adopted such an act.[61] Those criteria are set out in Art.11 of the Regulation. In order to be recognised as a qualified entity for the purpose of commencing an action for the protection of the Aarhus participation rights at the EC level, a non-governmental organisation shall comply with the following criteria: (a) it must be an independent and non-profit making legal person in accordance with a Member State's national law or practice; (b) it shall have the primary stated ***E.L. Rev. 849*** objective of promoting environmental

protection in the context of environmental law; (c) it must have existed for more than two years and be actively pursuing the objective referred to under (b); and (d) the subject matter in respect of which the request for internal review is made must be covered by its objective and activities. The Commission is charged with the duty of adopting the provisions which are necessary to ensure transparent and consistent application of those criteria.[62] At present, the Commission is examining the extent to which the future voluntary register of interest representatives, to be launched in Spring 2008, could serve as a tool for identifying NGOs entitled to institute internal review proceedings.[63] Although some of the criteria for identifying parties eligible to request internal review at the EC level resemble national requirements on access to administrative review, there is no coherence between them and the access criteria stipulated in the majority of the EC Member States. What is more, those criteria are not consistent with the requirements for the recognition of entities qualified to request an internal procedure laid down in the Commission proposal for the implementation of the third Aarhus pillar on access to justice in environmental matters, which is intended to establish a framework of minimum standards for access to the judicial and administrative proceedings in environmental matters in the EC Member States.[64]

In addition, while Directive 2003/35 explicitly states that the Member States must enable NGOs to have access to a review procedure for the purpose of protecting their Aarhus participation rights,[65] such insurance is not provided at the EC level. The EC Environmental Consultations Regulation does not explicitly guarantee to NGOs access to the internal review procedure for the purpose of protecting their Aarhus participation rights. It only acknowledges that a request for internal review of an administrative instrument adopted under environmental law can be filled in case of an alleged administrative omission. However, since a failure of an EC institution to consult the public prior to passing an environmental act as required by Aarhus can undoubtedly be qualified as an administrative omission, it is reasonable to believe that the EC Environmental Consultations Regulation, irrespective of the absence of explicit wording, is capable of enabling an NGO to seek the remedy for breach of its Aarhus participation rights through the internal review procedure. This granting of a right to NGOs to request internal review of acts adopted by the EC institutions involved in environmental decision-making does not stretch further than the already existing right of ***E.L. Rev. 850*** those entities to submit a complaint to the European Ombudsman concerning instances of maladministration in the activities of the EC institutions.[66] The difference is that access to the Ombudsman is not subject to numerous requirements apart from legal residency in one of the EC Member States and that action before it does not ensure access to the ECJ.

(b) Judicial review at EC level

If the Community body does not respond within 18 weeks or the NGO requesting the review is not satisfied with the answer, it may institute proceedings before the ECJ.[67] The regulation does not precisely indicate which act is susceptible for judicial review by the Court: an administrative act subject to the internal review procedure or the decision of the institution taken in the internal review procedure.[68] Court actions in cases where the Aarhus participation rights of citizens' groupings were neglected by EC authorities can be commenced, like the corresponding national actions, only by qualified entities. If an NGO which has exhausted the internal review option wishes subsequently to contest Community acts before the ECJ, it should do so not in accordance with the criteria for access to the internal review procedure listed in Art.11 of the EC Environmental Consultations Regulation, examined above, but in accordance with the admissibility test stated in Art.230(4) of the EC Treaty.[69]

However, the standing rules for challenging EC acts under Art.230(4) EC differ both from the EC Environmental Consultations Regulation criteria for commencing the internal review proceedings and national access to court requirements to be met by NGOs. Article 240(4) EC imposes the individual and direct concern test upon parties seeking standing before the ECJ. According to the case law of the ECJ, the applicant could claim that the decision was of individual concern to them only if that decision affected them by reason of certain attributes which were particular to them, or by reason of factual circumstances which differentiated them from all other persons, and thereby distinguishes them individually in the same way as the person addressed.[70] For an individual to be directly affected, the Community measure challenged must directly produce effects on his legal, not factual, position and leave no discretion to the addressees of that measure who are entrusted with its implementation, that being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules.[71]

If the individual concern test is satisfied, the ECJ must examine whether the applicant fulfils the direct concern requirement. An individual must meet both requirements in order to gain access to the ECJ.

This admissibility test in principle cannot be satisfied by an NGO. An association formed for the protection of the collective interests of a ***E.L. Rev. 851*** category of persons could not be considered to be directly and individually concerned, for the purpose of Art.230(4) EC, by a measure affecting the general interests of that category.[72] The ECJ put forward two possible exceptions that could give individual applicants--including environmental NGOs--*locus standi* under Art.230(4) EC. The first exception would apply to an applicant granted procedural rights by Community legislation in that specific decision[73] or its position as a negotiator was affected by the measure of which annulment is south.[74] The second exception applies in cases where there was a lack of an effective remedy for the applicant due to the absence of a national judicial procedure.[75] However, according to the ECJ in *UPA,* this does not imply setting aside the requirements for standing under Art.230(4) EC.[76] Lack of effective access to justice at the national level alone is not sufficient to grant standing at the Community level; the individual applicant must also be directly and individually concerned by the measure. The fact that the satisfaction of the individual concern, on the basis of exercise of express procedural rights, cannot arise in the context of the adoption of measurer of general application, but is instead confined to procedural guarantees arising “in the context of a procedure resulting in the adoption of an administrative act of individual application”[77] does not affect the protection of interest groups Aarhus participation rights because, as we mentioned earlier, the Aarhus public participation pillar relates only to administrative acts, while it does not cover measures of a legislative nature.

(c) The distinction between the criteria for commencing administrative and judicial review by NGOs for the purpose of protecting their Aarhus participation rights at the EC level

Thus, the access to justice criteria, as envisaged in the EC Environmental Consultations Regulation for the purpose of establishing an NGO's eligibility to make a request for internal review to the EC institutions taking Aarhus decisions, differ considerably from the Art.230(4) EC admissibility requirements. While the internal review eligibility criteria are focused on the objectives and activities pursued by NGOs intending to call upon the EC institutions for the purpose of protecting their Aarhus participation rights, the admissibility criteria laid down in Art.230(4) EC and the relevant case law of the ECJ emphasise the individual and direct concern of parties seeking judicial review of EC acts breaching their Aarhus participation rights. While any NGO incorporated under the national law of a Member State will have no difficulties meeting the EC Environmental Consultations Regulation criteria for initiating an internal review procedure, it is very unlikely that it would be able to satisfy the admissibility requirements for instituting a judicial procedure for protecting its Aarhus participation rights. The ECJ has already ruled out the possibility that an NGO can be individually and directly concerned only because it is interested in the protection of the environment.[78] As a consequence, the legality of decisions taken by Community institutions that may potentially harm public ***E.L. Rev. 852*** interest cannot be contested by NGOs before the ECJ. It upheld the judgment of the Court of First instance in *Greenpeace* that an NGO had to play a special role in a procedure which led to the adoption of an act in order to meet the Art.230(4) EC admissibility test.[79] It concludes that the NGO must be the interlocutor of the Commission with regard to the contested decision in order to claim individual concern.[80] This is not applicable in cases when NGOs would like to seek judicial protection of their Aarhus participation rights at the EC level because, as we already explained, neither the EC Environmental Consultations Regulation nor the minimum standards, as the rules which are probably going to be deployed for the purpose of the implementation thereof, impose an obligation upon the Commission or any other EC institution to individually invite particular parties to take part in the Aarhus-inspired consultations. In both cases, unspecified publicly issued information on the launch of the consultation suffices, as we explained above.

True, the *Greenpeace* judgment states that an NGO can be individually concerned if it participates in the procedure initiated by the Commission prior to the adoption of the impugned decision.[81] However, it is unlikely that the Commission's current practice of issuing via an internet site an invitation addressed to the public in general and not to particular parties to participate in the impact assessment consultations would be considered by the Court to qualify as the procedure, participation in which will guarantee the standing to NGOs to challenge EC acts in order to protect their Aarhus participation rights. On the other hand, it is doubtful whether an obligation imposed upon Community institutions to provide “early and effective opportunities for the public to participate during the preparation, modification or review” of the Aarhus decisions stipulated in Art.9 of the EC Environmental Consultations Regulation will be interpreted by the ECJ as a provision endowing NGOs with individual procedural rights within the meaning of the above cited *Greenpeace* ruling. So far no environmental NGO has been granted standing under Art.230(4) EC against decisions not addressed to them.[82]

Consequently, due to the fact that, as we have shown, NGOs experience great difficulties in satisfying the Art.230(4) EC admissibility test, it is unlikely that they will be able in the future to overcome this obstacle for the purpose of launching a judicial procedure for the protection of their Aarhus participation rights.[83]

(d) The justiciability of the Commission's minimum standards for consulting interested parties

An additional question is whether interest groups would be able to enforce their EC level Aarhus participation rights through the above-mentioned court procedure if they eventually become subject to the requirements laid down in the minimum standards previously described. Those standards are not legally enforceable in the European Court of Justice. The Commission claims that the objective of the minimum standards is not ***E.L. Rev. 853*** to establish procedural rights, respect for which would be subject to judicial control and review.[84] It insists that:

"[A] legally-binding approach to consultation is to be avoided, for two reasons: first, a clear dividing line must be drawn between consultations launched on the Commission's own initiative prior to the adoption of a proposal, and the subsequent formalised and compulsory decision-making process according to the Treaties. Second, a situation must be avoided in which a Commission proposal could be challenged in the court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European institutions should deliver on substance rather than concentrating on procedures."[85]

Thus, the Commission clearly states in its minimum standards for conducting consultation with interest groups that the situation must be avoided in which an EC measure could be challenged in the European Court of Justice on the grounds of alleged lack of consultation of interested parties prior to its drafting. In its view, such an overly legalistic approach would be incompatible with the need for a timely delivery of policy.[86] Consequently, an association that feels, for example, that the feedback offered by the Commission regarding its contribution to an EU consultation is not satisfactory is not entitled to apply for a judicial review of the quality of the grounds given in response to the objections made in the course of the consultation procedure. However, the Commission does not state that the consultation rules are non-justiciable, that is unable by their very nature to constitute normative bases for a court or court-like review. It merely states that it wishes to prevent such reviews.

The fact that the minimum standards have been adopted in a form of a communication, an atypical instrument not provided for in the Treaty, does not deprive it from being susceptible to judicial review. The case law of the Court of Justice demonstrates that communications producing legal effect can be challenged in legal proceedings.[87] Whether the minimum standards would have a legal effect as the instrument for the operationalisation of the Commission's Aarhus obligation to foster consultation with interest groups prior to drafting of its initiatives remains to be seen.

Although the minimum standards probably could not be enforced through court action, the breach thereof by the Commission could give rise to the institution of a request for internal review by the interest group whose Aarhus participation rights had been impaired. At present interest groups alleging the Commission non-observance of the minimum standards can complain to the European Ombudsman, which is empowered by virtue of Art.195 EC to investigate complaints from EU citizens concerning instances ***E.L. Rev. 854*** of maladministration in EU institutions, but not to pass legally binding judgments. The Ombudsman regards the Commission's failure to comply with the minimum standards for consultations as maladministration.[88] It notes that the standards are intended to ensure the principle of equality of treatment of interested parties participating in EU consultations and require the Commission to give each of them their proper weight in the decision it takes. The European Code of Good Administrative Behaviour, infringement of which constitutes the practice of maladministration, upholds those principles.[89]

(e) The distinction between national and EC level conditions to be met by NGOs wishing to protect their Aarhus participation rights in courts

The Art.230(4) EC admissibility conditions also differ from the requirements for bringing an action for the protection of the Aarhus participation rights at the national level. Directive 2003/35 provides for the possibility for all organisations which entered the consultation process to challenge before national courts non-compliance of national authorities with the Aarhus consultation requirements.[90] It regards the breach of the Member State duty to consult the public prior to taking decisions on issues

falling within the areas of the application of the Aarhus Convention to constitute the infringement of an essential procedural requirement for adopting such measures and consequently the grounds for challenging their legality. Access to justice is reserved for organisations qualified as the “public concerned”[91] that claim “sufficient interest” or “an impairment of a right”.[92] “The public concerned” means the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions.[93] Directive 2003/35 states that standing rules for challenging national acts violating the Aarhus participation right are to be determined in accordance with the respective national standards providing that the public concerned, i.e. the public affected or likely to be affected by a particular measure having sufficient interests in environmental decision-making, or maintaining an impairment of a right, where national law requires this as a precondition, should have access to the courts for the purpose of enforcing their Aarhus participation rights.[94] National law must define what constitutes a sufficient interest and impairment of a right.[95] To this end, the interest of any NGO promoting environmental protection and meeting any requirements under national law shall be deemed sufficient. Likewise, they shall be deemed to have rights capable of being impaired. Non-governmental organisations meeting national requirements for ***E.L. Rev. 855*** incorporation of such entities are deemed to fulfil those conditions.[96] Thus, litigation rights of non-governmental organisations intended to seek the courts' remedies for the protection of their Aarhus participation rights at the level of the Member States are subjected to national standing rules. These rules vary from one Member State to the other.[97] In some Member States, those standing requirements are more generous for interest groups than in others. For example, in some countries, such as Germany, civil courts do not recognise standing for NGOs, and the administrative courts are the only venue possible for public interest actions; in others NGOs may bring cases before the civil courts. In the majority of states, NGOs are allowed to bring proceedings in environmental matters before administrative courts. Overall, three principal positions are identifiable in the Members States regarding the possibilities for NGOs' actions before administrative courts: (1) the extensive approach in the form of an *action popularis* ; (2) the restrictive approach, according to which a “subjective right”, i.e. “impairment of a 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 at issue has to be demonstrated. Most countries endorse the intermediate approach regarding the admissibility of lawsuits brought by environmental associations before administrative courts. In order to seek review of administrative acts, administrative courts in most Member States do not require NGOs to demonstrate the violation of subjective rights. They need only 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.[98]

Consequently, while at the national level, *locus standi* for judicial challenging of measures breaching NGOs' Aarhus-induced participation rights is based upon “sufficient interest” or “impairment of a right”, in the limited number of states such as Germany, standing before the ECJ for the comparable European level actions are governed by the individual and direct concern principle. In the majority of the Member States, NGOs fulfilling national requirements for registration and establishment would not have any difficulties meeting the standing conditions. NGOs intending to initiate the comparable proceedings at the EC level are not, as a matter of principle, capable of satisfying the admissibility test. The possession of “sufficient interest” or “impairment of a right” does not suffice at the EC level. The proposals of Advocate General Jacobs in *UPA* [99] ***E.L. Rev. 856*** and the Court of First Instance (CFI) in *Jégo Quéré* [100] for relaxing the individual and direct concern requirement and replacing it by the alternative standing rules similar to those operating at the national level, such as “a substantial adverse effect upon the applicant's interest” and “impairment of a right or the imposition of an obligation” respectively were bluntly and unreservedly rejected by the Court of Justice.[101] This means that NGOs' actions for protecting their Aarhus participation rights at the EC level are to be confined to the internal review procedure stipulated in Art.10(1) of the EC Environmental Consultations Regulation, while at the national level, they would have wider opportunities for commencing court actions. Saying this, we have to bear in mind that even in countries which provide as a matter of law very broad access to the courts in environmental matters, the actual number of cases brought by NGOs is limited.[102]

Eliminating discrepancies between EU and national level eligibility criteria for the enforcement of Aarhus participation rights by interest groups

The EC measures transposing the Aarhus public participation requirements at the national and European levels of environmental decision-making on the issues falling within the areas of the application of this Convention do not introduce a single universally deployable set of standards for

consulting interest groups. The conditions for carrying out those consultations at the national level differ significantly from those introduced for the purpose of EC level consultations. Maintenance of those discrepancies is not sustainable for several reasons. From the normative point of view, this two-track approach contravenes the Commission undertaking expressed in its proposal for an EC Environmental Consultations Regulation that the measures envisaged for implementing the Aarhus public participation stipulations to EC institutions are complementary to measures that have been adopted for the level of the Member States.[103] In respect to practical implementation of those double standards the problems are even greater. Since national and not only European associations are eligible to submit contributions to the consultations initiated by the Commission in accordance with the minimum standards,[104] they have to be capable of meeting both the EC consultation requirements in order to make their views heard at the European level and the national consultation conditions when they intend to engage in environmental decision-making in particular Member States. Those two sets of standards differ considerably.[105] For example, the minimum standards on accountability and transparency requirements are noticeably stricter than corresponding national requirements when it comes to the need for disclosure of financial information. The recently issued Commission recommendations to Member States to ***E.L. Rev. 857*** enhance transparency and accountability of the non-profit sector may contribute to closing this gap.[106] However, since the Member States reserve significant discretion in the implementation of those recommendations it is unlikely that their application will result in the establishment of a consistent and homogenous set of rules for governing accountability and transparency of non-governmental associations in the European Union. The situation becomes even more complicated when we take into consideration the fact that Directive 2003/35 envisages a possibility for interest groups to participate in consultations organised by a state other than their state of origin.[107] When taking part in the Aarhus consultations in countries other then their state of incorporation, interest groups are required to comply with the access to consultation and access to justice standards of the host state. Since those conditions differ significantly from one country to the other, it is obvious that interest groups intending to consummate their Aarhus transboundary participation rights should be capable of meeting the great variety of consultation standards.[108] Furthermore, the conditions to be fulfilled by interest groups for the purpose of securing the enforcement of their Aarhus participation rights differ in the first place from the eligibility criteria for the participation in the Aarhus consultations within one country and from the access to justice requirements in other countries. On top of that, the requirements for the NGOs' access to the EC judiciary for the purpose of enforcing their Aarhus participation rights at the European level differ from the respective national requisites. The most important consequence of this state of affairs is the fragmentation and proliferation of rules governing the Aarhus public participation and the access to justice requirements at the national and EC levels.

Thus, the EC rules transposing the Aarhus public participation requirements into environmental decision-making proceedings at the national and European levels need to be streamlined in order to achieve a coherent approach in the implementation thereof. This can be ensured by introducing a single set of eligibility criteria for the participation of interest groups in the Aarhus-induced consultations preceding the adoption of environmental measures both at the national and EC levels. The EC legislation intended to incorporate the Aarhus public participation requirements into its legal system, that is to say Directive 2003/35 which adjusts EC law in respect to public participation in the taking of decisions at the level of the Member States and the EC Environmental Consultations Regulation applying the Aarhus requirements to EC institutions should be rendered consistent with each other.

The Commission proposal for the implementation of the third Aarhus pillar on access to justice in environmental matters which is intended to establish a framework of minimum standards for access to the judicial and administrative proceedings in environmental ***E.L. Rev. 858*** matters in the EC Member States[109] cannot achieve this objective due to the following reasons:

• it is applicable only to the Aarhus access to justice pillar and not to the access to consultation part. As such it does not aim to develop a uniform approach in establishing criteria for the utilisation of the Aarhus participation and enforcement rights;

• it only envisages streamlining of national standing rules, and it is not relevant for the judicial activity of the European Court of Justice;

• the access rules it stipulates are not compatible with the EC Environmental Consultations Regulation requirements. We have already emphasised that those two sets of rules introduce different criteria for the recognition of an entity qualified to request an internal review before a national authority and an EC institution or body respectively.[110]

The most efficient way to streamline EC rules implementing the Aarhus requirements at the national and European levels could be through the unification of the requirements for the access to the Aarhus consultations as well as the rules for the enforcement of the Aarhus participation rights, both at the European and national levels. This unification could be realised by subjecting interest groups access to consultation and access to justice conduct at the EU and national levels to a single set of requirements. This single set of requirements could be designed on the basis of the abundant proposal for the development of European association incorporation rules known as an EA statute.[111] Although the EC institutions failed to pass a law on the EA statute, the principles stipulated by the document did not lose their importance for regulating interest representation in Europe, because they are, to a large extent, reproduced in the above-mentioned Commission recommendations to Member States regarding a code of conduct for non-profit organisations intended to establish "common general minimum transparency standards for non-profit organisation (NPOs) in the European Union (EU)".[112] Although those recommendations are adopted within the framework of the EU fight against the misuse of NPOs for terrorist financing and other criminal purposes, they in fact introduce a comprehensive system for the regulation of non-profit sector activities ***E.L. Rev. 859*** in general. Moreover, they are in many respects similar to the access to communication requirements posited by the minimum standards and the conditions for access to justice for the purpose of the enforcement of the Aarhus public participation rights laid down in the EC Environmental Consultations Regulation as well as to the eligibility criteria for funding environmental non-governmental associations by the European Union.[113] The proposal for an EA statute stipulates that interest associations should fulfil the following requirements in order to qualify for participation in consultations preceding law-making and in order to initiate litigation for the purpose of enforcing their participation rights: (1) a grouping of natural and/or legal persons, the members of which pay contributions or pool their knowledge or their activities on a permanent basis for a non-profit making purpose, either in the general interest or in order to promote the trade, professional or other interests of its members in the most diverse areas. An association shall be free to determine the activities necessary for the pursuit of its objectives … provided its activities are compatible with the objectives of the Union, and the public interest; (2) an association may be formed by natural or legal persons resident in two or more Member States; (3) respect for the principle of good governance to internal organisation including the request that its assets should be used exclusively for the pursuit of its objectives; and (4) respect for EU disclosure rules.[114]

Interest groups complying with those criteria could be granted "labels" or "seals of approval" by public or private monitoring bodies or non-profit umbrella organisations for associations adopting the enhanced transparency and accountability measures as already set out in the above-mentioned Commission recommendations to Member States for enhancing transparency and accountability of non-profit associations.[115]

The subjection of the EC and national level Aarhus access to consultation and access to justice entitlements of interest groups to those requirements or to an adjusted version thereof will contribute to the elimination of the existing disparities between those two distinct set of standards. This will ensure the adoption of a holistic approach to the transposition of the Aarhus public participation rules both at the European and Member States levels.

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1. Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2005] OJ L 124/1. The European Community signed the Convention in 1998.

2. United Nations Economic Commissions for Europe (UN/ECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1999) 38 *International Legal Materials* 3, 517.

3. For a comprehensive overview of the involvement of interest groups in the European Union governance, see Obradovic, "Civil Society and the Social Dialogue in European Governance" (2005) 24 Y.E.L. 261.

4. Commission of the European Communities, *European Governance: White Paper,* COM (2001) 428.

5. Commission of the European Communities, *Strategic Objectives 2005-2009--Europe 2010: A Partnership for European Renewal Prosperity, Solidarity and Security --Communication from the President in agreement with Vice-President Wallström,* COM (2005) 12, p.5. See further Makinen, "Participation and Rights in the Documents of the European Commission" (2007) paper presented at the CINEFOGO Network of Excellence Mid-Term Conference on "European Citizenship--Challenges and Possibilities", Roskilde, June 1-3,

2007. The new EU Treaty will contain the provisions on participatory democracy agreed at the 2004 Intergovenmental Conference: see Art.I-47 CT; Brussels European Council June 21/22, 2007, Presidency Conclusions (*www.eu2007.de/en/News/download docs/Juni/0621-ER/010conclusions.pdf*), p.17.

6. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704.

7. See: *http://europa.eu.int/yourvoice/consultations/index_en.htm.*

8. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704, pp.19-22.

9. Above fn.8, pp.16-18.

10. The concept of good governance entails understanding that public decision-making and implementation thereof should be conducted in accordance with particular standards comprising an efficient, open, accountable and audited public service (Harlow, "Deconstructing Government" (2004) 23 Y.E.L. 57). See also the Commission's definition of the concept of good governance in Commission of the European Communities, *European Governance: White Paper,* COM (2001) 428, p.8.

11. On requirements to be fulfilled by interest groups for the purpose of their participation in EC consultations see Obradovic and Alonso Vizcaíno, "Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations" (2006) 43 C.M.L. Rev. 1049.

12. See Commission of the European Communities, *Communication on Impact Assessment,* COM (2002) 276, *Action Plan Simplifying and Improving the Regulatory Environment,* COM (2002) 278, at p.5, and *Impact Assessment Guidelines,* June 15, 2005, (SEC (2005) 791). See also impact assessment website *http://ec.europa.eu/governance/impact/index_en.htm.*

13. Directive 2001/18 of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms, and repealing Council Directive 90/220, [2001] O.J. L 106/1, Art.24.

14. Directive 2001/42 of the European Parliament and of the Council on the assessment of the effects of certain plants and programmes on the environment, [2002] O.J. L197/30, Art.6.

15. Directive 2003/87 of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61, [2003] O.J. L275/32, Art.8.

16. Directive 2000/60 of the European Parliament and of the Council establishing a framework for Community action in the field of water policy, [2000] O.J. L327/1, Art.14. It is amended by Decision 2455/2001, [2001] O.J. L331/1.

17. See, e.g. Art.6(4) of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive), [1992] O.J. L206/7 applicable by virtue of Art.7 of the same Directive to Directive 79/409 on the conservation of wild birds (Birds Directive), [1979] O.J. L103/1.

18. At Art.14(1).

19. Commission of the European Communities, *Action Plan Simplifying and Improving the Regulatory Environment,* COM (2002) 278, p.5.

20. At Art.14(2).

21. Minimum standard D.

22. At Art.14(2).

23. Aarhus Convention Art.6.

24. Above fn.23, Art.7.

25. Above fn.23, Art.8.

26. Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, [2006] O.J. L246/13, position 11.

27. Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in Environmental matters, [2005] O.J. L124/1, Annex: Declaration by the European Community in accordance with Art.19 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

28. Directive 2003/35 of the European Parliament and of the Council 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 and 96/61, [2003] O.J. L156/17, Art.2.

29. [1985] O.J. L175/40.

30. [1996] O.J. L257/26.

31. See above.

32. See above.

33. Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] O.J. L 246/13.

34. Directive 2003/35 Art.2 and Art.9 of the EC Environmental Consultations Regulation. The type of decisions subject to the Aarhus provisions are listed in Arts 6,7, and 8 thereof.

35. There are also significant inconsistencies between participatory rights and mechanisms for their enforcement conferred upon the public by EC Directives applying the Aarhus standards to the level of Member States (EIA and IPPC Directive as amended by Directive 2003/35, SEA Directive and WFD).

36. At Art.2(3).

37. At Art.9(2).

38. See Commission of the European Communities, *Communication from the Commission: Follow-up to the Green Paper European Transparency Initiative,* COM (2007) 127, pp.5-6.

39. At Art.9(1).

40. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704, p.16.

41. Above fn.40, p.6 and Commission of the European Communities, *Communication from the Commission: Follow-up to the Green Paper European Transparency Initiative,* COM (2007) 127, p.6, fn.10.

42. On the scope of the application of the minimum standards see Obradovic, and Alonso Vizcaino, above fn.11, pp.1062-1069.

43. Above fn.42, p.14.

44. Commission of the European Communities, *Proposal for a Regulation of European Parliament and of the Council on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC Institutions and Bodies,* COM (2003) 622, p.15.

45. The codification of standards for the conduct of the impact assessment consultations is accompanied with the establishment of the CONECCS database (Consultation, European Commission and Civil Society), which offers the general public information on the civil society's non-profit organisations established at European level and the committees and other consultative bodies the Commission uses when consulting organised civil society in either an informal or structured manner. At present, it lists more than 800 organisations. The Commission constructs this database as a follower of the directory on European non-profit associations published in 1996. However, not only NGOs, but also private interest organisations such as World Federation of Advertisers, the European Demolition Associations, and the Banking Federation of the European Union are included. CONECCS became fully operational in June 2002. The index, which is compiled on a voluntary basis, is intended to serve only as an information source and not as an instrument for securing exclusive access to the Commission's consultative process. Although it forms a part of the organised consultative process based on the minimum standards, it does not represent a system for accrediting certain organisations vis-à-vis the Commission. It should provide an overview of advisory committees set by the Commission and a non-exhaustive list of organisations active at the European level. Moreover, the criteria which are to be met by organisations seeking to be included in this database, differ substantially from those stipulated in the minimum standards. For CONECCS eligibility criteria, see *http://europa.eu.int/comm/civil society/coneccs/inscription.cfm* ?CL_en.

46. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704, p.11.

47. Directive 2003/35 Art.2c and Art.9(5) of the EC Environmental Consultations Regulation.

48. Annex V Arts 3 and 5.

49. At Art.9(2).

50. Prior to the publication of the minimum standards, the Commission gave some indication that such feedback should be guaranteed (*Commission's Discussion Paper The Commission and Non-governmental Organisations: Building a Stronger Partnership,* COM (2000) 11, p.10.

51. The European Ombudsman, Decision 948/2004/OV of May 4, 2005, para.3.8, available at: *www.euroombudsman.eu.int/decision/en/040948.htm*

52. Above fn.51, para.3.12.

53. COM (2001) 31, p.62.

54. Verschuuren, "Public Participation Regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention" (2005) 4 Y.E.E.L. 29, 38.

55. The European Ombudsman, Decision 948/2004/OV of May 4, 2005, paras 3.12 and 3.13 respectively. See: *www.euro-ombudsman.eu.int/decision/en/040948.htm*

56. Commission of the European Communities, *Communication from the Commission: Follow-up to the Green Paper European Transparency Initiative,* COM (2007) 127, p.6.

57. At Art.12(1).

58. Directive 85/337 Art.10a as amended by Directive 2003/35 and Art.15a of Directive 96/61 as amended by Directive 2003/35.

59. De Lange, "Beyond Greenpeace, Courtesy of the Aarhus Convention" (2003) 3 E.E.L.R. 227, 240.

60. Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters,* COM (2003) 624, Art.6.

61. EC Environmental Consultations Regulation Art.10(1).

62. Above fn.61, Art.11.

63. Commission of the European Communities, *Communication from the Commission: Follow-up to the Green Paper European Transparency Initiative,* COM (2007) 127, p.5.

64. Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters,* COM (2003) 624, Art.6 in conjunction with Arts 5 and 8. This proposal stipulates the criteria for the recognition of entities qualified to request an internal review before an administrative authority in its Art.8. It reads: "In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group shall comply with the following criteria: (a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment; (b) it must have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives; (c) it must have been legally constituted and worked actively for environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which is constituted, but not exceeding three years; (d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c)."

65. Directive 85/337 Art.10a as amended by Directive 2003/35 and Art.15a of Directive 96/61 as amended by Directive 2003/35.

66. See Art.195 EC and the publication, *What Can the European Ombudsman Do for You?: The European Ombudsman Guide for Citizens* at: *www.ombudsman.europa.eu/guide/en/default.htm*

67. EC Environmental Consultations Regulation Arts 10 and 12.

68. See extensively on the issue J. H. Jans, "Did Baron von Munchhausen ever visit Aarhus? Some critical remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies" in Richard Macrory (ed.), *Reflections on 30 Years of EU Environmental Law; A High Level of Protection?,* The Avosetta Series, Vol.7 (Groningen: Europa Law Publishing, 2005), p.475.

69. Above fn.67, Art.12.

70. Case C-50/00 P, *UPA v Council* [2002] E.C.R. I-6677 at [36].

71. Case T-223/01, *Japan Tobacco* [2002] E.C.R. II-3259 at [45].

72. Case C-321/95 P, *Greenpeace v Commission* [1998] E.C.R. I-1651 at [27] and [29].

73. Above fn.70, at [15], and Case T-122/96, *Federolio v Commission* [1997] E.C.R. II-1559.

74. Case T-196/03, *EFfCI* [2004] E.C.R. I-04263 at [42].

75. Case C-321/95 P, *Greenpeace v Commission,* above fn.70, at [18] and [19].

76. See above.

77. Case T-369/03, *Arizona Chemical* [2005] E.C.R. II-05839 at [86]. See further [83]-[92].

78. See above.

79. Case T-585/93, *Greenpeace v Council* [1995] E.C.R. II-2205 at [59] and Case C-321/95 P, *Greenpeace v Commission* [1998] E.C.R. I-1651 at [15].

80. Above fn.75, at [62] and [16] respectively.

81. Above fn.75.

82. De Lange, above fn.59, p.237, fn.68.

83. This seems to be confirmed in case T-94/04, *European Environmental Bureau* [2005] E.C.R. II-04919 at [66] and [67], where the CFI mentions that a (draft) regulation cannot alter the case law of the ECJ, based on Art.230 EC.

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

85. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704, p.10.

86. Above fn.80

87. Case C-366/88 *France v Commission* [1993] E.C.R. I-3571; Case C-303/90, *France v Commission* [1991] E.C.R. I-5315; Case C-325/91, *France v Commission* [1993] E.C.R. I-3283; Case C-57/95, *France v Commission* [1997] E.C.R. I-1627. See also Lefevre, "Interpretative Communications and the Implementation of Community Law at National Level" (2004) 29 E.L. Rev. 808.

88. The European Ombudsman, Decision 948/2004/OV of May 4, 2005, para.3.8, available at: *www.euroombudsman.eu.int/decision/en/040948.htm*

89. European Code of Good Administrative Behaviour (2005) Arts 5 (absence of discrimination) and 9 (objectivity), Luxembourg: Office for Official Publications of the European Communities. See also Case T-70/99, *Alpharma Inc v Council* [2002] E.C.R. II-3495 at [140].

90. Directive 85/337 Art.10a as amended by Directive 2003/35 and Art.15a of Directive 96/61 as amended by Directive 2003/35.

91. Above fn.85.

92. Above fn.85.

93. Directive 85/337 Art.1(2) as amended by Directive 2003/35 and Art.2(14) of Directive 96/61 as amended by Directive 2003/35.

94. Directive 85/337 Art.10a as amended by Directive 2003/35 and Art.15a of Directive 96/61 as amended by Directive 2003/35.

95. Above fn.89.

96. Directive 85/337 Art.10a as amended by Directive 2003/35 and Art.15a of Directive 96/61 as amended by Directive 2003/35.

97. Verschuuren, above fn.54, pp.183-192; De Sadeleer, Roller and Dross, *Access to Justice in Environmental Matters and the Role of NGOs* (Groningen: Europa Law Publishing, 2005), pp.176 and 199.

98. De Sadeleer, Roller and Dross *Access to Justice in Environmental Matters and the Role of NGOs* (Groningen: Europa Law Publishing, 2005), pp.183-187. The admissibility of legal actions commenced by NGOs is in nearly all the Member States contingent upon additional standing requirements. The most common are: that the association acts within the limits of its statute, that the interests at stake must be reflected in the statute of the association, that the NGO is active in policy area to which the initiated judicial action relates, that of a minimum time period of existence of the NGO, generally three years, that the association has legal personality, be a non-profit organisation, has a certain geographical reach or be accorded sanding entitlements or public interest status by a state (Sadeleer *et al.* , pp.187-191). The majority of those criteria have been incorporated in the proposal for an access to justice directive applicable to the practices of national courts (above, fn.60).

99. Opinion of A.G. Jacobs in Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] E.C.R. I-6677. See: *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en,* paras 59 and 103.

100. Case T-177/01, *Jégo Quéré v Commission* [2002] E.C.R. II-2365 at [26].

101. Case C-50/00 P, above fn.94 at [40], [41] and [44], and Case C-263/02 P, *Commission v Jégo Quéré* [2004] E.C.R. I-3425 at [34].

102. De Sadeleer, Roller and Dross, above fn.92, p.167.

103. Commission of the European Communities, *Proposal for a Regulation of European Parliament and of the Council on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC Institutions and Bodies,* COM (2003) 622, p.5.

104. Commission of the European Communities, *Communication from the Commission: Towards a Reinforced Culture of Consultation and Dialogue--General Principles and Minimum Standards for Consultation of Interested Parties by the Commission,* COM (2002) 704,

pp.11-12.

105. Verschuuren, above fn.54, pp.183-192.

106. Commission of the European Communities, *Commission Communication to the Council, the European Parliament and the European Economic and Social Committee: The Prevention of a Fight against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector: Recommendations for Member States and a Framework for a Code of Conduct for NPOs to Enhance Transparency and Accountability in the Non-profit Sector to Prevent Terrorist Financing and Other Types of Criminal Abuse,* COM (2005) 620.

107. Directive 85/337 Art.7 as amended by Directive 2003/35 and Art.17 of Directive 96/61 as amended by Directive 2003/35.

108. This argument might be considered to have a relative significance because transboundary actions are very rarely commenced (De Sadeleer, Roller and Dross, above fn.92, p.167).

109. Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters,* COM (2003) 624, Art.6 in conjunction with Arts 5 and 8. See fn.65 above. This proposal stipulates the criteria for the recognition of entities qualified to request an internal review before an administrative authority in its Art.8. It reads: "In order to be recognised as a qualified entity, an international, national, regional or local association, organisation or group shall comply with the following criteria: (a) it must be an independent and non-profit-making legal person, which has the objective to protect the environment; (b) it must have an organisational structure which enables it to ensure the adequate pursuit of its statutory objectives; (c) it must have been legally constituted and worked actively for environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which is constituted, but not exceeding three years; (d) it must have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State, in accordance with provisions set out by virtue of paragraph 1 (c)."

110. Above fn104.

111. Commission of the European Communities, *Amended Proposal for a Council Regulation (EEC) on the Statute for a European Association,* [1993] O.J. C236/01. For the latest version see Council of the European Union, *Amended Proposal for a Council Regulation (EEC) on the Statute for a European Association,* March 17, 2003, Council document 6873/03.

112. Above fn.106, p.15.

113. Decision 466/2002 of the European Parliament and the Council laying down a Community action programme promoting non-governmental organisations primarily active in the field of environmental protection, [2002] O.J. L75/1, Arts 2 and 3.

114. Above fn.108, Arts 1 and 3.

115. Above fn.108, p.13.