IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

Commission Notice on access to justice in environmental matters

(2017/C 275/01)

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A. **INTRODUCTION: ACCESS TO JUSTICE IN EU ENVIRONMENTAL LAW**

1. The environment is our life-support system and a common heritage. Preserving, protecting and improving is a shared European value, with EU environmental law establishing a common framework of obligations for public authorities and rights for the public.

2. The recently adopted Commission communication 'Better results through better application' ([1]) stresses that, where obligations or rights under EU law are affected at national level, there has to be access to national courts in line with the principle of effective judicial protection set out in the EU Treaties and with the requirements enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

3. EU law recognises that, in the domain of the environment, access to justice needs to reflect the public interests that are involved.

4. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ([2]) ('the Aarhus Convention') establishes that, in certain cases, natural and legal persons (such as non-governmental organisations, 'NGOs') can bring a case to a court or to other impartial bodies in order to allow for the review of acts or omissions of public or private bodies ([3]). This has been ratified by all Member States and by the EU ([4]).

5. Apart from meeting an international commitment, ensuring that individuals and NGOs have access to justice under this Convention is also an important means of improving Member State's implementation of EU environmental laws without the need for Commission intervention.

6. The Aarhus Regulation, (EC) No 1367/2006, applies the Aarhus Convention to EU institutions and bodies. For Member States, certain pieces of EU secondary legislation contain express access to justice provisions mirroring those of the Convention ([5]).

7. Outside the scope of harmonised EU secondary legislation, the current legislative provisions in the Member States on access to justice in environmental matters differ considerably ([6]). At the same time, the Court of Justice of the European Union ('CJEU') has issued significant rulings clarifying EU requirements on access to justice in environmental matters, both within and outside the context of the harmonised secondary legislation. The result is a sizeable and valuable body of CJEU case-law touching on all aspects of the subject.

([1]) C(2016)8600.
([2]) http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
([3]) See, in particular, Article 9(2) and (3) of the Aarhus Convention.
([4]) Decision 2005/370/EC.
([5]) For example, the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU.
([6]) http://ec.europa.eu/environment/aarhus/studies.htm

8. Against this background, a number of problems have been identified:

— Individuals and NGOs are adversely affected by obstacles to access to national courts. This helps to explain why a stream of preliminary references have been submitted to the CJEU by different national courts, seeking clarification on whether access should be given and under what conditions. The public is affected more indirectly when ineffective access to justice contributes to implementation failures, e.g. unhealthy air pollution levels resulting from administrative inaction.

— Public administrations and national courts face burdens due to litigation centred on issues related to access to justice. Providing greater clarity based on the existing CJEU case-law should contribute to efficient public administration as well as the administration of justice.

— Businesses are negatively affected by delays in administrative decision-making related to prolonged litigation due to unclear access to justice rules, such as on standing rights and the scope of judicial review. National courts are increasingly filling the gaps in national procedural law, particularly in the area of legal standing, but, because their rulings relate to specific cases, they cannot provide all the clarity and predictability necessary to guide investment decisions.

Timing and a clear legal framework are particularly relevant for small and medium-sized enterprises ('SMEs') which cannot afford unnecessarily long authorisation procedures and uncertainty about litigation risks and scope. Businesses can also suffer where ineffective access to justice contributes to a failure to provide them with the clean environment on which many of them depend or a failure of government to make investments that are good for the green economy.

9. Having considered several options, the Commission decided that an interpretative communication on access to justice in environmental matters (i.e. this Notice) would be the most appropriate and effective means to address the problems. By bringing together all the substantial existing CJEU case-law, and by drawing careful inferences from it, it would provide significant clarity and a reference source for the following: national administrations who are responsible for ensuring the correct application of EU environmental law; national courts, which guarantee respect for EU law and are competent to refer questions on the validity and interpretation of EU law to the CJEU; the public, notably individuals and environmental NGOs, who exercise a public-interest advocacy role; and economic operators, who share an interest in the predictable application of the law. The light adoption procedure would help the Commission deliver an effective initiative in the short term.

10. The option of continuing with 'business-as-usual' and only relying on CJEU case-law to evolve was not considered as an appropriate one in view of the needs identified. A legislative option in the form of a dedicated access to justice legal instrument was also not further pursued in view of the experience with a Commission proposal of 2003 ([7]) which remained with the Council for over a decade without any agreement being found or in prospect ([8]). Finally a sector-by-sector legislative approach, focusing on adding access-to-justice provisions in areas in which specific challenges have been identified (such as nature, water, waste and air) would not help in the short term and, in any case, the EU legislature does not appear to be currently receptive ([9]).

11. The Notice is based on provisions of EU law, including the Charter of Fundamental Rights, and the case-law of the CJEU. It addresses how the public can challenge decisions, acts or omissions of public authorities before a court of law or similar body, covering legal standing, the intensity of scrutiny and the effective remedies to be provided by the national judge, and several other safeguards. In doing so, it provides a clear idea of what is necessary at national level in order to comply with these requirements.

([7]) COM(2003) 624 final.
([8]) This proposal was therefore withdrawn by the Commission in 2014, see 'Withdrawal of obsolete Commission proposals' (OJ C 153, 21.5.2014, p. 3).
([9]) In negotiating the National Emissions Ceiling Directive, (EU) 2016/2284, the Council and Parliament considered including access to justice provisions, but decided to limit mention of access to justice to a recital.

12. In case Member States have to take measures to ensure compliance, they will be helped to make the necessary changes, including via exchanges under the recently adopted Environmental Implementation Review ('EIR') ([10]). The Commission published on 6 February 2017 the first ever comprehensive overview of how EU environmental policies and laws are applied on the ground. This shows that environmental policies and laws work but that there are big gaps in how they are put into practice across Europe. The most pressing implementation gaps across EU Member States are found in the policy fields of waste management, nature and biodiversity, air quality, and water quality and management. The EIR communication and the 28 country-specific reports set the scene for a positive and constructive approach to improving implementation of EU law and the present Notice is an important supplement to that.

13. In case of non-compliance with existing legal requirements under the EU *acquis*, the Commission will also continue to use infringement procedures to ensure their fulfilment.

14. While focused on the environment, the Notice fits with broader Commission work on access to justice, notably the EU Justice Scoreboard, and on the application of the Charter of Fundamental Rights, and the EU Framework to strengthen the rule of law ([11]). Effective justice systems play a crucial role in upholding the rule of law and the fundamental values of the European Union, as well as in ensuring effective application of EU law and mutual trust. That is why improving the effectiveness of national justice systems is one of the priorities of the European Semester, the EU's annual cycle of economic policy coordination. The EU Justice Scoreboard assists Member States to achieve more effective justice by providing comparative data on the quality, efficiency and independence of the national justice systems ([12]). The Commission adopted a new framework to address systemic threats to the rule of law in any of the EU's Member States in its 2014 communication ([13]). Respect for the rule of law is a prerequisite for the protection of all fundamental values listed in the Treaties, including fundamental rights.

15. The scope of the Notice is limited to access to justice in relation to decisions, acts and omissions by public authorities of the Member States. It does not address environmental litigation between private parties ([14]). Nor does it concern the judicial review of acts of the EU institutions via the General Court, which is addressed by the Aarhus Regulation, (EC) No 1367/2006. Further, while the Notice is closely aligned with CJEU case-law, only the CJEU itself can provide definitive interpretations.

16. Within these limits, the Notice will contribute to a better implementation of EU environmental law in the Member States by clarifying how the public can rely on national courts, which are often better placed to identify appropriate solutions since they are closer to the facts and their context. In this way, the Notice will also contribute to the rule of law, a fundamental value of the EU legal order.

B. **THE LEGAL CONTEXT: NATIONAL COURTS AND EU ENVIRONMENTAL LAW**

17. National courts are 'the ordinary courts' for implementing EU law within the legal systems of the Member States ([15]). They have powers to review decisions that are incompatible with EU law and order financial compensation for the damage caused ([16]).

18. Access to justice in environmental matters is intrinsic to EU environmental law, and draws on fundamental principles of EU law that are reflected in the provisions of the EU Treaties, the Aarhus Convention and secondary legislation as interpreted in case-law of the CJEU.

([10]) http://ec.europa.eu/environment/eir/country-reports/index_en.htm
([11]) COM(2014) 158 final.
([12]) In 2008, the Commission also launched a programme for the training of judges in the field of EU environmental law. By means of training modules available online, national judges and training institutes can obtain up-to-date and accurate knowledge on different topics of EU environmental law, such as access to justice, environmental liability, water and waste.
([13]) COM(2014) 158 final
([14]) This is addressed in the Commission's Collective Redress Recommendation, 2013/396/EU.
([15]) Opinion 1/09, *Creation of a Unified Patent Litigation System*, EU:C:2011:123, ground 80.
([16]) C(2016)8600, p. 4.

19. EU environmental law covers EU legislation which contributes to the pursuit of the following objectives of EU policy on the environment ([17]), set out in Article 191 of the Treaty on the Functioning of the European Union (TFEU):

— preserving, protecting and improving the quality of the environment; protecting human health,

— prudent and rational utilisation of natural resources, and

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

20. This legislation creates a wide range of obligations that competent public authorities in Member States must fulfil, and is relevant to significant categories of decisions, acts and omissions under their responsibility.

21. Stressing that EU law is a distinct and autonomous legal order, the CJEU has endorsed and developed general principles — such as those of equivalence and effectiveness ([18]) — in order to define and support it, while recognising the procedural autonomy of Member States ([19]), i.e. the power to fix their own detailed procedural requirements.

22. The rule of law includes an effective judicial protection of rights conferred by EU law. This is reflected in EU primary law. Article 19(1) of the Treaty on European Union (TEU) requires that '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*'. In addition, Member States are bound, when they are implementing EU law, by Article 47 of the Charter of Fundamental Rights which enshrines in its first paragraph the right to an effective remedy, providing that '*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*'. It should be recalled that Article 19(1) of the TEU and Article 47 of the Charter only apply in the field of EU law. Article 47 of the Charter corresponds to Article 6 and Article 13 of the European Convention on Human Rights (ECHR) which enshrine, respectively, the right to a fair trial and the right to an effective remedy.

23. Effective judicial protection is closely linked to the uniform interpretation of EU law by the CJEU and the possibility for — and sometimes requirement on — national courts to submit questions concerning the validity and interpretation of acts of EU institutions and bodies to the CJEU by way of preliminary reference under Article 267 of the TFEU. The role of Article 267 may be put in doubt if access to national courts is either impossible or rendered excessively difficult.

24. Since its ratification by the EU and its entry into force, the Aarhus Convention is an integral part of the EU legal order and binding on Member States under the terms of Article 216(2) of the TFEU ([20]). Within the framework of that legal order, the CJEU therefore has in principle jurisdiction to give preliminary rulings concerning the interpretation of such an agreement ([21]).

25. The objective of the Convention is '*to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*' ([22]). To that end, it obliges contracting parties to guarantee three broad categories of rights for citizens and their associations, namely rights of access to information, rights to participate in decision-making, and rights of access to justice in environmental matters.

26. Access to justice is addressed in Article 9 of the Convention. In its structure, this provision reflects the three abovementioned 'pillars' of the Convention and highlights that access to justice rights are auxiliary to, and supportive of, other rights ([23]). The Aarhus Convention Implementation Guide ([24]) published by the Aarhus Convention Secretariat provides further guidance for the contracting parties on the interpretation and the implementation of the requirements of the Convention, although it needs to be borne in mind that '*the Guide has no binding force and does not have the normative effect of the provisions of the Convention*' ([25]).

([17]) See Article 37 of the Charter of Fundamental Rights
([18]) See for example Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 43 and Case C-570/13 *Gruber*, paragraph 37.
([19]) Case C-416/10 *Križan*, paragraph 106.
([20]) Case C-243/15 *Lesoochranarske zoskupenie VLK II (LZ II)*, paragraph 45.
([21]) See C-240/09 *Lesoochranarske zoskupenie VLK I (LZ I)*, paragraph 30, on the interpretation of Article 9(3) of the Aarhus Convention.
([22]) Article 1, Aarhus Convention.
([23]) Article 9(1) refers to the separate right of access to information; Article 9(2) relates to rights to participate in decision-making procedures on specific activities; Article 9(3) covers acts and omissions that infringe environmental law in general. Article 9(4) addresses remedies and the timeliness and costs of the procedures in the previous paragraphs.
([24]) *The Aarhus Convention: An Implementation Guide*, second edition 2014. http://www.unece.org/env/pp/implementation_guide.html
([25]) See Case C-182/10 *Solvay and others*, paragraph 27.

27. The CJEU has held that it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with objectives laid down in the Aarhus Convention ([26]).

28. The EU has adopted legislation on the environment containing explicit access to justice requirements ([27]).

29. The sizeable body of CJEU case-law that has emerged on access to justice in environmental matters is primarily the result of preliminary references from national courts under Article 267 of the TFEU. A significant number concern access to justice provisions found in the secondary legislation. There are also cases that highlight the importance of general principles of EU law — notably the principle of effectiveness ([28]).

30. The foregoing represents the broad framework for EU access to justice in environmental matters within Member States. While the framework has been established at EU level, it is at the level of Member States — and in particular, national courts — that it acquires practical reality and meaning.

C. **GUARANTEEING ENVIRONMENTAL ACCESS TO JUSTICE**

1. PUBLIC INTERESTS, OBLIGATIONS AND RIGHTS RELEVANT TO THE EXERCISE OF JUDICIAL PROTECTION

1.1. **Introduction**

Access to justice in environmental matters serves the purposes of enabling individuals and their associations to exercise rights conferred on them under EU environmental law. It also helps to ensure that the aims and obligations of EU environmental legislation are attained.

31. Under EU law, access to justice in environmental matters represents a set of supportive rights which serves two purposes. It enables individuals and their associations to exercise the rights conferred on them by EU law, and it helps ensure that the aims and obligations of EU environmental legislation are attained ([29]).

1.2. **Public interests, obligations and rights**

EU environmental legislation aims to secure general public interests such as clean air, safe and adequate water resources and a healthy biodiversity. Active involvement of the public is a concomitant environmental public interest that supports them.

32. In legislating to preserve, protect and improve the quality of the environment, the EU legislature has largely legislated in favour of general public interests such as clean air, safe and adequate water resources, a healthy biodiversity and the avoidance of waste. These are general public interests because societal well-being depends on them.

([26]) See Case C-240/09 *LZ I*, paragraph 50. This ruling was in the context of Article 9(3) of the Aarhus Convention.

([27]) Article 6(2) of the Access to Environmental Information Directive, 2003/4/EC; Article 13 of the Environmental Liability Directive, 2004/35/EC; Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU. See also recital 27 of the National Emissions Ceiling Directive, (EU) 2016/2284, which makes a specific reference to the case-law of the CJEU on access to justice.

([28]) Some clarity on access to justice in environmental matters also results from direct actions taken by the European Commission under Article 258 TFEU to address problems of transposition with the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU. See, for example Case C-427/07 *Commission* v *Ireland* and Case C-530/11 *Commission* v *United Kingdom*.

([29]) Case C-71/14 *East Sussex*, paragraph 52, and Case C-72/95 *Kraaijeveld*, paragraph 56.

33. The measures put in place by the EU legislature to secure these general public interests include the following:

— binding environmental quality objectives and obligations that Member States must respect ([30]),

— duties on Member States to monitor the state of the environment ([31]),

— requirements on public authorities to prepare plans and programmes to reduce pollution and waste ([32]),

— requirements that certain activities should take place only after a permit or consent has first been obtained from a public authority ([33]), and

— requirements that, before consents are given for certain types of plans and projects, environmental assessments should be prepared ([34]).

These measures need to be supplemented at Member State level by national implementing legislation and general regulatory acts and by individual decisions and acts of public authorities.

34. Through a series of steps since the 1980s, the EU has also put in place measures to recognise an auxiliary public interest of actively involving the public in these measures ([35]). The CJEU has noted the link between access to justice in environmental matters and '*the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role*' ([36]).

1.3. **Ensuring an active role of the public, safeguarding rights and upholding obligations**

The public and other interests set out in EU environmental law and the related obligations placed on public authorities give rise to procedural and substantive rights for individuals and their associations. These rights need to be protected by national courts.

35. The CJEU has recognised that the public interests mentioned above and obligations placed on public authorities give rise to rights for individuals and their associations, which are to be protected by national courts. These rights are both procedural and substantive in nature. Several procedural and substantive rights may simultaneously be engaged, as where a decision, act or omission of a public authority involves issues of participation of the public as well as fulfilment of substantive environmental protection obligations.

36. In *LZ II*, the CJEU ruled in the context of the Habitats Directive, 92/43/EEC, that '*(i)t would be incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned*' ([37]).

([30]) These include limit values for important air pollutants like sulphur dioxide, particulate matter and nitrogen dioxide under Article 13 of the Air Quality Directive, 2008/50/EC; good water quality objectives for surface and ground waters under Article 4 of the Water Framework Directive, 2000/60/EC; and favourable conservation status for a range of species and types of natural habitat under Article 2 of the Habitat Directive, 92/43/EEC.

([31]) Examples include duties to monitor bathing waters under Article 3 of the Bathing Water Directive, 2006/7/EC and assess air quality under Articles 5 to 11 of the Air Quality Directive, 2008/50/EC.

([32]) Examples include requirements to prepare river basin management plans under Article 13 of the Water Framework Directive, 2000/60/EC, air quality plans under Articles 23 and 24 of the Air Quality Directive, 2008/50/EC, and waste management plans under Article 28 of the Waste Framework Directive, 2008/98/EC.

([33]) Examples include obligations to hold a waste permit under Article 23 of the Waste Framework Directive, 2008/98/EC, hold a permit under Article 4 of the Industrial Emissions Directive, 2010/75/EU, and obtain a consent under Article 6(3) of the Habitats Directive, 92/43/EEC.

([34]) Examples include Article 3 of the Strategic Environmental Assessment Directive, 2001/42/EC and Article 2 of the Environmental Impact Assessment Directive, 2011/92/EU.

([35]) The original Environmental Impact Assessment Directive, 85/337/EEC, required the public to be given an opportunity to express an opinion on environmental information submitted by project developers with the aim of supplementing it. The original Access to Environmental Information Directive, 90/313/EEC, noted in its recitals that '*access to information on the environment held by public authorities will improve environmental protection*'. These provisions were further strengthened through adoption of the Aarhus Convention and several pieces of EU secondary legislation.

([36]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 32.

([37]) Case C-243/15 *LZ II*, paragraph 44.

37. This underlines that the rationale for access to justice in environmental matters includes the need to ensure that obligations created by EU environmental law are fulfilled. The conditions for bringing a case before a national court, may, however, vary depending on who is deemed to be concerned. In this context, it is necessary to distinguish between environmental NGOs and individuals.

Environmental NGOs play an important role in ensuring compliance with the obligations of EU environmental law and enjoy a broad right to protect the environment which national courts need to uphold.

38. The involvement of the public has been envisaged as covering not only the role of individuals but also that of their associations ([38]). Indeed, CJEU case-law recognises that environmental associations — '*environmental non-governmental organisations or environmental NGOs*' — play a vital role in ensuring compliance with obligations under EU environmental law.

39. In *LZ I* (also known *as 'Slovak Brown Bears'*), the CJEU ruled that *'it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranarske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law'* ([39]).

40. The judgment in *LZ I* is also noteworthy because it concerned a decision by a public authority to authorise the hunting of brown bears in derogation from the provisions on species protection laid down in the Habitats Directive, 92/43/EEC. The species protection provisions of this directive do not aim at protecting individuals but the environment, and this in the general interest of the public. Therefore, the CJEU acknowledged that the claimant environmental NGO had a right that deserved judicial protection in the specific case, such as that of rendering the provisions of the Habitats Directive, 92/43/EEC, enforceable.

41. This is especially important in the field of nature protection, because in this field it may be difficult to argue that decisions, acts of omissions of public authorities can affect specific rights of individuals, such as those relating to human health.

42. The position of the CJEU in *LZ I* is also consonant with the seventh, 13th and 18th recitals of the Aarhus Convention, which acknowledge the important role that environmental NGOs play in environmental protection. Furthermore, the CJEU's decision in *LZ I* is not an isolated one. It is consistent with the earlier decision in *Janecek* that legal as well as natural persons can invoke EU environmental law that aims to safeguard human health ([40]).

43. In addition to the right of environmental NGOs that the CJEU recognised in *LZ I* and in *Janecek* ([41]), several EU legislative acts recognise the role of environmental NGOs by providing for *de lege* legal standing for them in relation to specific activities requiring public participation as well as situations of environmental damage. These are examined in more detail in Section C.2.

EU environmental law confers procedural and substantive rights on individuals. These relate in particular to requirements for public authorities to correctly follow a procedure intended to involve the public as well as provisions which concern human health and property.

([38]) For example, the Aarhus Convention defines 'the public' to include associations, organisations or groups of natural or legal persons.
([39]) Case C-240/09 *LZ I*, paragraph 51.
([40]) Case C-237/07 *Janecek*, paragraph 39.
([41]) C-237/07 *Janecek*, paragraph 39.

(a) *Procedural rights*

44. The '*public*' under Article 2(4) of the Aarhus Convention also includes individuals and these too have a recognised role in preserving, protecting and improving the quality of the environment. However, the right to rely on obligations imposed on national authorities by EU environmental law before a national court may be restricted by national law to circumstances in which a sufficient interest or an impairment of rights can be demonstrated ([42]). Access to a national court can therefore be restricted to the enforcement of those provisions which not only impose obligations on public authorities but also confer rights on individuals.

45. Procedural rights usually relate to public participation. They typically have to do with the practical arrangements whereby a public authority informs the public of a proposed decision, receives any submissions, takes these into account and publicly announces its decision. Public participation is envisaged in the Aarhus Convention for:

— decisions on specific activities ([43]),

— plans, programmes and policies relating to the environment ([44]), and

— executive regulations and/or generally applicable legally binding normative instruments ([45]).

46. Express public participation provisions are chiefly — though not exclusively — found in the following EU environmental directives: the Environmental Impact Assessment Directive, 2011/92/EU, the Industrial Emissions Directive, 2010/75/EU; the Public Participation Directive, 2003/35/EC; and the Strategic Environmental Assessment Directive, 2001/42/EC. On the other hand, in *LZ II* the CJEU construed broadly the mandatory public participation requirements of Article 6(1)(b) of the Aarhus Convention and read them in conjunction with Article 6(3) of the Habitats Directive, 92/43/EEC.

47. Moreover, as the CJEU observed in *Kraaijeveld*, procedural rights serve the purpose of ensuring the effective implementation of EU environmental law: '*In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts*' ([46]). The particular course of conduct alluded to in that case was the undertaking of an environmental impact assessment, which included public consultation. The same rationale holds true for other provisions of EU environmental law requiring public consultation, such as those found in the Strategic Environmental Assessment Directive, 2001/42/EC ([47]).

(b) *Substantive rights*

48. In addition to procedural rights, the CJEU has recognised that certain EU environmental secondary legislation confers substantive rights on individuals and their associations.

49. In *Janecek* the CJEU stated that '*whenever the failure to observe the measures required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives*' ([48]).

50. There are two reasons why the substantive right recognised in *Janecek* — i.e. to have one's health protected via EU environmental legislation — has broad relevance.

([42]) See for example Article 11(1) of the Environmental Impact Assessment Directive, 2011/92/EU, and Article 9(2) of the Aarhus Convention.
([43]) Article 6.
([44]) Article 7.
([45]) Article 8.
([46]) Case C-72/95 *Kraaijeveld*, paragraph 56.
([47]) Case C-41/11 *Inter-Environnement Wallonie*, paragraph 42.
([48]) Case C-237/07 *Janecek*, paragraph 38. *Janecek* was preceded by a number of judgments in which the CJEU stressed the need for correct transposition of air and drinking water directives in order to ensure that the persons concerned can ascertain the full extent of their rights, see Cases C-361/88 *Commission* v *Germany*, paragraph 24, and C-59/89, *Commission* v *Germany*, paragraph 13.

51. First, the CJEU itself in the subsequent case, *Stichting Natuur en Milieu* ([49]), applied the same rationale to air quality legislation which operates at a wider level than the local level relevant in *Janecek*. This indicates that the protection of human health is not to be seen as confined to immediate, local threats ([50]).

52. Second, EU environmental legislation often includes the protection of human health amongst its objectives, in line with Article 35 of the Charter of Fundamental Rights ([51]). Human health is specifically mentioned in some of the most important pieces of EU environmental legislation, such as the Waste Framework Directive, 2008/98/EC ([52]), the Water Framework Directive 2000/60/EC ([53]) and the National Emissions Ceiling Directive (EU) 2016/2284 ([54]). The rationale of *Janecek* might, therefore, be relevant well beyond air quality and drinking water legislation.

53. A possible breach of property rights, and related pecuniary damage, stemming from a decision, act or omission of a public authority which infringes environmental law, may also entitle an individual to invoke EU environmental law before a court.

54. In *Leth*, the CJEU held that '*the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337/EEC [now Directive 2011/92/EU]*' ([55]). The rationale of *Leth* applies also to other pieces of EU environmental legislation such as the Strategic Environmental Assessment Directive, 2001/42/EC.

55. EU environmental law does not establish a general right to a healthy and intact environment for every individual. However, a natural or legal person may have obtained the right to use the environment for a specific economic or non-profit activity. An example could be an allocated and acquired fishing right in specified waters ([56]). This may give rise to the need to challenge any decision, act or omission which impacts that specifically allocated right to use the environment.

56. This is especially relevant for EU water and nature legislation. In this regard, the over-arching instrument for water, the Water Framework Directive, 2000/60/EC, defines '*pollution*' in terms of the introduction of substances or heat which '*impair[s] or interfere[s] with amenities and other legitimate uses of the environment*'. Both the Wild Birds Directive, 2009/147/EC, and the Habitats Directive, 92/43/EEC, refer to a broad range of possible uses of nature, including recreational pursuits (such as hunting), research and education. For these different uses, it is reasonable to suppose that, besides interests, issues concerning rights could also come to the fore.

57. Against this background, the remaining sections of this Notice examine access to justice in environmental matters from several different perspectives:

— the precise basis and the conditions on which individual and environmental NGOs can expect to obtain legal standing,

— the scope of review, i.e. the grounds of review and the intensity of scrutiny that should apply to contested decisions, acts and omissions,

— effective remedies to address decisions, acts and omissions found to be legally flawed,

— litigation costs and the factors that need to be taken into account in order to avoid that these are prohibitive, and

— the timeliness of procedures and the need to provide the public with practical information.

([49]) Joined Cases C-165 to C-167/09 *Stichting Natuur en Milieu*, paragraph 94.
([50]) *Janecek* concerned local air quality measures for the city of Munich, while *Stichting Natuur en Milieu* concerned the national emissions ceiling for the Netherlands.
([51]) According to this, 'a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'.
([52]) See Article 13.
([53]) See definition of '*pollution*' in Article 2(33).
([54]) See Article 1.
([55]) Case C-420/11 *Leth*, paragraph 36.
([56]) See pending Case C-529/15 *Folk*.

2. LEGAL STANDING

2.1. **Introduction**

Legal standing is the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant regarding the legality of a decision, act or omission of a public authority. Legal standing can vary depending on the subject matter of the contested decision, act or omission. It can also vary depending on whether the claimant is an individual or a recognised environmental NGO.

58. Legal standing — sometimes referred to as *locus standi* — is the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant. The entitlement to challenge is in respect of decisions, acts and omissions of public authorities, which may infringe such a right or interest. Decisions, acts and omissions represent the ways in which public authorities fulfil — or take a position on — duties placed on them under EU environmental law, for example to ensure that waste facilities and industrial installations operate under a permit ([57]). Apart from being a means of ensuring the protection of rights and interests, legal standing represents a means of ensuring accountability in respect of such decisions, acts or omissions.

59. A few EU environmental directives contain access to justice provisions expressly requiring Member States to provide legal standing ([58]). However, express provisions on access to justice, including standing, are absent in most EU secondary environmental legislation. Nevertheless, despite the absence of express legislative provisions, the requirements concerning legal standing have to be interpreted in the light of the principles established in the case-law of the CJEU.

60. The basis for legal standing varies according to the subject matter of the decision, act or omission sought to be challenged. The following sections distinguish between decisions, acts and omissions concerning:

— requests for environmental information and entitlement to receive information (Section C.2.2),

— specific activities that are subject to public participation requirements (Section C.2.3),

— requests for action under environmental liability rules (Section C.2.4),

— other subject matter, such as national implementing legislation, general regulatory acts, plans and programmes and derogations (Section C.2.5).

61. For the first three categories, express legal standing rights can be largely found in secondary EU environmental legislation ([59]). For the last category, legal standing depends on general principles governing legal standing as interpreted by the CJEU.

62. The extent of legal standing also varies according to whether the person seeking to challenge is an individual, environmental NGO or other entity. This aspect is considered in the different sections below.

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

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

([57]) Such duties are found in the Waste Framework Directive, 2008/98/EC, and the Industrial Emissions Directive, 2010/75/EU.

([58]) Article 6(2) of the Access to Environmental Information Directive, 2003/4/EC; Article 13 of the Environmental Liability Directive, 2004/35/EC; Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU. See also recital 27 of the National Emissions Ceiling Directive, (EU) 2016/2284, which makes a specific reference to the case-law of the CJEU on access to justice.

([59]) See also Case C-243/15, *LZ II*. The CJEU establishes legal standing requirements for cases beyond EU secondary law on the basis of Article 47 of the Charter of Fundamental rights in conjunction with Article 9(2) of the Aarhus Convention for decisions, acts and omission for which the public participation provision of Article 6 of the Aarhus Convention applies.

63. EU environmental law confers rights on natural and legal persons to request environmental information ([60]). The Access to Environmental Information Directive, 2003/4/EC, provides explicitly in its Article 6 for a judicial review procedure to examine acts or omissions by public authorities in relation to requests for environmental information falling within the directive's scope. The right to a review is based on the requirements of Article 9(1) of the Aarhus Convention and is intended to protect the right to make an information request ([61]). Any natural or legal person submitting an information request enjoys legal standing ([62]).

64. EU environmental law confers rights on natural and legal persons not only to request but to receive environmental information ([63]). It is clear from the CJEU's decision in *East Sussex* that the rights of applicants for environmental information include the right to have the competent public authority correctly fulfil conditions related to the supply of information ([64]). That case concerned rights to receive information on request but the public is also entitled to receive information through active dissemination by the competent public authorities ([65]). The fulfilment by public authorities of their obligations to actively disseminate environmental information may, inter alia, be important for safeguarding the right to have one's health protected ([66]).

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

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

65. EU environmental legislation contains a significant number of obligations that require public authorities to make decisions on specific activities that may have effects on the environment. For example, a proposed motorway will require a decision of a public authority consenting to it before building can start. Similarly, a proposed industrial activity may require a decision to be made by a public authority on an industrial emissions permit before it can commence operating. Further, much EU secondary environmental legislation requires public consultation during the decision-making process ([67]). Mandatory consultation confers participation rights on those members of the public who are entitled to participate.

66. Legal standing to challenge decisions, acts and omissions concerning specific activities that are subject to public participation requirements is based on both express provisions on legal standing found in Article 9(2) of the Aarhus Convention and related EU secondary legislation ([68]) as well as on case-law of the CJEU. In particular, the CJEU confirmed in *Kraaijeveld* ([69]) that a decision, act or omission of a public authority impairing participation rights gives rise to an entitlement to seek a judicial review.

67. Since the *Kraaijeveld* judgment was delivered, an express legal standing right based on the right to participate has been incorporated into the Aarhus Convention. In particular, Article 9(2) of the Aarhus Convention requires a review procedure before a court of law and/or another independent and impartial body established by law ([70]) in order to challenge the substantive and procedural legality of any decision, act or omission, subject to the public participation provisions of Article 6 of the Aarhus Convention.

([60]) These are found in the Access to Environmental Information Directive, 2003/4/EC.
([61]) The right to make an information request is set out in Article 4 of the Aarhus Convention.
([62]) See Aarhus Implementation Guide, page 191.
([63]) These are found in the Access to Environmental Information Directive, 2003/4/EC, as well as in several pieces of sectoral environmental information.
([64]) Case C-71/14 *East Sussex*, paragraph 56.
([65]) See for example Article 7 of the Access to Environmental Information Directive, 2003/4/EC, and Article 11 of the INSPIRE Directive, 2007/2/EC.
([66]) Notable examples include Article 12(1)(e) of the Bathing Water Directive, 2006/7/EC, which requires the public to be informed whenever bathing is prohibited or advised against; and Article 8(3) of the Drinking Water Directive, 98/83/EEC, which requires consumers to be promptly informed of health-endangering drinking water contamination.
([67]) Notable examples are Article 24 of the Industrial Emissions Directive, 2010/75/EU, Article 6(4) of the Environmental Impact Assessment Directive, 2011/92/EU, and Article 15 of the Seveso III Directive 2012/18/EU. There is a vaguer public consultation requirement in Article 6(3) of the Habitats Directive, 92/43/EEC, which, however, has to be read in conjunction with Article 6(1)(b) of the Aarhus Convention, see Case C-243/15 *LZ II*, paragraph 45.
([68]) Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU.
([69]) Case C-72/95 *Kraaijeveld*, paragraph 56.
([70]) In this Notice, references to national courts should also be considered as applicable, *mutatis mutandis*, to other independent and impartial bodies established by law.

68. Related pieces of EU secondary environmental legislation ([71]) contain provisions based on the wording of Article 9(2). However, this secondary legislation does not cover all decision-making processes covered by Article 6 — and by extension Article 9(2) — of the Convention. Since Article 9(2) refers to situations in which the public participation provisions of Article 6 of the Aarhus Convention apply, Member States are obliged to have in place a judicial review regime whenever Article 6 of the Convention foresees an obligation concerning public participation.

69. In *LZ II* ([72]) the CJEU ruled that the public participation requirements of Article 6(1)(b) of the Aarhus Convention also apply in the context of Article 6(3) of the Habitats Directive 92/43/EEC, in situations where a public authority is obliged by national law to determine whether or not to carry out an appropriate assessment on a project that may have a significant effect on the integrity of a protected Natura 2000 site. Further, it ruled that, because the requirements of Article 6(1)(b) of the Convention apply to such situations, those of Article 9(2) apply to these situations as well.

70. With this judgment, the CJEU clarified that the requirements of Article 9(2) of the Aarhus Convention in conjunction with Article 47 of the Charter of Fundamental Rights might also apply to those areas of environmental law which do not contain specific access to justice requirements. Indeed, while *LZ II* concerned the Habitats Directive, 92/43/EEC, the rationale behind the CJEU's interpretation lends itself to be applied by analogy to decision-making processes in other sectors of EU environmental law such as water and waste.

71. It is the '*public concerned*' that benefits from the public participation provisions of Article 6(2) of the Aarhus Convention and by extension the access to justice provisions of Article 9(2) and the corresponding EU secondary legislation. This is defined as '*the public affected or likely to be affected by, or having an interest in, the environmental decision-making*' ([73]). '*The public*' is defined as '*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups*' ([74]).

72. However, neither Article 9(2) of the Aarhus Convention nor the provisions of EU secondary legislation grant unconditional access to justice to the members of the public. The Convention and the legislation allow contracting parties and the Member States to impose certain conditions and so to avoid a general legal standing in environmental matters for everyone (*actio popularis*) ([75]). Furthermore, both the Aarhus Convention and the EU secondary legislation derived from it provide for a differentiation in legal standing rights. This differentiation is between, on the one hand, individuals, associations, organisations and groups and, on the other, recognised environmental NGOs.

2.3.1. ***Individuals***

For individuals, the precondition of needing to show the 'impairment of a right' or a sufficient interest in order to obtain legal standing to bring a challenge concerning a specific activity has to be interpreted and applied in the light of the obligation to grant a wide access to justice in environmental matters. Rights which may be impaired include procedural rights of the individual stemming from EU environmental law (e.g. public participation rights) as well as substantive rights conferred on the individual (e.g. protection of human health, property rights).

73. According to Article 9(2) of the Aarhus Convention as well as Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU, and Article 25 of the Industrial Emissions Directive, 2010/75/EU, the contracting parties and the Member States may restrict access to the courts to those individuals who demonstrate either a sufficient interest or, alternatively, the impairment of a right. The '*impairment of a right*' doctrine is explained further in Section C.2.5.3.

([71]) See Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU.
([72]) Case C-243/15 *LZ II*.
([73]) See Article 2(5) of the Aarhus Convention and Article 1(2)(d) and (e) of the Environmental Impact Assessment Directive, 2011/92/EU.
([74]) See Article 2(4) of the Aarhus Convention.
([75]) See also Aarhus Convention Implementation Guide, p. 199.

2.3.2. ***Environmental NGOs with legal standing de lege***

2.3.2.1. *General Principle*

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

74. Articles 2(5) and 9(2) of the Aarhus Convention and the related EU legislation giving effect to it recognise the important role of actors such as environmental NGOs by giving them a form of legal standing *de lege* on the assumption that they meet the relevant requirements laid down in national law. For these NGOs, pre-conditions to legal standing based on a sufficient interest or impairment of a right are deemed to be fulfilled ([76]). This legal standing *de lege* has implications not only for the admissibility of a claim but also for the scope of review exercised by the national judge (see Section C.3.2.2.2).

75. The CJEU has clarified the extent of the requirements of national law that NGOs can be expected to fulfil to get this legal standing. It has stated that, although it is for the Member States to make rules defining such requirements, they may not be framed in a way that makes it impossible for NGOs to exercise a right to go to court in order to protect the general interest. The national rules '*must […] ensure wide access to justice*' ([77]).

76. The CJEU has held that national legislation is in breach of Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU, where it does not permit NGOs in the sense of Article 1(2) of that directive to rely before the courts, in an action contesting a decision authorising projects '*likely to have significant effects on the environment*' for the purposes of Article 1(1) of that directive, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals ([78]).

77. This rationale applies in all cases involving legal standing *de lege*, i.e. those within the scope of Article 9(2) of the Aarhus Convention.

2.3.2.2. *Specific criteria for legal standing* de lege

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

78. National rules may define the requirements that NGOs must fulfil in order to qualify for legal standing *de lege*. CJEU case-law sheds light on how stringent such rules may be.

(a) *Active in the environmental field*

79. An engagement in the area of the environment helps ensure that an NGO has useful expertise and knowledge. In *Djurgården*, the CJEU confirms that '*a national law may require that such an association, which intends to challenge a project covered by Directive 85/337/EEC* [now Directive 2011/92/EU] *through legal proceedings, has as its object the protection of nature and the environment*' ([79]). It cannot be inferred from this formulation that the CJEU approved a requirement that the NGO must have an exclusive object of environmental protection. However, it appears permissible for a Member State to require that the protection of the environment constitutes a dominant or substantial objective of an NGO.

([76]) See Article 11(3) of the Environmental Impact Assessment Directive, 2011/92/EU and Article 9(2) of the Aarhus Convention.
([77]) Case C-263/08 *Djurgården*, paragraph 45.
([78]) Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 59.
([79]) Case C-263/08 *Djurgården*, paragraph 46.

(b) *Membership requirement*

80. The number of members that an NGO has may be an important indicator that it is active. In *Djurgården* the CJEU looked at a requirement of national law that an NGO had to have a certain number of members. The CJEU ruled that the number of members required cannot be fixed at such a level that it runs counter to the objective of facilitating access to justice ([80]). It also stressed the importance of facilitating locally based NGOs, as these may be the most likely to challenge smaller scale projects which do not have a national or regional importance but still have a significant effect on the environment ([81]). It may be noted that not all NGOs that benefit from *de lege* standing in Member States are membership-based. Some are charitable foundations. Indeed, claims by such foundations have given rise to important CJEU case-law.

(c) *Other criteria*

81. In practice, some Member States require an NGO to satisfy other criteria to obtain legal standing *de lege*. These may relate to the independence or non-profit-making character of the NGO or its having a distinct legal personality under national law. Or they may involve the NGO proving that it has a solid financial basis to pursue an objective of promoting environmental protection. Or they may consist in a minimum duration of existence before legal standing *de lege* is granted. In this regard, the CJEU reasoning in *Djurgården* concerning membership requirements, recalled in the previous paragraph, should be taken into account ([82]).

2.3.3. ***Non-discrimination against foreign NGOs***

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

82. Environmental NGOs of neighbouring Member States may wish to participate in a decision-making process for a specific activity or otherwise be active in relation to it. This is particularly true where a specific activity may have trans-boundary environmental impacts. Article 3(9) of the Aarhus Convention stipulates that '*the public shall have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*'. Thus, when a foreign NGO seeks legal standing, it must not be treated less favourably than domestic NGOs in relation to the conditions to be fulfilled for legal standing *de lege*.

83. Article 3(9) only prohibits discrimination, so a Member State may require foreign NGOs to fulfil the same conditions as apply to domestic ones. However, these conditions, in particular the procedure to obtain the status of an NGO with legal standing *de lege*, must not prevent or render it excessively difficult for a foreign NGO to obtain that status ([83]).

2.3.4. ***Other associations, organisations and groups***

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

84. As already noted, '*the public*' under the Aarhus Convention can include '*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups*'. Thus, even if not entitled to legal standing *de lege*, associations, organisations and groups may be entitled to legal standing on the same basis as individuals. This can facilitate a merger of claims which might otherwise have to be pursued separately by individual claimants, bringing advantages to both the public concerned (through the sharing of the burden of litigation) and the public authority (by reducing the risk of having to deal with a multiplicity of separate legal challenges).

([80]) Case C-263/08 *Djurgården*, paragraph 47.
([81]) In the context of this particular case, the CJEU considered that a membership requirement of 2 000 members was not in line with the objectives of the Environmental Impact Assessment Directive, 2011/92/EU.
([82]) Case C-263/08 *Djurgården* paragraph 47.
([83]) See also point 18 of the Collective Redress Recommendation, 2013/396/EU, where a different mechanism of awarding legal standing to NGOs from another Member State is recommended. This mechanism is based on the recognition of standing awarded in the Member State in which the NGO is domiciled. This would be more favourable than the principle of non-discrimination in particular for NGOs from Member States where the conditions for granting legal standing are less strict than in others. Therefore, in cases falling within the scope of both the Aarhus Convention and the Recommendation, the additional application of the mutual recognition mechanism of the Recommendation would facilitate the activities of NGOs further.

2.3.5. ***Prior participation***

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

85. A lack of participation in the administrative procedure for adopting a decision may be an issue in the admissibility of a later legal challenge to that decision ([84]). The CJEU case-law emphasises the role of national courts in protecting substantive rights conferred on individuals and associations under EU law and, at the same time, that the administrative and judicial procedures serve different purposes. For example, the decision of a public authority may give rise to a potential breach of a claimant's right to have his or her health protected independently of any procedural rights of the claimant.

86. In this regard, in *Djurgarden*, the CJEU held that, in the context of a decision relevant to the Environmental Impact Assessment Directive, 2011/92/EU, '*an environmental decision-making procedure […] is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure*' ([85]). Therefore '*the members of the public concerned […] must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views*'.

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

87. The Environmental Liability Directive, 2004/35/EC, aims, amongst other things, to encourage natural and legal persons to play a role in assisting competent authorities to address situations of environmental damage covered by environmental liability rules ([86]). It allows natural or legal persons affected by such damage or having a sufficient interest in the damage or alleging the impairment of a right caused by the damage to make submissions and requests to the competent national authority to take necessary measures. It envisages that certain NGOs will be deemed to have a sufficient interest or rights capable of being impaired, so entitling them to request action. The competent authority is required to take a decision on the request for action ([87]).

88. The entitlement to make submissions and request action is formulated in a manner that draws very closely on the wording used in Article 9(2) of the Aarhus Convention and in the related provisions of the Environmental Impact Assessment Directive, 2011/92/EU. Indeed, those entitled to make submissions and request action are also entitled to legally challenge the procedural and substantive legality of a competent authority's decision, act or failure to act on the basis of the submissions and the request ([88]).

89. The similarity in wording, including with regard to the privileged entitlement of environmental NGOs, means that the CJEU case-law on legal standing described in Section C.2.3 can also be taken into account in interpreting the Environmental Liability Directive, 2004/35/EC.

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

2.5.1. ***General basis for legal standing***

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

([84]) See also the Aarhus Convention Implementation Guide, p. 195.
([85]) Case C-263/08 *Djurgarden*, paragraph 38.
([86]) These rules include detailed provisions on '*remedial measures*' for environmental damage coming within the directive's scope, see Article 7 of the Environmental Liability Directive, 2004/35/EC.
([87]) Article 12 of the Environmental Liability Directive, 2004/35/EC.
([88]) Article 13 of the Environmental Liability Directive, 2004/35/EC.

90. Article 19(1) TEU, which codifies the established principle of effective judicial protection ([89]), requires that '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*' At the same time, Article 47(1) of the Charter of Fundamental Rights, which Member States are bound to respect when implementing EU law, provides that *'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*'.

91. In the specific domain of the environment, Article 9(3) of the Aarhus Convention provides that contracting parties shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. As previously noted, the definition of '*the public*' includes environmental NGOs.

92. Article 9(3) is broader than Article 9(2) of the Aarhus Convention as the intended beneficiary of legal standing is '*the public*', which is by definition in the Aarhus Convention broader than the *'public concerned*'. Article 9(3) also refers to acts and omissions by private persons, while Article 9(2) is limited to decisions, acts and omissions of public authorities ([90]). On the other hand, Article 9(3) leaves the contracting parties the choice between an administrative review procedure and a judicial review procedure. Further, it makes no reference to access criteria such as the impairment of a right or the sufficiency of an interest, nor does it provide for legal standing *de lege* for environmental NGOs.

93. As a consequence, the CJEU has clarified in *LZ I* that Article 9(3) does not contain any clear and precise obligation capable of directly regulating the legal position of individuals, since it is subject to the adoption of subsequent measures by contracting parties ([91]). However, the CJEU has also held that the provisions of Article 9(3), although drafted in broad terms, are intended to ensure effective environmental protection ([92]) and that *'it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law*' ([93]).

94. By virtue of Article 216(2) of the TFEU, the Aarhus Convention is part of the EU legal order ([94]). The requirements of the EU legal order, which are binding for the Member States in the implementation of Article 9(3) of the Convention, include the uniform application and interpretation of EU law. A key mechanism for ensuring this is the possibility for — and sometimes the duty on — national courts to seek a ruling from the CJEU under Article 267 of the TFEU on the validity or interpretation of specific EU law requirements. This necessitates access to the national courts.

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

2.5.2. ***Legal standing to protect procedural rights under EU environmental law***

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

96. Procedural rights are particularly important in the case of plans and programmes. Many pieces of EU environmental legislation require that plans and programmes be adopted to ensure that envisaged environmental objectives are

([89]) See, for example Case C-432/05 *Unibet*, paragraph 37.
([90]) For the scope of this Notice see Section A.
([91]) Case C-240/09 *LZ I*, paragraph 45.
([92]) Case C-240/09 *LZ I*, paragraph 46.
([93]) Case C-240/09 *LZ I*, paragraph 49.
([94]) Case C-243/15 *LZ II*, paragraph 45.

achieved. These documents can serve as a means of managing interventions over time (e.g. river basin management plans) ([95]) or of setting out actions to respond to specific problems (e.g. air quality plans to lower excessive levels of air pollution) ([96]). In addition to requiring certain kinds of plan and programme to be adopted, EU environmental legislation also sets requirements for the environmental assessment of plans and programmes (e.g. land-use plans) which can have a significant impact on the environment ([97]).

97. Much of the legislation concerned envisages a stage of mandatory public consultation during the decision-making process. In this regard, Article 7 of the Aarhus Convention requires public consultation for plans and programmes coming within its broad scope. On this basis, plans and programmes related to the environment which are mandatory under EU law but for which no explicit public participation provisions have been established, may still need to include public consultation.

98. Legal standing to challenge decisions, acts and omissions of public authorities concerning plans and programmes covered by Article 7 of the Convention can be defined in the light of the CJEU case-law on public participation. Applying the rationale of the ruling in *Kraaijeveld* ([98]) (which concerned a project rather than a plan or programme), the beneficiaries of participation rights are entitled to ask for a review by a court of whether the required course of conduct in the decision-making process for a plan or programme was respected.

99. The CJEU case-law indicates that legal standing is not only relevant for decisions, acts or omissions on individual plans and programmes, but is also relevant for national legislation and general regulatory acts establishing the procedural requirements for such plans and programmes. Indeed, in *Terre Wallonne and Inter-Environnement Wallonie* ([99]), the CJEU ruled that an action programme required under the Nitrates Directive, 91/676/EEC, also requires in principle a strategic environmental assessment (which includes public consultation) under the Strategic Environmental Assessment Directive, 2001/42/EC. As a result, a national court annulled parts of a national order establishing a nitrates action programme on the basis that it had failed to provide for a strategic environmental assessment. In the subsequent case, *Inter-Environnement Wallonie*, the CJEU confirmed the appropriateness of annulment in these circumstances ([100]).

100. It is clear that both individuals and environmental NGOs can benefit from legal standing to protect procedural rights. This is because both are entitled to exercise such rights.

2.5.3. ***Legal standing to protect substantive rights***

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

101. It is clear from the CJEU case-law that legal standing needs to be granted to individuals and environmental NGOs to protect human health via EU environmental legislation, property rights covered by the objectives of EU environmental legislation, and, in the case of environmental NGOs, to protect the environment via the requirements of EU environmental legislation.

102. The application of the '*impairment of rights doctrine*' (i.e. the doctrine followed by certain Member States according to which an individual needs to demonstrate to a court that a right that they enjoy has been impaired) has presented challenges because environmental protection usually serves the general public interest and does not usually aim at expressly conferring rights on the individual. The alternative approach of requiring a sufficient interest appears to raise fewer challenges, but similar considerations to those described for the impairment of rights doctrine should apply *mutatis mutandis*.

103. The CJEU has confirmed that it is for the Member States to define what constitutes the impairment of a right ([101]). However, it has also clarified that the wording of Article 11(3) of the Environmental Impact Assessment Directive, 2011/92/EU, and the second paragraph of Article 9(2) of the Aarhus Convention mean that this discretion is

([95]) See Article 13 of the Water Framework Directive, 2000/60/EC.
([96]) See Article 23 of the Air Quality Directive, 2008/50/EC.
([97]) See Article 4 of the Strategic Environmental Assessment Directive, 2001/42/EC
([98]) Case C-72/95 *Kraaijeveld*, paragraph 56.
([99]) Joined Cases C-105/09 and C-110/09 *Terre Wallonne and Inter-Environnement Wallonie*.
([100]) Case C-41/11 *Inter-Environnement Wallonie*, paragraph 46.
([101]) Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 44.

qualified by the need to respect the objective of ensuring wide access to justice for the public concerned ([102]). Further, the discretion of Member States on what constitutes the impairment of a right cannot make it excessively difficult to protect the rights conferred by EU law. Therefore, legal standing of members of the public concerned by the decisions, acts or omissions which fall within the scope of the Environmental Impact Assessment Directive, 2011/92/EU — and Article 9(2) of the Aarhus Convention — cannot be interpreted restrictively ([103]).

104. The CJEU has upheld these rights in the context of the following decisions, acts and omissions of public authorities: the omission of a public authority to prepare a legally required air quality plan ([104]), adopted national emission reduction programmes ([105]) and the grant of a derogation under nature legislation ([106]). The case-law therefore underlines the need for Member States and national courts to ensure legal standing to challenge very broad categories of decision, act and omission on the basis of an extensive set of substantive rights.

2.5.4. ***Criteria that individuals and NGOs must satisfy to claim legal standing***

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

105. The wording of Article 9(3) of the Aarhus Convention (*'where they meet the criteria, if any, laid down in its national law'*, grants the contracting parties a certain degree of discretion to establish the criteria for standing.

106. Member States are not obliged to give standing to any and every member of the public (*actio popularis*) or any and every NGO. However, according to the Aarhus Convention Implementation Guide, any such criteria should be consistent with the objectives of the Convention regarding ensuring access to justice ([107]). The parties may not take the clause '*where they meet the criteria, if any, laid down in its national law*' as an excuse for introducing or maintaining criteria so strict that they effectively bar all, or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment ([108]). Further, in accordance with the principle of effectiveness, Member States cannot adopt criteria which render it impossible or excessively difficult to exercise rights conferred by EU law.

107. Appropriate criteria established by the Member States in the context of Article 9(2) of the Aarhus Convention will also be appropriate in an Article 9(3) context. However, unlike Article 9(2), Article 9(3) does not expressly provide for legal standing *de lege* for environmental NGOs. This raises the question of whether Member States are entitled to apply the impairment of rights doctrine without any allowance for the fact that an NGO will not be able to demonstrate an impairment in the same way as an individual. In this regard, considering the role of environmental NGOs in protecting general environmental interests such as the quality of air and biodiversity, Member States which apply the impairment of rights doctrine need to do so in such a way as to ensure that environmental NGOs are given legal standing to contest decisions, acts and omissions which concern this role.

3. SCOPE OF JUDICIAL REVIEW

3.1. **Introduction**

The scope of judicial review determines how national judges will assess the legality of contested decisions, acts and omissions. It has two aspects. The first concerns the possible grounds of judicial review, i.e. the areas of law and legal arguments that may be raised. The second concerns the intensity of scrutiny (or the standard of review).

([102]) Case C-570/13 *Gruber*, paragraph 39 and Case C-115/09 *Bund für Umwelt und Naturschutz*, paragraph 44.
([103]) Case C-570/13 *Gruber*, paragraph 40.
([104]) Case C-237/07 *Janecek*.
([105]) Joined Cases C-165 to C-167/09 *Stichting Natuur en Milieu*.
([106]) Case C-240/09 *LZ I*.
([107]) See Aarhus Convention Implementation Guide, p. 198.
([108]) See Aarhus Convention Implementation Guide, p. 198.

108. The scope of judicial review is a key element of an effective system of judicial review as it determines how national judges will assess the legality of contested decisions, acts and omissions. It has two main aspects. The first relates to the areas of law and the legal arguments which can be raised in a legal challenge, in particular as regards whether a claimant is entitled to invoke all relevant provisions of EU environmental law in order to build a case. This is addressed in Section C.3.2. The second aspect relates to the intensity of scrutiny to be exercised by judges when assessing legality and is addressed in Section C.3.3.

109. A number of EU directives that expressly provide for access to justice contain provisions relevant to the scope of judicial review ([109]). However, most environmental secondary legislation lacks such provisions and, to understand the appropriate scope, it is necessary, as with legal standing, to refer to the case-law of the CJEU.

3.2. **Possible grounds of judicial review**

110. This aspect is particularly relevant in those jurisdictions which grant legal standing only on the basis that the rights of the claimant have been impaired. In these, the possible grounds of judicial review are often traditionally restricted to those legal provisions which confer the individual rights that provide the basis for the legal standing invoked. This aspect is also relevant to restrictions aimed at limiting claimants to arguments they have raised in prior administrative proceedings (preclusion) or at preventing claimants from abusing judicial processes by making irrelevant legal submissions.

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

111. This category is covered by Article 9(2) of the Aarhus Convention. As noted above, Article 9(2) is aimed at providing for access to justice in relation to decisions, acts or omissions on specific activities covered by the public participation requirements of Article 6 of the Convention.

112. As also noted, Article 9(2) allows Member States to restrict legal standing on the basis of claimants who are individuals having to show the impairment of a right or a sufficient interest. In terms of the possible grounds of judicial review, this gives rise to a potential difference in how the claims of individuals and environmental NGOs may be treated. This is especially relevant to decisions, acts and omissions that concern the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU, the main pieces of EU secondary legislation that give effect to Article 9(2). However, in *LZ II* ([110]) the CJEU confirmed that the scope of Article 6 of the Aarhus Convention — and hence of Article 9(2) — is wider than that of these EU directives.

3.2.1.1. *Individuals*

If it makes the admissibility of legal challenges brought by individuals subject to the condition of impairment of an individual right, a Member State is also authorised to provide that the annulment of an administrative decision by a national court requires the infringement of an individual right of the claimant.

113. In *Commission* v *Germany*, the CJEU ruled that where, in accordance with the access to justice provisions of the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU, a Member State limits the legal standing for individuals to situations where rights are impaired, it '*is also authorised to provide that the annulment of an administrative decision by the court having jurisdiction requires the infringement of an individual public-law right of the applicant*' ([111]). This interpretation can apply in respect of other contested decisions, acts and omissions covered by Article 9(2) of the Aarhus Convention.

114. This means that, under an impairment of rights regime, in applications lodged by individuals, the national court can confine its examination to the provisions which entitled the individual to bring the legal challenge.

([109]) Article 6(2) of the Access to Environmental Information Directive, 2003/4/EC; Article 13 of the Environmental Liability Directive, 2004/35/EC; Article 25 of the Industrial Emissions Directive, 2010/75/EU; Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU; and Article 23 of the Seveso III Directive, 2012/18/EU. See also recital 27 of the National Emissions Ceiling Directive, (EU) 2016/2284, which makes a specific reference to the case-law of the CJEU on access to justice.

([110]) Case C-243/15, *LZ II*.

([111]) Case C-137/14, *Commission* v *Germany*, paragraph 32.

3.2.1.2. *Recognised environmental NGOs*

For legal challenges falling within the scope of Article 9(2) of the Aarhus Convention, recognised environmental NGOs are not restricted in the legal grounds they can plead and are entitled to invoke any provision of EU environmental law.

115. The restriction of pleas described in Section C.3.2.1.1 does not apply to environmental NGOs which fulfil the criteria laid down in national law in order to obtain legal standing *de lege*.

116. In *Trianel*, the CJEU clarified that these NGOs are entitled to rely on any provision of EU environmental law which has direct effect and on national law implementing EU law. It held that if '*the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings […] such a limitation cannot be applied as such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337/EEC*' ([112]).

117. This means that an environmental NGO which has brought proceedings on the basis of legal standing *de lege* is entitled to invoke any provision of EU environmental law which it considers to have been infringed.

3.2.2. ***Subject matter falling under Article 9(3) of the Aarhus Convention***

The grounds to be examined in judicial reviews falling under Article 9(3) of the Aarhus Convention should, as a minimum, cover the provisions of law on which the claimant's entitlement to legal standing is based.

118. Article 9(3) of the Aarhus Convention provides for legal standing to challenge acts and omissions not covered by Article 9(1) or (2) of the Aarhus Convention.

3.2.2.1. *Individuals*

119. Under Article 9(3) of the Aarhus Convention, members of the public have access to judicial proceedings where they meet the criteria laid down in national law. Thus, under an impairment of rights approach, Member States could confine the scope of review to legal pleas related to the rights that the claimant argues have been impaired.

3.2.2.2. *Environmental NGOs*

120. In the absence of legal standing *de lege*, environmental NGOs are entitled, as a minimum, to a judicial review in respect of those provisions of law which give rise to actionable rights and interests. As is evident from Sections C.1 and 2, and in particular the CJEU's judgment in *LZ II*, environmental NGOs enjoy a broad right to protect the environment and invoke environmental obligations before national courts.

3.2.3. ***Preclusion and other restrictions***

The scope of the review by a national court may not be reduced to the objections which have already been raised within the time-limit set during the administrative procedure. However, courts can treat as inadmissible arguments submitted abusively or in bad faith.

121. In *Commission* v *Germany* the CJEU ruled that it is not possible to restrict the '*scope of the review by the courts to the objections which have already been raised within the time-limit set during the administrative procedure which led to the adoption of the decision*'. The CJEU justified its position by pointing to the obligation to ensure a review of both the substantive and procedural legality of the contested decision in its entirety ([113]). This judgment is relevant to decisions, acts and omissions covered by Article 11 of the Environmental Impact Assessment Directive, 2011/92/EU and Article 25 of the Industrial Emissions Directive, 2010/75/EU and to decisions, acts and omissions falling under Article 9(2) of the Aarhus Convention. It is also applicable to acts and omissions falling under Article 9(3) of the Convention, because legal challenges to these also cover substantive and procedural legality (see Section C.3.3.3).

([112]) Case C-115/09, *Bund für Umwelt und Naturschutz*, paragraph 45.
([113]) Case C-137/14 *Commission* v *Germany*, paragraph 80.

122. While preclusion is not permitted, the CJEU has indicated that national legislatures *'may lay down specific procedural rules, such as the inadmissibility of an argument submitted abusively or in bad faith, which constitute appropriate mechanisms for ensuring the efficiency of the legal proceedings*' ([114]). In this regard, it is for the Member States to lay down rules which are in conformity with the general requirement to provide for judicial review of the substantive and procedural legality of decisions, acts and omissions.

3.3. **Intensity of scrutiny/standard of review**

Under Article 9(2) and Article 9(3) of the Aarhus Convention, Member States are to ensure an effective judicial review of the substantive and procedural legality of decisions, acts and omissions falling within the scope of these provisions, even if EU secondary legislation does not make any explicit reference to a standard of review that covers both these aspects of legality.

Scrutiny should, where necessary, extend to the legality of legislation and regulatory acts where these reduce or impair procedural and substantive rights.

123. The intensity of scrutiny or standard of review determines how thoroughly the national court is obliged to assess the legality of the decision, act or omission at stake. Approaches vary considerably across Member States. They can extend from a focus on procedural issues to a full review of contested decisions, acts or omissions, with a possibility for judges to replace the findings of the administration with their own assessment.

124. The intensity of scrutiny or standard of review is not laid down in detail in the Aarhus Convention or EU secondary legislation. However, the case-law of the CJEU sheds some light on the minimum requirements to be fulfilled for the judicial review to be considered effective.

3.3.1. ***Requests for environmental information***

Member States must ensure an effective judicial review of the right to request environmental information that covers the relevant principles and rules of EU law. The latter include specific conditions that a public authority must fulfil under binding EU provisions on access to environmental information.

125. Legal challenges to decisions concerning requests for environmental information fall within the scope of Article 9(1) of the Aarhus Convention. The Access to Environmental Information Directive, 2003/4/EC, contains access to justice provisions ([115]) which reflect the requirements of Article 9(1). They provide that Member States are to ensure that any person requesting information under the directive has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. They do not, however, determine the extent of the judicial review required by the directive.

126. In *East Sussex*, the CJEU was asked to interpret the scope of review required under the Access to Environmental Information Directive, 2003/4/EC. It held that *'in the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness*' ([116]). In the specific context of the access to justice provisions of the directive, the CJEU clarified that an effective review needs to meet the objective of providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest ([117]). With regard to the contested administrative decision to charge an applicant certain costs for responding to an information request, the CJEU in *East Sussex* held that the national court has at least to examine whether or not relevant conditions in the directive were met ([118]).

([114]) Case C-137/14 *Commission* v *Germany*, paragraph 81.
([115]) Article 6(2).
([116]) Case C-71/14 *East Sussex*, paragraph 53.
([117]) Case C-279/12 *Fish Legal and Shirley*, paragraph 36.
([118]) Set out in Article 5(2).

3.3.2. ***Other subject matter such as specific activities requiring public participation; environmental liability; plans and programmes; and derogations; national implementing legislation and regulatory acts***

The CJEU case-law provides guidance on how the scrutiny of decisions, acts and omissions under EU environmental legislation should be carried out.

3.3.2.1. *The need to scrutinise both procedural and substantive legality*

127. The judicial review provided for under Article 9(2) of the Aarhus Convention — and under the EU secondary legislation transposing it — is required to assess the substantive and procedural legality of contested decisions, acts and omissions. However, neither the Aarhus Convention nor the EU secondary legislation specifies the extent of the review of substantive and procedural legality that needs to be undertaken.

128. In a similar vein, Article 9(3) of the Aarhus Convention does not provide an explicit obligation to establish a review system in which the substantive and procedural legality of an act or omission is assessed. In the context of EU secondary legislation, only the Environmental Liability Directive, 2004/35/EC, currently expressly provides for this. Nevertheless, the case-law of the CJEU, notably *East Sussex* and *Janecek*, indicates that an EU principle of effective judicial review covering substantive and procedural legality applies to acts and omissions falling under Article 9(3) of the Aarhus Convention. Otherwise it could not be ensured that the objectives of, and the rights conferred by, EU environmental law could be sufficiently protected by national courts. According to the Aarhus Convention Implementation Guide, the standard of review to be applied in the context of Article 9(3) is identical to the one to be applied in the context of Article 9(2) of the Convention, which means that a national court should examine both substantive and procedural legality ([119]).

129. The CJEU case-law makes clear that a review confined to procedural legality would not be in compliance with the obligations stemming from Article 9(2) and the related EU secondary legislation. In *Commission* v *Germany*, the CJEU held that '*the very objective pursued by Article 11 of Directive 2011/92/EU and Article 25 of Directive 2010/75/EU is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety*' ([120])

130. More generally, in *East Sussex* ([121]), the CJEU held that a system of judicial review complies with the principle of effectiveness '*if it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision*'.

131. The conclusion to be drawn from *East Sussex* is that, even if the standard of review is not specified in EU law, the way in which a review is carried out has to be effective in upholding rights and in ensuring that the objectives of the relevant EU legislation are achieved.

3.3.2.2. *Procedural legality*

132. The Aarhus Convention Implementation Guide defines procedural illegality as a case where the public authority has violated procedures set out in law ([122]).

133. Procedural shortcomings which may lead to the illegality of a decision, act or omission can be related to (1) the competence of the authority to take the decision or act that is at stake; (2) a mandatory procedure laid down for the decision-making process (e.g. public consultation or the undertaking of an environmental impact assessment); or (3) the form in which a decision, act or omission is found.

134. While (1) and (3) are usually determined by Member States in line with their procedural autonomy, (2) is more likely to be determined by EU law where mandatory public participation requirements are laid down in the Aarhus Convention and related EU secondary legislation. For instance, the Environmental Impact Assessment Directive, 2011/92/EU, sets out formal public consultation requirements which a public authority has to fulfil when carrying out an environmental impact assessment. Fulfilling these requirements is essential in order to ensure effective public participation in the decision-making process. As a consequence, applying the approach recalled above, the

([119]) Aarhus Convention Implementation Guide p. 199.
([120]) Case C-137/14, *Commission* v *Germany*, paragraph 80 (emphasis added).
([121]) Case C-71/14 *East Sussex*, paragraph 58.
([122]) See page 196.

national court needs to be empowered to examine compliance with these formal requirements and decide on adequate remedies in case of shortcomings in the procedure. Mandatory formal requirements are not at the discretion of the public authority.

135. The scrutiny of procedural legality may concern the scope for regularising the unlawful measures of a private party or a public authority. The CJEU has allowed for the possibility of regularisation but attached conditions as to its use ([123]). In *Križan*, in the context of an authorisation procedure for a landfill, the CJEU was asked to consider the scope for rectifying an error made by a public authority (specifically, a failure to make available certain information in a procedure to approve a landfill) at the stage of an administrative appeal from the decision of that authority. The CJEU confirmed that regularisation was possible, provided all required options and solutions remained possible at the appeal stage ([124]). This was a matter for the national court to determine ([125]).

3.3.2.3. *Substantive legality*

136. Substantive illegality is defined by the Aarhus Convention Implementation Guide as a case where the substance of the law has been violated ([126]).

(a) *Facts of the case*

137. A first aspect of reviewing the substantive legality concerns the facts of the case. Gathered by the administration and eventually amended in a public consultation process, they are the basis on which the competent authority decides whether or not to take any decision or action and with which content and justification. Where the facts are incomplete or wrong, or interpreted wrongly, the mistake has a direct consequence on the quality of the administrative decision taken and may jeopardise the objectives of EU environmental law.

138. In *East Sussex*, the CJEU confirmed that, in the absence of EU rules, it is for the legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. In this regard, it must not be made impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) ([127]).

139. National courts are not generally required to carry out any information-gathering or factual investigations of their own. However, in order to ensure an effective review of the decisions, acts or omissions at stake, a minimum standard has to be applied to the examination of the facts in order to ensure that a claimant can exercise his or her right to ask for a review in an effective manner also so far as the examination of facts is concerned. If a national court could never review the facts on which the administration based its decision, this could, from the outset, prevent a claimant from presenting effectively a potentially justified claim.

(b) *Assessment of the merits of a decision, act or omission*

140. When they draw conclusions from the facts of a case and the applicable legislation, administrative decision-makers usually enjoy a wide discretion. The CJEU recognises that a limited review of the merits of a decision, act or omission can be compatible with EU law. As noted above, the CJEU in *East Sussex* held that, while a limited judicial review does not *per se* make it excessively difficult to exercise the rights conferred by EU law, it must, as a minimum, enable the court hearing an application to apply effectively the relevant principles and rules of EU law ([128]).

141. This means that the standard of review applied has to ensure that the objectives and the scope of the EU law at stake are safeguarded. It also has to take into account the extent of the decision-maker's discretion in evaluating the facts and drawing conclusions and findings from them.

142. The case-law of the CJEU provides clarity on how national judges should scrutinise the discretion of public authorities in several specific contexts.

([123]) In Case C-215/06 *Commission* v *Ireland*, the CJEU held at paragraph 57 that *'while Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.'*

([124]) Case C-416/10 *Križan*, paragraphs 87-91.

([125]) Case C-416/10 *Križan*, paragraph 91.

([126]) See page 196.

([127]) Case C-71/14 *East Sussex*, paragraph 52.

([128]) Case C-71/14 *East Sussex*, paragraph 58.

143. In the context the Environmental Impact Assessment Directive, 2011/92/EU, the CJEU judgments in *Mellor* and *Gruber* ([129]) establish that a decision taken by an administration not to carry out an environmental impact assessment on a project can be challenged before a national court by a member of the public concerned. In particular, an effective judicial review must cover the legality of the reasons for the contested screening decision ([130]). This includes the question of whether the project has a likely significant effect on the environment. Further, with regard to the same directive, the CJEU in *Commission* v *Germany* held that a Member State cannot limit the scope of a judicial review to the question of whether a decision not to carry out an environmental impact assessment was valid. It observed that excluding the applicability of judicial review in cases in which, having been carried out, an environmental impact assessment is found to be vitiated by defects — even serious defects — would render largely nugatory the provisions of the directive relating to public participation ([131]).

144. In the context of Article 6(3) of the Habitats Directive, 92/43/EEC, the CJEU ruled in *Waddenzee* ([132]) that the competent public authorities may only authorise an activity in a protected Natura 2000 site where, taking into account the conclusions of an appropriate assessment, no reasonable scientific doubt remains that, in the light of the site's conservation objectives, the activity will not adversely affect the integrity of the site. This means that, when called upon to review a decision authorising such an activity, the national judge has to determine whether or not the scientific evidence relied upon by the public authority leaves no reasonable doubt.

145. The national judge may thus be called upon to take into account the relevant scientific evidence, on which environmental measures are normally based. The formulation of the ruling in Case *Waddenzee* indicates that the test of whether there is no reasonable doubt is an objective one and cannot be treated by the national court as a subjective one lying exclusively within the public authority's own discretion.

146. In the context of a requirement to prepare air quality plans under ambient air quality legislation, the CJEU in *Janecek* noted that '*while the Member States thus have a discretion, Article 7(3) of Directive 96/62/EC includes limits on the exercise of that discretion which may be relied upon before the national courts (see, to that effect, Case C-72/95 Kraaijeveld and Others [1996] ECR I-5403, paragraph 59), relating to the adequacy of the measures which must be included in the action plan with the aim of reducing the risk of the limit values and/or alert thresholds being exceeded and the duration of such an occurrence, taking into account the balance which must be maintained between that objective and the various opposing public and private interests*' ([133]). Thus, in this judgment, the CJEU envisages that the scrutiny of the national judge should extend to the adequacy of measures in the light of the relevant interests at stake in that case. Similarly, in the context of a requirement on Member States to draw up programmes to reduce emissions of specific pollutants in order to comply with ceilings on such emissions set by the National Emissions Ceiling (NEC) Directive, (EU) 2016/2284 ([134]), the CJEU in *Stichting Natuur en Milieu* held that judicial scrutiny should extend to whether national programmes contained appropriate and coherent policies and measures capable of reducing emissions to the levels required by emissions ceilings ([135]).

147. In the same vein, the intensity of judicial scrutiny that the CJEU expected in *Janecek* and *Stichting Natuur en Milieu* is relevant in the domains of EU water and waste legislation, where requirements on competent public authorities to prepare plans and programmes also fulfil a key role in addressing environmental objectives.

148. In *Stichting Natuur en Milieu*, the CJEU noted the general obligation on Member States to refrain from taking any measure, general or specific, liable seriously to compromise the attainment of a result required by a directive ([136]). This is relevant where it is argued to the national judge that a decision aimed at implementing one EU environmental law will harm the implementation of another.

149. Common threads running through the above cases and *East Sussex* are the importance of the specificities of individual pieces of EU legislation and the correct interpretation of EU law during the decision-making process.

([129]) Case C-570/13 *Gruber*, paragraphs 42-50.
([130]) Case C-75/08 *Mellor*, paragraph 59.
([131]) Case C-137/14 *Commission* v *Germany*, paragraph 48; and Case C-72/12 *Altrip*, paragraph 37.
([132]) Case C-127/02 *Waddenzee*, paragraph 59.
([133]) Case C-237/07 Janecek, paragraph 46.
([134]) Previously 2001/81/EC.
([135]) Cases C-165 to C-167/09, *Stichting Natuur en Milieu*.
([136]) Cases C-165 to C-167/09, *Stichting Natuur en Milieu*, paragraphs 78 and 79.

Much of the case-law mentioned arises from preliminary references from national courts aimed at enabling them to verify whether the administrative decision-maker applied a correct interpretation of EU law. In this context, it is also important to recall that national courts are obliged to apply relevant EU law *ex officio*, irrespectively of what the parties in the proceedings invoke if, by virtue of national law, they must raise points of law based on binding domestic rules which were not raised by the parties ([137]).

150. The principle of proportionality is also relevant when account is being taken of the specificities of EU environmental legislation ([138]).

(c) *Scrutinising national legislation and regulatory acts*

151. As noted in Section C.1.2, EU environmental legislation to safeguard public interests — including the interest of public involvement — will depend, in part, on national implementing legislation and general regulatory acts. It cannot be excluded that legislative and regulatory acts will themselves sometimes be flawed, and more restrictive in recognising the rights mentioned in Section C.1 than are warranted by the EU environmental legislation concerned. Flawed national implementing legislation and regulatory acts can result in a lack of uniform application of EU environmental law, and the CJEU has, therefore, recognised the necessity of providing for their review in certain circumstances.

152. The Aarhus Convention excludes legislative acts from its scope ([139]) and the Environmental Impact Assessment Directive, 2011/92/EU, excludes from its scope '*projects the details of which are adopted by a specific act of national legislation*'. However, in *Boxus*, and *Solvay*, the CJEU confirmed that national courts must be ready to scrutinise national legislative acts to ensure that they meet any conditions that would justify their exclusion from environmental impact assessment requirements. These cases related to national legislation that purported to lay down requirements concerning specific elements of airport and railway infrastructure, independently from the usual administrative procedures. The CJEU considered that the exception for legislative acts only applies where certain conditions are met, and observed that the relevant access to justice provisions of the Aarhus Convention and the Environmental Impact Assessment Directive, 2011/92/EU would lose all effectiveness if the mere fact that a project is adopted by a legislative act were to make it immune to any review procedure for challenging its substantive and procedural legality ([140]). National courts are therefore obliged to review whether the conditions justifying exclusion are fulfilled ([141]).

153. In *Inter-Environnement Wallonie*, the CJEU stressed the importance of national courts scrutinising legislative acts in order to ensure fulfilment of EU environmental law requirements concerning plans and programmes ([142]). In *Stadt Wiener Neustadt*, the CJEU referred to the role of the national court in ascertaining whether national legislation was compliant with the Environmental Impact Assessment Directive, 2011/92/EU in relation to regularisation of unlawful measures ([143]). In that case, it held that EU law precluded national legislation that provided that a prior environmental impact assessment must be deemed to have been carried out for certain projects that had, in actuality, failed to undergo an assessment. It noted that such legislation could frustrate the possibility to obtain an effective remedy under reasonable conditions ([144]).

(d) *Examining the validity of acts adopted by EU institutions and bodies*

154. Article 267 of the TFEU provides a means whereby national courts can put questions to the CJEU on the validity of EU legislation and acts. The use of this possibility is illustrated by *Standley*, in which, following questions posed

([137]) See Case C-72/95 *Kraaijeveld*, paragraph 57.
([138]) In Joined Cases C-293/12, *Digital Rights Ireland Ltd* and C-594/12 on the rules on general retention of communication metadata, the CJEU noted at paragraph 47 '*With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference*'.
([139]) This is because the definition of 'public authority' in Article 2(2) of the Aarhus Convention excludes bodies or institutions acting in a judicial or legislative capacity.
([140]) Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*, paragraph 53.
([141]) Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*.
([142]) Case C-41/11, *Inter-Environnement Wallonie*, paragraphs 42 to 47.
([143]) Case C-348/15 *Stadt Wiener Neustadt*, paragraph 38.
([144]) Case C-348/15 *Stadt Wiener Neustadt*, paragraphs 47 and 48.

by a national court, the CJEU, amongst other things, examined the validity of the Nitrates Directive, 91/676/EEC in the light of the 'polluter pays' principle set out in Article 191 of the TFEU ([145]). Similarly, in *Safety Hi Tech*, the CJEU reviewed the validity of the Ozone Regulation, (EC) No 3093/94 [now (EC) No 2037/2000], against the stipulation in Article 191 of the TFEU that EU environmental policy should aim at a high level of environmental protection ([146]). *Eco-Emballages SA*, which, inter alia, featured a question about the validity of a Commission directive adopted under the Packaging Waste Directive, 94/62/EC, shows how Article 267 of the TFEU can be used in relation to a subsidiary act adopted at EU level ([147]).

4. EFFECTIVE REMEDIES

4.1. **Introduction**

There is a general requirement on every body of a Member State to nullify the unlawful consequences of a breach of EU environmental law. Member States must also refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law. Member States have discretion with regard to effective remedies, provided that they comply with the principles of equivalence and effectiveness.

155. It will generally not be sufficient for a judicial review to determine whether a particular decision, act or omission was lawful. It will also be necessary for the national court to consider effective remedies — sometimes referred to as reliefs — where the conduct of the public authority is found to have been contrary to EU law. The CJEU has derived from the principle of cooperation in good faith now laid down in Article 4(3) of the TEU a requirement on every organ of a Member State to nullify the unlawful consequences of a breach of EU law ([148]). The duty of cooperation also requires that breaches be prevented before they occur, with Member States being obliged to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law ([149]). The legal systems of the Member States must therefore provide for effective remedies that comply with these requirements.

156. The detailed procedural rules applicable to effective remedies are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States. This is provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) ([150]). With regard to the latter principle, the CJEU has also relied on standards deriving from Article 47(1) of the Charter of Fundamental Rights of the EU which enshrines the right to an effective remedy ([151]).

157. The Aarhus Convention also refers to effective remedies. Article 9(4) requires that judicial review procedures to challenge decisions, acts and omissions shall provide adequate and effective remedies, including *'injunctive relief'* as appropriate. This is an auxiliary requirement to those of Article 9(1),(2) and (3) of the Aarhus Convention.

4.2. **Remedies in case of minor procedural defects**

Minor procedural defects do not require remedies, provided it can be established — without placing any burden on the applicant for judicial review — that they did not impact on the contested decision.

158. In *Altrip*, which concerned questions of interpretation arising from alleged irregularities in an environmental impact assessment carried out on a proposed flood retention scheme, the CJEU noted that, *'it is unarguable that not*

([145]) Case C-293/97 *Standley*, paragraphs 51 and 52.
([146]) Case C-284/95 *Safety Hi Tech*, paragraph 33 to 61.
([147]) Joined Cases C-313/15 and C-530/15, *Eco-Emballages SA*.
([148]) Case C-201/02 *Wells*, paragraphs 64-65.
([149]) Case C-129/96 *Inter-Environnement Wallonie*, paragraph 45.
([150]) Case C-201/02 *Wells*, paragraph 67, and Case C-420/11 *Leth*, paragraph 38.
([151]) Case C-71/14 *East Sussex*, paragraph 52.

every procedural defect will necessarily have consequences that can possibly affect the purport of a decision' ([152]). It ruled that effective remedies such as revocation need not arise if a contested decision would not have been different without the procedural defect invoked ([153]). However, it also ruled that the applicant for judicial review could not be required to prove a causal link between the procedural defect and the contested decision ([154]). Instead, it was for others to provide evidence that the procedural defect would have made no difference to the outcome ([155]).

4.3. **Suspension, revocation or annulment of unlawful decisions or acts, including disapplication of legislation and regulatory acts**

National courts must consider taking general or particular measures to address a lack of compliance with EU environmental law. These may need to include the suspension, revocation or annulment of unlawful decisions or acts, and the disapplication of legislation and regulatory acts.

159. In *Wells*, which concerned the grant of a consent for mining operations without an environmental impact assessment having first been carried out, the CJEU considered the scope of the obligation to remedy the failure to carry out an environmental impact assessment. It held that '*the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project*' ([156]). It also noted that '*(i)t is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects*' ([157]).The CJEU saw the suspension or revocation of the contested consent as being a step towards fulfilling an omitted requirement, namely the undertaking of an environmental impact assessment ([158]).

160. In *Boxus*, and *Solvay*, the CJEU considered how a national court should deal with a situation where national legislation did not meet the criteria to justify the non-application of environmental impact assessment requirements. It ruled that the national court should be ready to set aside the flawed legislation ([159]). In *Stadt Wiener Neustadt* the CJEU considered that national legislation which could frustrate the possibility to obtain an effective remedy of the kind referred to in *Wells* was incompatible with the requirements of the Environmental Impact Assessment Directive, 2011/92/EU ([160]). It was for the national court to ascertain this ([161]).

Some national courts have the power to limit the effects of the annulment of regulatory acts found to be contrary to EU environmental law. However, this power may only be exercised if stringent conditions are met.

161. Where a breach of EU environmental law requires the annulment of regulatory acts (in line with the powers granted to the courts by national law), the national court may face a dilemma: how to limit any undesirable environmental effects caused by the annulment itself, especially where some time will elapse before replacement provisions can be put in place? The CJEU set out criteria for addressing this issue in *Inter-Environnement Wallonie* ([162]), which concerned a legally flawed nitrates action programme, and *Association France Nature Environnement* ([163]), which concerned a legally flawed decree on strategic environmental impact assessment. It confirmed that a national court is entitled to limit the legal effects of annulment, provided that such limitation is dictated by an overriding consideration linked to environmental protection.

([152]) Case C-72/12 *Altrip*, paragraph 49.
([153]) Case C-72/12 *Altrip*, paragraph 51.
([154]) Case C-72/12 *Altrip*, paragraphs 52-54.
([155]) However, the possibility of disregarding minor procedural defects for purpose of effective remedies does not preclude a judge from declaring that a procedural defect has occurred.
([156]) Case C-201/02 *Wells*, paragraph 65.
([157]) Case C-201/02 *Wells*, paragraph 69.
([158]) Case C-201/02 *Wells*, paragraph 60.
([159]) Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus*, paragraph 57; and Case C-182/10 *Solvay and others*, paragraph 52.
([160]) Case C-348/15 *Stadt Wiener Neustadt*, paragraphs 45 to 48.
([161]) Case C-348/15 *Stadt Wiener Neustadt*, paragraph 31.
([162]) Case C-41/11 *Inter-Environnement Wallonie*.
([163]) Case C-379/15 *Association France Nature Environnement*.

162. However, the power of the national court to limit the effects of annulment may only be exercised if certain conditions are met ([164]):

— the contested provision of national law constitutes a measure correctly transposing EU law on environmental protection,

— the adoption and coming into force of a new provision of national law do not make it possible to avoid the damaging effects on the environment arising from annulment of the contested provision of national law,

— the annulment would have the effect of creating a legal vacuum concerning transposition which would be more damaging to the environment, in the sense that that annulment would result in lesser protection,

— the effects of a contested provision exceptionally kept in force last only for the period strictly necessary for adopting measures to remedy the irregularity.

4.4. **Instructions requiring omitted measures to be adopted**

Competent administrative authorities must consider taking general or particular measures to address a lack of compliance with EU environmental law. Should they fail to do so, it is for the national court having jurisdiction to take any necessary measure.

163. In *Janecek* ([165]), the CJEU considered the failure by a public authority to adopt a legally required air pollution action plan to address a problem of high levels of particulate matter, and confirmed that a national court can require the public authority to adopt such a plan. This case therefore points to the role of national courts in ordering omitted measures to be adopted.

164. *Janecek* ([166]) and *Client Earth* ([167]) and *Altrip* ([168]) all go further, indicating that the role of the national court extends to checking the content of decisions and acts to ensure that they fulfil EU law requirements. As a corollary, effective remedies therefore need to include steps that address content deficiencies, for example an instruction requiring an already adopted air quality action plan to be revised ([169]).

4.5. **Making good unlawful harm caused by an unlawful decision, act or omission**

Remedies should include measures aimed at making good the unlawful harm caused by an unlawful decision, act or omission. Such measures need to cover both compensation for pecuniary damage and redress for unlawful harm to the environment.

165. By the time a contested decision, act or omission is legally challenged, harm may have already resulted. In *Wells* the CJEU held that a Member State is required to make good any harm caused by a failure to comply with EU environmental law ([170]). In that case, the CJEU mentioned financial compensation for the environmental claimant. However, as can be seen from subsequent case-law, notably in *Grüne Liga Sachsen* ([171]), the possibility of redress also extends to the environment itself — in particular where compliance with the infringed requirement would have entailed avoiding or compensating for environmental damage.

4.5.1. ***Compensation for pecuniary damage***

Under the doctrine of state liability, a breach of the requirements of EU environmental law may confer on the public concerned a right to compensation for pecuniary damage. It is for the national courts to determine whether the three conditions for the liability of the EU law to which the right to compensation is subject are met.

([164]) Case C-379/15 *Association France Nature Environnement*, paragraph 38.
([165]) Case C-237/07 *Janecek*, paragraphs 39-42.
([166]) Case C-237/07 *Janecek*, paragraph 46.
([167]) Case C-404/13 *Client Earth*, paragraph 58. In this case, where the context involved binding air quality limit values under the Air Quality Directive, 2008/50/EC, the CJEU held that *'where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50/EC and has not applied for a postponement of the deadline as provided for by Article 22 of the directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter'*.
([168]) Case C-72/12 *Altrip*.
([169]) See footnote 163.
([170]) Case C-201/02 *Wells*, paragraph 66.
([171]) Case C-399/14 *Grüne Liga Sachsen*.

166. In *Leth*, which concerned a claim for compensation for alleged property de-valuation resulting from the expansion of an airport without an environmental impact assessment, the CJEU shed light on the possibility of obtaining pecuniary compensation for non-fulfilment of a requirement of EU environmental law. It confirmed that the prevention of pecuniary damage was covered by the objective of protection pursued by the Environmental Impact Assessment Directive, 2011/92/EU, and that it was for the domestic legal order of each Member State to provide detailed procedural rules covering compensation claims, subject to the principles of equivalence and effectiveness ([172]). It recalled settled case-law establishing a doctrine of state liability according to which persons who have been harmed have a right to reparation if three conditions are met:

— the rule of European Union law infringed must be intended to confer rights on them,

— the breach of the rule must be sufficiently serious, and

— there must be a causal link between that breach and the loss or damage sustained by the individuals ([173]).

It stressed that the nature of the rule breached must be taken into account, doubting that the failure to carry out an environmental impact assessment could by itself constitute the reason for the decrease in value of a property ([174]). It also confirmed that the question of whether or not the conditions for compensation were met was one for the national court.

167. The rationale of the judgment in *Leth* applies to other breaches of EU environmental law where the legislation at stake aims at protecting or granting individual rights, including access to justice rights.

4.5.2. ***Addressing unlawful harm to the environment***

168. In *Grüne Liga Sachsen*, the CJEU was presented with questions of interpretation of the Habitats Directive, 92/43/EEC, in a situation in which a bridge had already been constructed in a site protected under that directive without the necessary safeguards having first been adopted. The CJEU effectively required the situation to be addressed retrospectively in a manner that corresponded as closely as possible to that in which an unexecuted project would have been. Similar conditions needed to be fulfilled *mutatis mutandis*. Thus, the impact of the bridge needed to be appropriately assessed, and even the option of demolishing the bridge considered as a possible solution to preventing damage ([175]). Further, it can be deduced from the judgment that compensation needed to be provided for any unlawful damage already done to the protected site ([176]).

169. Any harm to the environment has to be addressed in an effective manner which is in line with the objectives of the EU environmental legislation concerned ([177]).

4.6. **Interim measures**

A national court dealing with a dispute governed by EU environmental law must be in a position to order interim measures.

170. Interim measures — referred to as *'injunctive relief'* in Article 9(4) of the Aarhus Convention — allow a court to order that a contested decision or act not be implemented or that some positive measure be taken before the court delivers its final judgment. The aim is to avoid harm arising from a decision or act that might ultimately turn out to be unlawful.

171. In *Križan*, which concerned a permit for a landfill, the CJEU was asked whether the access to justice provisions of what is now the Industrial Emissions Directive, 2010/75/EU, allowed for interim measures (despite not specifically mentioning them). It stated that *'the exercise of the right to bring an action provided for by Article 15a of [the then] Directive 96/61/EC would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring*

([172]) Case C-420/11 *Leth*, paragraphs 36 and 38.
([173]) Case C-420/11 *Leth*, paragraph 41.
([174]) Case C-420/11 *Leth*, paragraph 46.
([175]) Case C-399/14 *Grüne Liga Sachsen*, paragraph 75.
([176]) This is because the CJEU required the future of the bridge to be considered in the context of Article 6(4) of the Habitats Directive, 92/43/EEC. This requires compensatory measures if a damaging project is allowed to proceed on the grounds of absence of alternative solutions and overriding public interest.
([177]) See also Case C-104/15 *Commission* v *Romania*, paragraph 95, with regard to the importance of taking account of requirements of results when addressing non-compliance. This case concerned Articles 4 and 13(2) of the Mining Waste Directive, 2006/21/EC.

an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit' ([178]).

172. In *Križan*, the CJEU also recalled that the possibility of interim measures is a general requirement of the EU legal order. In the absence of EU rules, and in line with the principle of procedural autonomy, it is up to Member States to lay down the detailed conditions for granting interim measures.

173. The CJEU itself has defined criteria for deciding on applications for interim measures where it has jurisdiction itself. Orders it has made, including in the field of EU environmental law, refer to the need for the CJEU to be presented with a prima facie case, the urgency of the matter and the balance of interests ([179]).

5. COSTS

5.1. **Introduction**

Member States must ensure that judicial review procedures to challenge decisions, acts and omissions relating to EU environmental law are not prohibitively expensive.

174. The costs of a judicial review procedure present a potential major deterrent to bringing cases before a national court. This is especially true in environmental cases, which are often initiated to protect general public interests and without any financial gain in view. Indeed, after weighing the potential benefits of litigation against the risk of incurring high litigation costs, the public concerned may refrain from seeking a judicial review even in well-justified cases.

175. To address the potential deterrent effect of costs, the Aarhus Convention in its Article 9(4) provides that the review procedures covered by Article 9(1), (2) and (3) '*shall*' not be prohibitively expensive. Because it is an auxiliary requirement to the provisions of Article 9(1), (2) and (3) of the Aarhus Convention, the cost provision of Article 9(4) is relevant across the different kind of legal challenge related to EU environmental law that these provisions cover ([180]).

176. Certain EU directives include an explicit requirement on costs based on the wording of Article 9(4) ([181]). There is existing CJEU case-law that interprets the cost provisions of the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU ([182]), which are both based on the cost provision of Article 9(4) of the Aarhus Convention.

177. Further, in *Edwards and Pallikaropoulos*, the CJEU held that the requirement that the cost of a procedure should not be prohibitively expensive '*pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law*' ([183]). A cost regime has therefore to be shaped in such a way as to guarantee that rights conferred by the EU can be effectively exercised.

178. In this regard, the CJEU has developed a number of criteria aimed at avoiding that litigation costs become prohibitively expensive.

([178]) Case C-416/10 *Križan*, paragraph 109.

([179]) See for example *Commission* v *Malta*, C-76/08 R. Point 21 states that: '*It is settled case-law that the judge hearing an application for interim measures may order interim relief only if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (see, inter alia, the order in Case C-404/04 P-R Technische Glaswerke Ilmenau* v *Commission [2005] ECR I-3539, paragraph 10, and the case cited)*'. Point 22 states that '*The conditions thus imposed are cumulative, so that an application for interim measures must be dismissed if one of them is not met (see, inter alia, Technische Glaswerke Ilmenau* v *Commission, paragraph 11, and the case cited)*'.

([180]) See also Case C-268/06 *Impact*, paragraph 51.

([181]) Article 11(4) of the Environmental Impact Assessment Directive, 2011/92/EU; Article 25(4) of the Industrial Emissions Directive, 2010/75/EU; and Article 23 of the Seveso III Directive, 2012/18/EU.

([182]) Case C-427/07 *Commission* v *Ireland*; C-260/11 *Edwards and Pallikaropoulos*; and Case C-530/11 *Commission* v *United Kingdom*.

([183]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 33.

5.2. **Criteria for assessing whether costs are prohibitive**

The requirement that judicial review procedures not be prohibitively expensive is subject to interpretation at EU level. It relates to all the costs of participating in a procedure, including financial guarantees that a claimant is asked to provide, and applies to all judicial stages. Claimants are entitled to reasonable predictability as regards their exposure to costs. Where a national court is empowered to determine what costs an unsuccessful claimant should pay, it may take into account subjective considerations related to the claimant while also ensuring that the costs are not objectively unreasonable.

(a) *National courts and provisions on costs*

179. Article 3(8) of the Aarhus Convention provides that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected. The CJEU case-law also confirms that the cost provision does not prevent national courts from making cost orders ([184]).

180. However, under Article 9(4) of the Aarhus Convention, costs cannot be prohibitive. In this regard, the CJEU has confirmed that interpretation of the notion of '*prohibitive*' costs cannot be a matter for national law alone, and that, in the interests of uniform application of EU law and the principle of equality, it must be given an autonomous and uniform interpretation throughout the European Union ([185]).

181. It has observed that the requirement in the Environmental Impact Assessment Directive, 2011/92/EU, and in the Industrial Emissions Directive, 2010/75/EU, according to which procedures must not be prohibitively expensive '*means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result*' ([186]).

182. The CJEU has looked at how the cost proviso is enshrined in national law. The CJEU has held that transposition ([187]) should ensure for the claimant a reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount ([188]).

183. The CJEU has held that the cost proviso is to be interpreted in the context of all the costs arising from participation in judicial proceedings ([189]). Therefore, account needs to be taken of all of the costs borne by the party concerned, such as legal representation costs, court fees, and the cost of evidence and experts' fees.

184. Further, in the context of interim measures, the CJEU has clarified that the cost provision also applies to financial costs resulting from measures which the national court might impose as a condition for the grant of interim measures in the context of disputes arising from the Environmental Impact Assessment Directive, 2011/92/EU, and Industrial Emissions Directive, 2010/75/EU ([190]). More specifically, it has looked at costs related to financial guarantees (such as bonds or cross-undertakings in damages) that a claimant is asked to provide to compensate for delays to a project that result from an unsuccessful legal challenge. On the one hand, it has stated that the requirement that proceedings not be prohibitively expensive cannot be interpreted as immediately precluding the application of a financial guarantee where that guarantee is provided for by national law ([191]). On the other, it has indicated that '*it is incumbent upon the court which rules on this issue to make sure that the resulting financial risk for the claimant is also included in the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive*' ([192]).

185. A further criterion relates to the judicial instances to which the cost provision applies. The CJEU has clarified that it is applicable at all stages of proceedings, i.e. not only at the stage of first-instance proceedings, but also at the stages of an appeal or second appeal ([193]).

([184]) Case C-427/07 *Commission* v *Ireland*, paragraph 92.
([185]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraphs 29-30.
([186]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 35.
([187]) The case-law concerns the cost provision as found in the Environmental Impact Assessment Directive, 2011/92/EU, and the Industrial Emissions Directive, 2010/75/EU, which are subject to the duty of transposition applicable to directives.
([188]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 58
([189]) Case C-427/07 *Commission* v *Ireland*, paragraph 92.
([190]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 66. By way of analogy, this is also relevant to the Seveso III Directive, 2012/18/EU.
([191]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 67.
([192]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 68.
([193]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraphs 45 and 48.

(b) *Applying the 'loser pays principle' and other cost-allocation approaches when deciding on costs*

186. The CJEU has addressed how national courts should apply the 'loser pays principle' when making cost orders in respect of unsuccessful environmental claimants. Under this principle, a national court can order the party who loses a case to bear the entire cost burden of the procedure, including the opposing side's costs. The case-law establishes that, in the cost decision of the national court, both subjective and objective considerations are relevant. The case-law also rejects the proposition that, because a claimant makes a legal challenge, the costs cannot have been prohibitive for them ([194]).

187. Subjective elements include:

— the financial situation of the person concerned,

— whether the claimant has a reasonable prospect of success,

— the importance of what is at stake for the claimant and for the protection of the environment,

— the complexity of the relevant law and procedure, and

— the potentially frivolous nature of the claim at its various stages ([195]).

188. Over and above considering the individual situation of the applicant (subjective test) and the individual facts of the case, a national court should apply an objective test aimed at ensuring that the costs are not objectively unreasonable. The CJEU has stressed this in the context of members of the public and their associations having an active role to play in defending the environment ([196]). The costs of proceedings must, therefore, neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable ([197]).

189. Where the 'loser pays principle' applies, a cost-allocation approach involving cost-capping may prove useful. This provides greater predictability on — and greater control over — cost exposure. It involves a mechanism — the protective cost order — whereby a ceiling is established at the outset of proceedings on how much costs a claimant will have to pay if they lose — and, in reciprocal cost-capping, how much costs they can recover if they win. In a one-way cost cap, the costs which have to be borne by a claimant if a case is lost are limited to a certain amount, thereby increasing the predictability of the financial risk. However, in reciprocal cost-capping, the public authority's liability to pay a successful claimant is also limited and any excess will have to be met by the claimant alone.

190. The CJEU considered a system of cost-capping in *Commission* v *United Kingdom*, noting that, in principle, the possibility for the court hearing a case to grant a protective cost order ensures greater predictability as to the cost of the proceedings and contributes to compliance with the requirement on prohibitive costs ([198]). However, it considered that several specific features of the Member State's cost-capping system — such as the absence of an obligation to grant protection where the cost of the proceedings is objectively unreasonable and the exclusion of protection where only the particular interest of the claimant was involved — meant that it did not amount to a method that could satisfy the requirement that costs not be prohibitive.

191. The reasoning that the CJEU applied to a specific cost-capping system in *Commission* v *United Kingdom* is relevant by analogy to other approaches to cost-allocation. Thus, where a national court enjoys discretion to order each party, including a successful claimant, to pay his or her own costs (back-to-back cost allocation), it needs to take account of the CJEU criterion that the cost of proceedings not be objectively unreasonable. Fixing an environmental claimant with having to pay his or her own costs even if he or she wins a case might be argued to be inherently unreasonable and inconsistent with the requirements of Article 9(4) of the Aarhus Convention that procedures must be fair and equitable.

192. 'One-way cost shifting' is an approach to cost-allocation under which a successful environmental claimant can recover their own costs (as under the 'loser pays principle') but an unsuccessful one is spared, in whole or in part,

([194]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 43.
([195]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 42.
([196]) Case C-260/11 *Edwards and Pallikaropoulos*, paragraph 40.
([197]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 47.
([198]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 54.

from having to pay the costs of the other side. Cost shifting may extend to the state paying part of an unsuccessful claimant's costs — as where the litigation is deemed to reflect a strong public interest. Thus, one-way cost shifting can present features which address potential shortcomings of other cost-allocation approaches (in terms of the need for costs not to be objectively unreasonable and in terms of procedures needing to be fair and equitable).

193. Some cost shifting regimes are conditional in order to limit their use, with the national court charged with allocating costs having to apply criteria such as the significance of the case, the impact for the environment, the seriousness of the breach of law or the conduct of the parties. However, a discretion which is too wide may undermine cost predictability, an aspect that the CJEU case-law identifies as important, particularly where judicial proceedings entail high lawyers' fees. It may also result in the regime failing to meet the overall criterion of costs not being objectively unreasonable ([199]).

5.3. **Legal aid**

194. Article 9(5) of the Aarhus Convention requires the contracting parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. This provision stops short of requiring that a legal aid scheme is provided and EU secondary environmental legislation is silent on the matter. Member States may therefore choose whether or not to have a legal aid scheme which contributes to reducing the cost risk of litigation in environmental cases. However, the existence of a legal aid regime may not in itself demonstrate that costs are not prohibitive, if access to legal aid is means-tested and only open to individuals. This is because the requirement that costs must not be prohibitive applies to individuals with a capacity to pay as well as to associations.

195. At the same time, it should be recalled that Article 47(3) of the Charter of Fundamental Rights does require that '*legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*'. This provision leaves Member States a free choice of the means to be used in guaranteeing litigants legal aid in order to ensure that they enjoy an effective right of access to a court. Member States are thus free to institute their legal aid schemes in the way they consider appropriate. Examples include access to pre-litigation advice, legal assistance and representation in court, and exemption from — or assistance with — the cost of proceedings. The right to legal aid is not absolute and may be subject to restrictions, as is the right of access to a court. Member States will therefore be free to impose conditions on the granting of legal aid, based, for example, on the prospects of an applicant's success in the proceedings. However, these conditions shall not deprive individuals of the 'practical and effective' access to a court to which they are entitled ([200]).

6. TIME LIMITS, TIMELINESS AND THE EFFICIENCY OF PROCEDURES

Member States are entitled to require that environmental claimants apply for judicial review within specified time limits which are reasonable. Under Article 9(4) of the Aarhus Convention, Member States have to ensure that judicial review procedures are conducted in a timely manner.

196. A number of temporal considerations are relevant to environmental access to justice: requirements that environmental claimants must bring their challenges within specified time limits, and requirements that judicial review procedures should be conducted in a timely manner.

197. In *Stadt Wiener Neustadt*, the CJEU confirmed that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interest of legal certainty. This protects both the individual and the administrative authority concerned ([201]).

198. Timeliness of court procedures is a key guarantee that judicial review will be efficient. Accordingly, Article 9(4) of the Aarhus Convention requires that the procedures referred to in Article 9(1), (2) and (3) are to be timely.

199. Timely procedures serve several purposes. They enable legal clarity to be provided and legal challenges resolved, without undue delay. Lengthy procedures tend to generate greater litigation costs, increasing the financial burden of the parties to a legal dispute; they may also cause delays to projects and other economic activities that are ultimately confirmed to be lawful. Timely procedures are thus in the interest not only of environmental claimants but of all parties to legal disputes, including economic operators.

([199]) Case C-530/11 *Commission* v *United Kingdom*, paragraph 47.
([200]) See 'Explanations relating to the Charter of Fundamental Rights', Article 47(3).
([201]) Case C-348/15 *Stadt Wiener Neustadt*, paragraph 41.

200. The requirement in Article 9(4) of the Convention that procedures must be timely is not sufficiently clear and unconditional to be directly applicable and must therefore be transposed into national law in order to take effect.

201. A general obligation to ensure a reasonable length of proceedings is also enshrined in Article 47(2) of the Charter of Fundamental Rights, which corresponds to Article 6(1) of the European Convention on Human Rights on the right to a fair trial.

7. PRACTICAL INFORMATION

Practical information needs to be provided to the public on access to judicial review procedures.

202. According to Article 9(5) of the Aarhus Convention, the contracting parties '*shall ensure that information is provided to the public on access to […] judicial review procedures*'. The obligation to inform the public about their access to justice rights was also taken into account in certain EU secondary legislation which transposes the requirements of the Aarhus Convention ([202]). The obligation to inform the public applies to procedures under Articles 9(1), (2) and (3) of the Convention.

203. With reference to the obligation now found in Article 11(5) of the Environmental Impact Assessment Directive, 2011/92/EU ([203]), the CJEU in its judgment in *Commission* v *Ireland* highlighted that '*the obligation to make available to the public practical information on access to administrative and judicial review procedures […] amounts to an obligation to obtain a precise result which the Member States must ensure is achieved*' ([204]). It also held that '*in the absence of any specific statutory or regulatory provision on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters*' ([205]).

204. Member States have a wide discretion in how they fulfil the requirement. However, *Commission* v *Ireland* confirms that it is insufficient for Member States to merely rely on the publication of national rules on access to justice and the accessibility of relevant national court decisions. The CJEU reference to ensuring that the public concerned is made aware of its access to justice rights in a sufficiently clear and precise manner points to the need for Member States to consider, first, the addressees of the information, second, the content of the information and, third, the manner of presenting it.

205. In terms of addressees, it should be ensured that the information can reach a broad and representative public. Providing practical information only on a website may be insufficient, given that a considerable section of the population might not have access to web-based resources. While it is an effective and efficient tool it should be complemented by other measures.

206. In terms of content, information on the review procedure should include all relevant aspects in order to facilitate a decision of a member of the public on whether or not to bring a case to court.

207. The information should be complete, accurate and up-to-date ([206]), highlighting relevant changes that occur in relation to review procedures. Use of out-of-date or misleading information may have serious consequences and arrangements should be in place to avoid this. All the sources of law used to determine the conditions of access should be covered, including national case-law where this plays an important role.

208. As for the manner of presenting information, the information should be clear and understandable for a non-lawyer.

209. Also relevant in this context is Article 3(3) of the Aarhus Convention which provides that each party '*shall promote environmental education and environmental awareness amongst the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters*'.

([202]) For example, Article 11(5) of the Environmental Impact Assessment Directive, 2011/92/EU.
([203]) Previously Article 10(6) of Directive 85/337/EEC.
([204]) Case C-427/07 *Commission* v *Ireland*, paragraph 97 (emphasis added).
([205]) Case C-427/07 *Commission* v *Ireland*, paragraph 98.
([206]) See also the information available on access to justice via the e-Justice portal, which has to be regularly updated by Member States: https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do

D. **CONCLUSION**

210. Analysis shows that, as interpreted by the CJEU, existing requirements of the EU *acquis*, in particular those stemming from EU secondary environmental law and international commitments, already provide a coherent framework for access to justice in environmental matters. The existing requirements address all key aspects of the subject, ensuring that members of the public, including environmental NGOs, are entitled to bring cases to national courts and to have those cases correctly examined and made subject to effective remedies. Furthermore, successive judgments delivered over the past decade show the importance the CJEU attaches to access to national courts as a means of ensuring the effectiveness of EU law. Cases brought to national courts are not only a means of challenging decisions, acts and omissions of Member State public authorities on the basis of EU environmental law. Via preliminary references under Article 267 of the TFEU, they also make it possible for the CJEU to rule on the interpretation and validity of EU acts.

211. The present Notice facilitates access to the national courts by explaining and interpreting existing legal requirements. In this way, it contributes to improving the application of EU law. It is aimed at helping Member States, national courts, legal practitioners and the public, and the Commission will follow with interest how these intended beneficiaries make use of it, and how access to justice in environmental matters evolves across the EU.

212. The role of the CJEU will remain paramount in the interpretation of EU law relevant to access to justice in environmental matters, including the fulfilment of requirements stemming from Article 19(1) of the TEU on effective judicial protection. In this regard, the existing case-law shows the fruitful results of the cooperation between the CJEU and national courts within the context of Article 267 of the TFEU. This may be expected to continue. The Commission will follow carefully and assess relevant new case-law that the CJEU delivers, and will consider updating this Notice in the future should that prove necessary.

ANNEX I

List of relevant case-law of the CJEU for access to justice in environmental matters:

Judgment of 30 May 1991, *Commission* v *Germany* C-361/88, EU:C:1991:224

Judgment of 17 October 1991, *Commission* v *Germany* C-58/89, EU:C:1991:391

Judgment of 24 October 1996, *Kraaijeveld* C-72/95, EU:C:1996:404

Judgment of 14 July 1998, *Safety Hi-Tech* C-284/95, EU:C:1998:352

Judgment of 29 April 1999, *Standley* C-293/97, EU:C:1999:215

Judgment of 7 December 2000, *Commission* v *France* C-374/98, EU:C:2000:670

Judgment of 7 January 2004, *Wells* C-201/02, EU:C:2004:12

Judgment of 7 September 2004, *Waddenzee* C-127/02, EU:C:2004:482

Judgment of 13 March 2007, *Unibet* C-432/05, EU:C:2007:163

Judgment of 25 July 2008, *Janecek* C-237/07, EU:C:2008:447

Judgment of 15 April 2008, *Impact* C-268/06, EU:C:2008:223

Judgment of 3 July 2008, *Commission* v *Ireland* C-215/06, EU:C:2008:380

Judgment of 16 July 2009 *Commission* v *Ireland* C-427/07, EU:C:2009:457

Judgment of 30 April 2009, *Mellor* C-75/08, EU:C:2009:279

Judgment of 15 October 2009, *Djurgården* C-263/08, EU:C:2009:631

Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz* C-115/09, EU:C:2011:289

Judgment of 18 October 2011, *Boxus* Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667

Judgment of 8 March 2011 *LZ I* C-240/09, EU:C:2011:125

Judgment of 26 May 2011, *Stichting Natuur en Milieu* C-165 to C-167/09, EU:C:2011:348

Judgment of 16 February 2012, *Solvay and others* C-182/10, EU:C:2012:82

Judgment of 28 February 2012 *Inter-Environnement Wallonie* C-41/11, EU:C:2012:103

Judgment of 15 January 2013, *Križan* C-416/10, EU:C:2013:8

Judgment of 14 March 2013, *Leth* C-420/11, EU:C:2013:166

Judgment of 11 April 2013, *Edwards and Pallikaropoulos* C-260/11, *EU:C:2013:221*

Judgment of 3 October 2013, *Inuit* C-583/11P, EU:C:2013:625

Judgment of 7 November 2013, *Altrip* C-72/12, EU:C:2013:712

Judgment of 19 December 2013, *Fish Legal and Shirley* C-279/12, EU:C:2013:853

Judgment of 13 February 2014, *Commission* v *United Kingdom* C-530/11, EU:C:2014:67

Judgment of 19 November 2014, *Client Earth* EU C-404/13:C:2014:2382

Judgment of 6 October 2015, *East Sussex* C-71/14, EU:C:2015:656

Judgment of 15 October 2015, *Commission* v *Germany* C-137/14, EU:C:2015:683

Judgment of 14 January 2016, *Grüne Liga Sachsen* C-399/14, EU:C:2016:10

Judgment of 21 July 2016 *Commission* v *Romania* C-104/15, EU:C:2016:581

Judgment of 15 October 2015, *Gruber* C-570/13, EU:C:2015:683

Judgment of 28 Juin 2016, *Association France Nature Environnement* — C-379/15 EU:C:2016:603

Judgment of 8 November 2016, *LZ II* C-243/15, EU:C:2016:838

Judgment of 10 November 2016, *Eco-Emballages*, C-313/15 and C-530/15 EU:C:2016:859

Judgment of 17 November 2016, *Stadt Wiener Neustadt* C-348/15. EU:C:2016:882

Order of the President of the Court of 24 April 2008 in *Commission* v *Malta* C-76/08 R EU:C:2008:252

Opinion 1/09, *Creation of a Unified Patent Litigation System*, EU:C:2011:123

ANNEX II

Current EU instruments cited

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive') (OJ L 206, 22.7.1992, p. 7).

Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ('the Nitrates Directive') (OJ L 375, 31.12.1991, p. 1).

European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ('the Packaging Waste Directive') (OJ L 365, 31.12.1994, p. 10).

Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption ('the Drinking Water Directive') (OJ L 330, 5.12.1998, p. 32). This replaces Directive 80/778/EEC.

Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer ('the Ozone Regulation') (OJ L 244, 29.9.2000, p. 1). This replaces Regulation (EC) No 3093/94.

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ('the Water Framework Directive') (OJ L 327, 22.12.2000, p. 1).

Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ('the Strategic Environmental Assesment' or 'SEA Directive') (OJ L 197, 21.7.2001 p. 30).

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 ('the Access to Environmental Information Directive') (OJ L 41, 14.2.2003, p. 26).

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 ('the Public Participation Directive') (OJ L 156, 25.6.2003, p. 17).

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage ('the Environmental Liability Directive') (OJ L 143, 30.4.2004, p. 56).

Council Decision of 17 February 2005 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 (2005/370/EC) (OJ L 124, 17.5.2005, p. 1).

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ('the Aarhus Regulation') (OJ L 264, 25.9.2006, p. 13).

Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC ('the Bathing Water Directive') (OJ L 64, 4.3.2006, p. 37).

Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC ('the Mining Waste Directive') (OJ L 102, 11.4.2006, p. 15).

Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) ('the INSPIRE Directive') (OJ L 108, 25.4.2007, p. 1).

Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007, p. 17).

Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe ('the Air Quality Directive') (OJ L 152, 11.6.2008, p. 1).

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ('the Waste Framework Directive') (OJ L 312, 22.11.2008, p. 3).

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ('the Wild Birds Directive') (OJ L 20, 26.1.2010, p. 7).

Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) ('the Industrial Emissions Directive') (OJ L 334, 17.12.2010, p. 17).

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ('the Environmental Impact Assessment Directive') (OJ L 26, 28.1.2012, p. 1); this replaces Directive 85/337/EEC.

Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC ('the Seveso III' or 'Major-Accident Hazards Directive') (OJ L 197, 24.7.2012, p. 1).

Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) ('the Commission Collective Redress Recommendation') (OJ L 201, 26.7.2013, p. 60).

Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of the national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC ('the National Emissions Ceiling' or 'NEC Directive') (OJ L 344, 17.12.2016, p. 1).