

# **No longer gatekeeper: Why the European Commission provides access to justice for civil society organisations**

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## **Legal rights and practical effects**

One of the characteristic features of European Union law is its emphasis on rights. Over time, the EU has steadily evolved to become a distinctly rights-based polity. The origin of this development was the founding members' focus on the four 'market freedoms', which were interpreted as fundamental rights: a right to free movement of goods, persons, services and capital. More recently, additional rights have been particularly pronounced in the area of non-discrimination. The foundational principle, the prohibition of discrimination based on nationality (now art. 18 TFEU), was first extended to equality between men and women, and later to all discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation racial or ethnic origin, religion or belief, disability, age or sexual orientation (art. 21 of the Charter of Fundamental Rights). Other rights have been formulated in areas like environmental or consumer protection. Increasingly, measures pertaining to social policy have been incorporated in this "rights revolution" (Mabbett 2011).

By virtue of its superiority and direct effect, EU law now vests its subjects with a wide array of rights that are directly enforceable – individual citizens can use EU law against their own national authorities. That rights are enforceable does of course not mean that they are self-enforcing. Rights have to be activated – claimed – in face of alleged infringements, and their nature is frequently in dispute. The EU provides a comprehensive system for rights vindication and dispute resolution, based on its own judicial bodies and the judicial systems of the member states. This enforcement mechanism has frequently been identified as the major source of the expansion of EU rights: private litigants claim rights derived from EU law against their national authorities before national courts who refer such questions to the Court of Justice of the European Union (CJEU). The CJEU, in turn, has again and again signaled its openness to such rights claims, interpreted EU statutes broadly and developed novel rights even were they had not been specifically mentioned in the legal texts. Many commentators find this judicial development to happen outside the control of electorally accountable member state governments, or even the political process more proper (e.g. Stein 1981; Weiler 1991; Stone Sweet 2005; Sindbjerg Martinsen 2011; Stone Sweet and Stranz 2012), and observe that a specifically European form of “adversarial legalism” is becoming increasingly characteristic a regulatory style (Kelemen 2011).

Empirical research on rights claims, however, has highlighted an important fact: Not everybody is equally well positioned to use this system to give effect to their rights claims. Rights of standing and access to justice vary widely between member states, and not every individual with a valid claim can muster the necessary resources to activate the legal system and sustain a challenge (cf. Alter and Vargas 2000). This suggests that there is a potential gap between the availability of rights and their actual application. It stands to reason that such gaps are unevenly distributed. Whereas in areas such as trade, taxation or competition the potential plaintiffs who stand to gain from rights based in EU law are often companies with the resources to support a legal challenge, the same is not true in areas where rights pertain to individuals who may be too powerless to bring suits in defense of their individual rights, such as in cases of consumer fraud or discrimination. A similar gap is likely to exist in areas such as environmental protection

were the extensive legal obligations arising from EU law do not necessarily translate into individual rights but rather constitute a collective interest. In other words, rights can be ineffectual where there is not sufficient private interest to claim them, or where individuals do not have standing to enforce a public interest.

One way of addressing this gap is to notify the European Commission of the perceived lack of effectiveness of certain rights. Many rights claims based on EU law are therefore addressed to the European Commission in the hope that it will employ the infringement procedure, particularly in policy areas like consumer protection, non-discrimination and environmental protection. The Commission receives about 3000-3500 complaints per year. In 2013, 17% of these complaints related to “justice”<sup>1</sup> and 15% to the environment (the two largest policy fields). Similarly, about a quarter of all subsequently opened infringement cases pertained to the environment, by far the largest single policy sector (COM(2014)612: 7, 11-12).<sup>2</sup> It needs to be pointed out, however, that the Commission has complete discretion over which cases to pursue. The Commission’s decision to open or close a case can itself not be challenged, and the Commission is under no obligation to give reasons (cf. Harlow and Rawlings 2006: 466-468; Chalmers, Davies et al. 2010: 341-342). In this sense, the European Commission has acted as a gatekeeper to the EU’s legal system, at least for certain types of claims. Ultimately, this can amount to a form of ‘docket control’ that allows the Commission to ensure that the CJEU’s caseload in these areas is in line with its policy priorities. The Commission has used the infringement procedure widely not only to give effect to EU law but also to develop policy outside the legislative arena (cf. Scharpf 2011: 229-230; Schmidt 2011a: 50).

While the infringement procedure is therefore a valuable policy tool for the Commission – and in this sense it should have an interest in maintaining its “docket control” – there are drawbacks to this procedure when it comes to effectively safeguarding rights. Most

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<sup>1</sup> This area covers cases involving discrimination, fundamental rights and judicial cooperation (arrest warrants, enforcement orders etc.).

<sup>2</sup> The proportion of individual complaints as a basis for infringement procedures varies from year to year but their importance cannot be overstated (cf. Chalmers, Davies et al. 2010: 333).

importantly, the procedure is time-consuming. The completion of the administrative phase of the infringement procedure takes on average about four years from the first informal letter to the referral to the Court, should the procedure go this far (COM(2007)502: 5), and the court case itself again adds several months.<sup>3</sup> The Commission's addition of measures towards alternative dispute resolution in the case of individual complaints (the "EU-Pilot" programme) will do nothing to speed it up and has been extensively criticised as potentially inducing "complaint fatigue" (cf. Smith 2010: 156), giving member state authorities the opportunity to draw out the process and causing individual complainants to simply give up.

The Commission itself acknowledges its limited capacity to provide effective remedies for rights infringements, in particular since many important measures of judicial protection are only available at the national level: "Only a national tribunal can apply remedies like injunctions to the administrations, cancellation of national decisions, damages etc." (COM (2007)502: 8). One of the strategies of the Commission to address this problem has been to introduce measures to expand access to justice at the national level, not only by granting wider rights of standing and legal aid to individuals, but in particular to interest groups acting in the interest of the public. Support by interest groups for rights claims has been shown to have a significant influence on outcomes (cf. Cichowski 2004; Cichowski 2006; Conant 2006; Slepcevic 2009). Where litigants could draw on the support of organised interests, rights claims were more likely to be successful than where individuals were on their own. Interest groups active in areas such as environmental protection, moreover, can pursue public interests much more effectively than individuals. Since public authorities can often bypass or "contain" individual rulings (Conant 2002), interest groups can more easily engage in wider political mobilization than individuals in support of rights claims in order to achieve a lasting impact on public policy (cf. Alter and Vargas 2000; Börzel 2006; Cichowski 2006).

While interest groups can therefore play an important role in giving practical effect to legal rights, the actual ability of interest groups to lend support to rights claims differs

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<sup>3</sup> Since many cases are concluded before this stage, the Commission states the average duration of an infringement procedure as 26 months (COM(2007)502: 5).

widely between member states. The conditions for access to courts for interest groups are extremely heterogeneous and often significantly more restrictive than those for individuals, particularly regarding standing and costs. It is this situation that the Commission has started to address by pursuing various initiatives to expand access to justice for interest groups in national courts, effectively forfeiting its gatekeeping position. Early efforts in limited policy areas such as consumer protection date back to the 1980s, but broader measures aimed at more general access to justice for interest groups are more recent. Since the start of the century the Commission has repeatedly pushed for a harmonization of rights of standing and introduced measures to provide legal aid – with varying success. The remainder of this paper analyses the conditions for access to justice for interest groups in the EU legal system and outlines the various efforts by the Commission to enhance such access. A final section then takes up the trade-off between the Commission’s forfeiture of its role as gatekeeper with its concomitant ‘docket control’ and the potential gain in effective rights enforcement.

### **Access to justice for interest groups in the European Union**

‘Access to justice’ is a fairly broad and necessarily vague concept. The European Union Agency for Fundamental Rights (FRA) points out that “access to justice is a concept with many nuances which includes, first and foremost, effective access to an independent dispute resolution mechanism coupled with other related issues, such as the availability of legal aid and adequate redress.” (European Union Agency for Fundamental Rights 2011: 9). Nonetheless, important legal documents such as the Charter of Fundamental Rights explicitly refer to access to justice. Its article 47 summarises the main elements of the concept: the right to an effective remedy before a tribunal, the right to a fair and public hearing, the right to be advised and represented, and the right to legal aid for those who lack sufficient resources. The EU framework in place to guarantee these rights for individuals at the member state level is fairly extensive.<sup>4</sup> Apart from the

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<sup>4</sup> Direct access to the Court of Justice of the European Union in the judicial review of EU acts is notoriously restrictive, requiring individuals to show ‘direct and individual’ concern in the disputed matter. For the most part, these conditions are only met when the individual is explicitly addressed in the EU act in question. This paper is solely concerned with access to justice at the national level.

general clauses contained in the Charter of Fundamental rights and the principles developed by the Court of Justice, individual pieces of EU legislation contain specific clauses on access to justice, such as in the case of free movement rights (art. 31, directive 2004/38), non-discrimination and equality (e.g. art. 7, directive 2000/43 on racial equality and art. 9, directive 2000/78 on equality in employment), and the environment. In addition, directive 2003/8 “to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes” sets certain minimum standards for legal aid to individuals in certain types of cross-border disputes concerning civil and commercial law (cf. European Union Agency for Fundamental Rights 2011: 19). The launch of the European Commission’s E-Justice portal in 2010 (as part of the European Council’s Stockholm programme) has further added to the resources for individuals using EU law to seek individual redress.

The situation is different for interest groups. Rights of standing are more restrictive for groups in pursuing litigation on behalf of others or purely in the public interest, and legal aid is often available for individuals only (cf. de Sadeleer, Roller et al. 2005; European Union Agency for Fundamental Rights 2011; Darpo 2013). Since the cost involved in these efforts cannot be recovered, not all interest groups have the capacity to engage in legal proceedings. The Commission and the legislative institutions of the EU have, however, successively put in place provisions to guarantee access to justice for interest groups, primarily in policy areas discussed above that lie at the intersection of private and public interests. These policy areas fall into two categories: those where individuals may be too powerless to bring suits in defense of their own individual rights, such as in cases of consumer fraud or discrimination, and those where the interests are collective rather than individual, such as environmental protection.

*Where individuals might be too powerless to bring suits on their own: consumer protection and anti-discrimination*

The policy area where questions of access to justice for interest groups was first addressed in the EU was consumer protection. Here, organised interests are explicitly assigned a role in EU law. Since the Amsterdam Treaty, the relevant article in primary

law reads: “In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and *to organise themselves in order to safeguard their interests*” (art. 169(1) TFEU, my emphasis, cf. also Micklitz 2006: 454). Already in 1984, in what was the first provision for access to justice for organised interests in EU law, directive 84/450 on misleading advertising allowed that: “persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising may (a) take legal action against such advertising; and/or (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings” (art. 4(1) directive 84/450). In this sense, entities other than the immediate victim of false advertising were empowered to bring suits for injunctions against private companies engaging in such practices. In the period since, the Commission and the EU legislators have expanded this right for interest groups active in consumer protection to seek judicial (or quasi-judicial) injunctions against unfair market practices to many other sectors of marketing (cf. Micklitz 2006: 455-456). Shortly after the original directive, the Commission started deliberations “whether it was opportune to draft a framework directive introducing a general right for consumer associations to act in the courts on behalf of the general interest of consumers” (COM (87) 210: 3) so as to create a horizontal provision for access to justice for interest groups in questions of consumer protection, a move that was also supported by the European Parliament (cf. OJ No. C 99, 13.4.1987: 203-205). The Commission readdressed this question in its 1993 Green Paper on the access of consumers to justice, in particular with regard to cross-border conflicts. Such conflicts were particularly difficult to handle judicially where the rules of standing for interest groups suing for an injunction differed between the countries involved. The Commission suggested a harmonisation or at least a mutual recognition of rights of standing for consumer organisations (COM (1993) 576: 79-80). This solution was accepted by the legislative institutions in directive 98/27 “on injunctions for the protection of consumers' interests”. Member states would nominate organizations qualified to bring actions for injunctions, with the purpose of compiling an EU-wide list of organizations whose standing to sue would be mutually recognised.

Such ‘qualified entities’ would include, next to public (state-run) consumer watchdogs, “organisations whose purpose is to protect [the collective interests of consumers], in accordance with the criteria laid down by their national law” (art. 3, directive 98/27). Organizations can apply nationally to be registered. They are then screened and officially approved to assure cross-border legal standing (cf. Micklitz 2006: 462). The list is regularly updated by the Commission and published in the Official Journal. Some countries adopt a broad approach to registration and include a wide variety of private entities, while others restrict the list to statutory bodies. Germany, for example, lists 77 separate organizations, from broad consumer watchdogs to environmental groups (such as ‘BUND’) and local renters associations (‘Mieterschutzbund’), whereas Ireland only lists its National Consumer Agency (cf. OJ No. C 115, 15.04.2014: 1-52).

The Commission and the legislative institutions later expanded this general approach to supplement individual redress by allowing access to courts for interest groups in other fields outside consumer protection, notably in the field of non-discrimination. In this sense, both the Racial Equality Directive (art. 7(2) directive 2000/43) and the Employment Equality Directive (art. 9(2) directive 2000/78), proposed by the Commission in 1999, contain a clause that states: “Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive”. Such associations include NGOs, trade unions or equality bodies (European Union Agency for Fundamental Rights 2011: 39). An identical phrase was later also included in two recast directives on gender equality (art. 8(3) directive 2004/133 and art. 17(2) directive 2006/54).

*Where there might not be sufficient private interests to seek redress: Environmental protection*

The framework envisaged by the Commission for interest group litigation in environmental matters follows a similar logic, but is based on a different premise. Environmental protection is a collective interest, and degradation often does not affect individuals in the sense of giving them an individual claim for redress or damages. In other words, the environment is not a sufficiently private interest to activate the EU's individual rights protection regime.

The EU's current legal regime regulating access to justice in environmental matters is based on the "Aarhus Convention" that was signed by the EU, all EU member states and other members of the United Nations Economic Commission for Europe (UN/ECE) in 1998. The Aarhus Convention deals with access to information, public participation in decision-making and access to justice in environmental matters and aims to make both decision-making procedures more inclusive and enforcement of environmental law more effective. It addresses rights of inclusion in decision-making and enforcement to the 'public' in the sense of natural and legal persons, their associations, organisations and groups, including non-governmental organizations promoting environmental protection, as long as they meet certain requirements under national law (Art. 2 para 4 and 5, Aarhus Convention). As an international treaty, the provisions of the convention did not automatically create new rights, but had to be implemented by both the EU and the member states.

The convention provides for access to justice in several respects. In a first step, the rights to information and participation in decision-making procedures are enforceable in court. In a second step, the convention provides for substantive and procedural complaints against national permitting processes and environmental impact assessments concerning large construction projects (residential developments, roads, power lines, power plants etc.). Two directives implementing these two steps in the convention's framework for access to justice passed the EU legislative process with relatively little conflict (directive 2003/4 and directive 2003/35 respectively). In a third step, the most far reaching provision concerning access to justice in environmental

matters is a general clause mandating that members of the public, including interest groups, “have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities” (art. 9(3), Aarhus Convention) that violate environmental laws. In effect, this clause, if implemented, would allow interest groups to go to court against third parties, including private enterprises, that are held to harm the environment. It is therefore perhaps not surprising that this clause proved the most contentious in the process of implementation of the Aarhus Convention at the EU level. The Commission’s 2003 proposal for a directive providing wide access to justice for interest groups in environmental matters met with opposition in both the European Parliament and the Council, despite the fact that it excluded the possibility to go to court against private entities (cf. Micklitz 2006: 457; Poncelet 2012: 291). The proposal did however state that “Entities active in the field of environmental protection [...] should have access to environmental proceedings in order to challenge the procedural and substantive legality of administrative acts and omissions which contravene environmental law” (COM (2003) 624, recital 9), which would allow interest groups to go to court against public bodies, in particular where they fail to act against acts of environmental pollution or destruction. In order to qualify for such access to justice, interest groups would have to register in a procedure akin to that for consumer groups, the legal action would have to fall within their statutory field of activity and the case would have to fall within their geographic field of activity (COM (2003) 624, art. 8 and 9). Since the legislative institutions could not agree on the proposal for a number of years (member state governments, in particular, expressed concerns for the integrity of their judicial systems), the Commission withdrew the original proposal in May 2014 and started a new consultation procedure in order to submit a new proposal (cf. European Commission 2013).

Despite the Commission’s failure to have its proposal accepted by the legislative institutions, several judicial procedures, primarily preliminary references questioning the national implementation of directives 2003/4 and 2003/35 covering the first two steps on access to justice of the Aarhus conventions, have significantly expanded access to justice in environmental matters (cf. Oliver 2013: 1446-1455). An important case in

this regard concerned the question what limits member states can impose on non-governmental organisations' rights of standing before national courts in environmental matters. In 'Djurgården', an environmental group in the Stockholm area challenged a decision by local authorities to grant permission for the construction of an underground high voltage power line that had the potential to impact local groundwater (cf. Reichel 2010: 70). The responsible Swedish court rejected the challenge as inadmissible, since the group in question did not meet the requirements for legal standing under Swedish law. This law stipulated that only such groups would have access to courts that had carried out activities in Sweden for at least three years and had a membership base of more than 2000 members<sup>5</sup> (cf. Reichel 2010: 69; Jans 2013: 157). The Swedish government itself conceded that the provisions on standing were only met by two environmental groups in Sweden at the time (cf. Oliver 2013: 1450). On appeal, the Swedish Supreme Court referred the question to the Court of Justice. During the proceedings, the Commission took the position that, despite a certain leeway for member states to regulate legal standing, EU environmental law "grants environmental organisations wider access to the courts than individuals. It thereby imposes further limitations on Member States' discretion and prevents them from adopting restrictions which undermine" the objectives of the applicable EU law (as reproduced in the opinion of Advocate General Eleanor Sharpston, case C-263/08, para 55). The Commission therefore considered that restrictions on interest group standing such as the Swedish ran counter to EU law. The CJEU broadly concurred. The judges conceded that "it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter" to the objectives of EU environmental law (judgement of the Court, case C-263/08, para 47). The Swedish Supreme Court subsequently granted standing to the organisation and referred the case back to a lower court for a decision on the merits. In reaction to the judgement the Swedish government adjusted the applicable law and reduced the membership requirement to 100 members.

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<sup>5</sup> Djurgården-Lilla Värtern Miljöskyddsförening, the NGO in question, stated that it had about 300 members.

The Djurgården-Lilla Värtern environmental group has since been very active in challenging public construction projects in the Stockholm area; most recently their target for legal actions has been the permitting process for a large highway bypass.<sup>6</sup>

A similar case concerning rights of standing for environmental interest groups arose out of a dispute concerning the decision by a German authority to grant permission for the construction of a coal fired power plant in the town of Lünen. The German environmental NGO 'BUND' contested this decision on the grounds that the planned power station would adversely impact five nature conservation sites in the vicinity. The responsible national court rejected this appeal as inadmissible, since under German environmental law such decisions can only be challenged if they infringe on *individual* rights (cf. Jans 2013: 159; Oliver 2013: 1452). In the proceedings, the Commission relied on the principle of effectiveness to suggest that the court interpret access to justice broadly (as stated in the opinion of Advocate General Eleanor Sharpston, case C-115/09, para 73, ECR 2011 I-3695). The Court in its judgement more narrowly referred to the Environmental Impact Assessment Directive (directive 2003/35), holding that this piece of EU law, by granting broad access to courts for NGOs in permitting processes, precludes national legislation from restricting environmental challenges to cases where individual (and not public) interests were affected (case C-115/09, para. 50, ECR 2011 I-3722). The German national court subsequently granted BUND standing, and in its decision on the merits revoked the permit for the construction of the power plant.<sup>7</sup>

In response to this case, the German government and legislature adapted parts of the Environmental Appeals Act in November 2012 to grant wider standing for interest groups. The European Commission, however, did not see this response as far reaching enough, in particular since the revised German law placed strict limits on the arguments environmental organisations could use in court ('preclusion'). It started an infringement procedure and referred the matter to the Court in October 2013, where the case is now pending.

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<sup>6</sup> Cf. [www.dlv.se](http://www.dlv.se), last accessed 2015-02-26.

<sup>7</sup> The plant has since been built, but under stricter conditions. Its operation, however, continues to be the target of lawsuits brought by local environmental organisations.

A third case, and possibly the most far reaching concerning access to justice for environmental interest groups, concerned the question if interest groups have a general right to access to justice in environmental matters, despite the fact that the Commission's 2003 proposal for a directive on general access to justice for interest groups had not been agreed upon by the EU legislature. The underlying conflict was a challenge by a Slovak environmental NGO<sup>8</sup> against a decision by public authorities to issue permits to hunt brown bears, a species that is protected under the EU's Habitat Directive. In the absence of agreement on the Commission's 2003 proposal, there is no explicit piece of EU law that would grant interest groups the possibility to challenge such alleged breaches of EU environmental law by public authorities outside the applicability of the Environmental Impact Assessment Directive (directive 2003/35), which only concerns permitting process for large projects. There is, however, a corresponding provision in the Aarhus Convention, to which both the EU and its member states are signatories. The Commission's position in this case is not clear from the documents. The Court, however, instructed the referring Slovak court, short of declaring the Aarhus Convention directly effective, to "interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives" of the Convention (case C-240/09, para 50, ECR 2011 I-1306). In effect, the judges urged the Slovak Supreme Court to grant standing to the interest group "in order to ensure effective judicial protection in the fields covered by EU environmental law", especially concerning a species protected by EU law (case C-240/09, para 50 and 51, ECR 2011 I-1306-7). The Supreme Court followed suit and granted the group standing to challenge the hunting licenses (cf. Vozár 2011: 13; Brakeland 2014: 15).

The judgement by the Court of Justice had widespread effect. National high courts started applying its reasoning to allow interest groups to challenge all sorts of administrative decisions relating to environmental matters in a broad sense. In 2013, the German Federal Administrative Court allowed an environmental group to challenge the city of Darmstadt's clean air plan. Its judgement explicitly made reference to the

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<sup>8</sup> VLK Lesoochránárske zoskupenie, [www.wolf.sk](http://www.wolf.sk).

CJEU's decision in the 'Slovak bears' case. In the same year, the Swedish Supreme Administrative Court referred to the case when it allowed standing for environmental protection groups to challenge permits issued for the 2013 wolf hunt, which it subsequently ruled to contravene EU species protection laws (cf. Epstein and Darpö 2013: 258-260). A year later, the same court again referred to a general right of access to justice in environmental questions when it granted standing to the Swedish Society for Nature Conservation in a challenge to a forest clear-cutting operation, a case that otherwise had no relation to EU law at all (cf. Darpö 2014: 388-389).

The Commission for its part has used these developments to renew its push for a directive regulating a general access to justice for environmental interest groups (cf. European Commission 2013: 3). It has withdrawn its outdated 2003 proposal, opened a consultation procedure and will most likely present a new proposal in the near future. As has happened numerous times in the past, it is accompanying these legislative efforts with a number of infringement proceedings aimed at enforcing its interpretation of current obligations based on previous case law (cf. Hofmann 2013).

Unrelated to the Aarhus convention but in effect following a very similar trajectory on access to justice for environmental interest groups are the EU's rules on liability for environmental damage. Directive 2004/35 sets up a framework that is supposed to implement a 'polluter pays' regime, whereby the costs of environmental damage, as in damage to sensitive habitat or endangered species, are borne by the perpetrator, who is often a private party. The environmental liability directive contains rules on access to justice that include standing rights for interest groups. Similar to the provisions of the Commission proposal on general access to justice in environmental matters, such standing refers to challenges to acts and omissions of public authorities related to the occurrence of environmental damage. There is no possibility in EU law to challenge acts of private parties directly - such as taking a private polluter to court. In effect, interest groups have to ask public authorities to intervene in a case of environmental pollution, and where such an intervention is insufficient, interest groups have access to judicial review (directive 2004/35 art. 12 and 13). The preparatory stages to this directive had included proposals by the Commission to allow for a much broader access to courts for

interest groups (cf. Brans 2005: 97). In its 2000 White Paper on environmental liability, the Commission foresaw a possibility for interest groups to bring cases for injunctions in urgent matters concerning environmental damage. In such cases, interest groups would be able to bypass the state and act against the polluter directly: “In urgent cases, interest groups should have the right to ask the court for an injunction directly in order to make the (potential) polluter act [...]. They should be allowed, for this purpose, to sue the alleged polluter, without going to the State first.” (COM (2000) 66: 22 under 4.7.2.). This approach would have been very similar to the possibility to seek injunctions in consumer law described above. The final directive, however, does not contain such a provision. Moreover, the Commission proposed rules that would have allowed interest groups to recover (some of) the costs involved in bringing such actions against third parties: “The possibility to bring claims for reimbursement of reasonable costs incurred in taking urgent preventive measures (i.e. to avoid damage or further damage) should be granted, in a first instance, to interest groups, without them having to request action by a public authority first” (COM (2000) 66: 22 under 4.7.2.). This, too, was omitted from the final directive.

### *Costs and legal aid*

The Commission had early on identified the issue of the costs of legal proceedings, for individuals and interest groups alike, as a major obstacle for an effective access to justice. In its 1993 Green Paper on access of consumers to justice the Commission stated that “the experience gained in the Member States shows that it is illusory to provide for a right to bring proceedings if the holder lacks the resources required to exercise it. This applies to natural persons and legal persons alike. Although the action for an injunction does not provide for compensation for damages, the association which brings the action has to foot the bill (lawyer's fees, expert report, justice) and in transfrontier cases these costs will probably be prohibitive (quite apart from the risk of losing the case). Often consumer organisations do not even have enough resources to bring actions against unlawful practices originating in their own country, let alone abroad.” (COM (93) 576: 81). In the following, the efforts of the Commission to expand legal aid to interest groups remained closely tied to consumer protection laws, despite the fact that other pieces of

legislation (notably in non-discrimination) had also provided for concrete access to justice for interest groups. Its 2000 Green Paper on legal aid in civil matters again referred to consumer groups when addressing the issue of legal aid to interest groups: “Legal aid could solve the problem that consumers' associations are most likely to face when trying fully to take advantage of the *locus standi* which the directive gives them, i.e. the scarcity of financial resources” (COM (2000) 51: 7). This carried on into its 2002 proposal for a legal aid directive. The European Council had agreed in principle on common minimum standards for such aid to individuals in its 1999 Tampere justice and home affairs programme. The Commission expanded on this mandate by including in its proposal an article 15 which stated that “Legal aid shall be granted to not-for-profit legal persons based in a Member State where proceedings are designed to protect legally-recognised general interests and they do not have sufficient resources to bear the cost of the proceedings” (art. 15, COM (2002) 13: 17). This part of the proposal was explicitly tied back to the provisions on interest group litigation in consumer protection. In this vein, the non-profits the Commission had in mind were “for example consumers' associations“ in cases where the issue at stake concerned “collective interests rather than a mere accumulation of private interests” (COM (2002) 13, explanatory memorandum: 8). It justified this passage by explicitly referring to the directive 98/27 on injunctions for the protection of consumers' interests described above: “That Directive empowers ‘qualified’ entities recognised by the Member States to bring proceedings for an injunction throughout the Community. The possibility of legal aid for these organisations contributes to the objectives of the 1998 Directive” (COM (2002) 13, explanatory memorandum: 8). However, the Commission was unsuccessful in getting the legislative institutions to adopt this provision, and seems to have abandoned the project since, although the problem clearly persists: “In most Member States, legal aid is not available to E[nvironmental]NGOs or associations, is only available in very exceptional cases, or lawyers are not keen on undertaking it because it is poorly paid” (Darpo 2013: 20).

## **Why the Commission supports access to justice**

As I have shown above, the Commission has over the last years actively pushed for better access to justice for interest groups, often in the face of member state resistance. As I outlined in the introduction, this appears to constitute a trade-off. EU environmental and consumer protection laws now have many more guardians than just the Commission, but at the same time the Commission's control over legal developments is now more limited. By way of a conclusion I will outline how much of a disadvantage to its strategic position can be expected from a loss of its gatekeeping position.

It is of course wholly reasonable to assume that the Commission is interested in the effectiveness of EU law. Within the architecture of EU institutions, it is the Commission that is assigned the task of monitoring and enforcing obligations arising out of EU law, and the Commission uses the respective infringement procedure against member states extensively. But the Commission's capacities to adequately do so are often limited. The Commission frequently highlights the added value of the preliminary reference procedure as an enforcement tool, and has done so from its earliest annual "Report on the Application of Community Law": "The Commission's monitoring of the application of Community law [...] must not be allowed to divert attention from the control exercised by a private citizen who brings an action before a national court (which may refer the matter to the Court of Justice for a preliminary ruling). The possibilities of action by private citizens have been greatly extended by the consistent decisions of the Court recognizing the direct effect of numerous provisions of the Treaty and of secondary legislation. This additional method of control deserves to be made more widely known to the general public." (COM (84) 181: 4). The Commission frequently pointed out its limited capacity for monitoring infringements in its justification for measures expanding interest groups access to justice, for example in the case environmental policy: "As guardian of the Treaties, the Commission uses its enforcement powers to address an absence of required end-results. However, the high number of infringements, complaints and petitions related to EU environment legislation points to a need generally to reinforce implementation monitoring within

Member States” (COM 2012 95: 7). A general deficit in enforcement capabilities was also one of the central justifications for its proposal for a general directive on access to justice in environmental matters: “Furthermore, the objective of this proposal for a directive is to eliminate shortcomings in the enforcement of environmental law. These shortcomings have been demonstrated for numerous years. At European Union level, the importance of public participation in enforcing environmental law was stressed on several occasions. These shortcomings are due to, among other things, the lack of a financial private interest in enforcing environmental law, in contrast to other areas of Community law where economic operators require the correct application of legislation, such as internal market and competition” (COM 2003 624, explanatory memorandum: p. 2).

As such, the Commission’s measures are also a corollary to its effort to make EU legislation more inclusive of civil society interests at all stages of the policy cycle. This is evident at the pre-legislative and the legislative stage: “The Commission provided EU level access points both through its significant funding for NGOs and also by including them in expert groups and consultative forums” (cf. Cichowski 2006: 240, cf. also pp. 201-202). The same also holds for the monitoring and enforcement stage.

So what about the Commission’s ability to use legal proceedings in order to advance its policy interests (e.g. Snyder 1993; Mendrinou 1996: 13; Rawlings 2000)? Empirical evidence suggests that the Commission can use litigation to apply pressure on legislative institutions where they object to Commission initiatives (Schmidt 2000; Schmidt 2011b), and the example presented above in the case of a general access to justice for NGOs in environmental questions corroborates this view. As the pivotal ‘repeat player’ (Galanter 1974) in EU law litigation, the Commission can use Court proceedings for ‘rule gain’. In this view, litigation forms part of what Fritz Scharpf has called the ‘supranational-hierarchical’ mode of policy making. This policy mode permits an exit from the ‘joint-decision trap’ as the Commission can produce policy change without becoming involved in complex bargaining procedures (cf. Scharpf 2006: 852-3). From the point of view of the Commission, this opportunity exists primarily in its use of the infringement procedure, over which it has full control and complete discretion. In this

sense, the loss of the gatekeeper position can diminish its control over an important policy tool.

The preliminary reference procedure, however, also provides the Commission with an opportunity to present its legal opinion to the Court through the lodging of observations. The Commission intervenes in all such cases and provides its own analysis of the case to the Court. Research on Commission positions before the Court suggests that it is quite successful in convincing the Court of its opinion in both infringement procedures and its interventions in preliminary reference procedures (cf. Conant 2007). As shown above, the Commission supported the NGO plaintiffs in the ‘Djurgården’, ‘Trianel’ and (most likely) ‘Slovak bears’ cases, and is using the outcome to advance new legislative proposals (cf. European Commission 2013). Where private actors bring cases and the Commission can intervene, it can use its sparse resources to pursue policies in other venues, rather than invest resources in pursuing infringement proceedings in such areas. This works well as long as the Commission can reasonably assume that the private plaintiffs have similar preferences. On the dimension “EU law vs. national law”, this is undoubtedly the case in all cases mentioned above. Giving greater effect to EU law is in this sense a Commission priority. Whether a congruence of preferences can be assumed on a policy dimension, however, is less clear. While the Commission, and the responsible DGs in particular, have demonstrated an interest in the protection of consumers, minorities, the disadvantaged and the environment, it is not clear which way its preferences go when there is a clear conflict between economic interests and protection issues. From this point of view, forfeiting its gatekeeper role and providing greater access to courts may well go the way of Goethe’s sorcerer’s apprentice.

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