Legal Standing of Individuals and NGOs in Environmental Matters under Article 9(3) of the Aarhus Convention

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Abstract

Individuals and non-governmental organizations’ access to justice in environmental matters may be hindered by a variety of obstacles, such as the fulfillment of legal standing conditions. In this regard, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), on its Article 9(3), imposes on each State Party the obligation to ensure members of the public, “where they meet the criteria, if any, laid down in its national law”, to have access to justice in order to challenge any violation of national environmental law. In this contribution, I focus on this provision with the purpose of assessing its normative content regarding the criteria for legal standing. To this end, I analyze the interpretation of Article 9(3) given by the Aarhus Convention Compliance Committee (ACCC), as well as the relevant case law of domestic courts and the Court of Justice of the European Union (CJEU).

Keywords
access to justice – legal standing – Aarhus Convention – soft law – environmental law – NGOs – actio popularis
1 Introduction

Individuals and non-governmental organizations' (NGOs) access to justice in environmental matters may be hindered by a variety of obstacles: the costs and delays of judicial and administrative procedures and the evidence of environmental harm are only some examples of such obstacles. However, the fulfillment of conditions for legal standing remains the first – and most troublesome – barrier that natural and legal persons must overcome in order to obtain a court decision on environmental matters. In many national jurisdictions, applicants are granted legal standing only if they demonstrate that the contested act or omission affects them personally and directly. In particular, in some States, in order to have standing rights, one must prove to have sufficient interest in taking legal action, while in other States applicants must demonstrate the impairment of subjective rights.

Considering the characteristics of environmental harms, both the right-based and the interest-based criteria may significantly hamper the effective access to justice in environmental matters. Indeed, environmental harms, for their nature, tend to impact many people in similar ways. Thus, a private entity may find it particularly difficult, if not impossible, to demonstrate a personal interest in taking legal action for the protection of the environment. The restriction of legal standing rights to subjects directly affected by environmental harms is considered one of the reasons behind the poor implementation of environmental laws.

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3 For instance, the rights-based criterion is applied in, among others, Germany and Austria. The interest-based criterion prevails in, among others, Belgium, Bulgaria, Denmark, Finland, France, Greece, Hungary, Ireland, Netherlands, Luxembourg, Italy, Slovakia, Sweden, Slovenia, and United Kingdom. For the analysis of national legislations on legal standing in environmental matters see Darpö, supra note 2, pp. 12–14.
In light of the difficulties to reconcile the interest-based and the right-based criteria of legal standing with the need to ensure the effective protection of the environment, some national jurisdictions have adopted another approach to legal standing. It consists in allowing any natural or legal person to take legal action against potential violations of environmental law (actio popularis). Under these systems, it is sufficient for the applicant to allege that the contested act or omission entails a potential breach of environmental law, without the need to demonstrate that his or her personal interests are affected. The actio popularis allows the justiciability of diffuse interests. They are interests which, for their nature, belong to all the members of the society and cannot be owned by an identified individual or group of individuals.

Actio popularis may appear to be the most adequate means to ensure the effective access to justice in environmental matters. However, it is important to consider that the effectiveness of access to justice depends on a variety of factors. For instance, broad standing rules may lead to higher financial barriers or more limited extent of judicial control. Thus, in practice, actio popularis will widen access to justice if States have the capacities to deal with the numerous claims this type of action may prompt. These capacities depend on legal and systemic factors that are different in each country.

The differences in national legislative provisions on access to justice and the variety of national interests which may be affected by legal standing rules, are elements to be considered when addressing international legal norms on the access to justice in environmental matters.

In Europe, an important legal instrument aimed at enhancing the access to justice in environmental matters is the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), signed in 1998. Access to justice is a pillar of this treaty, along with the access to information and public participation in decision-making. However, the implementation of the provisions on the

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7 Aragão and Carvalho, *cit. supra* note 1, p. 43; Darpaö, *cit. supra* note 2, p. 12. Examples of actio popularis in environmental matters can be found in Portugal, Spain, and Romania. In this regard, see ibid.
8 Schall, *cit. supra* note 5, p. 439.
9 Aragão and Carvalho, *cit. supra* note 1, pp. 43–46.
access to justice resulted to be more problematic than others. Moreover, their content and scope have been the subject of much debate in literature.

In particular, Article 9(3) raises questions regarding its effects on the legal standing of individuals and NGOs. Under Article 9(3), each State Party to the Aarhus Convention must ensure that “members of the public” which “meet the criteria, if any, laid down in its national law” have access to justice to challenge any alleged violation of national law “relating to the environment”. Recently, such provision has attracted the attention of international lawyers for two main reasons. First, Article 9(3) may be considerably relevant to ensure wide access to justice in environmental matters because of its broad scope of application. Indeed, it imposes on States to grant access to justice with respect to any potential violation of national environmental law generally. Second, the wording of Article 9(3), with its general reference to “members of the public” and its focus on national criteria, remains rather unclear about how much discretion it leaves to States in identifying subjects entitled to take legal action.

The present article focuses on the second issue, with the purpose of assessing the normative effects of Article 9(3) on national criteria of legal standing. To this end, the interpretation of Article 9(3) given by the Aarhus Convention Compliance Committee (“ACCC” or “Committee”), as well as

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14 Ibid., p. 404.
15 Aarhus Convention, Art. 9(3): “each Party 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”.
17 The ACCC has been established under Art. 15 of Aarhus Convention. See UN/ECE Meeting of the Parties to the Aarhus Convention, Report of the First Meeting of the Parties, Addendum, Decision 1/7, Review of compliance, ECE/MPP/2/Add.8 (2002). On the functioning of this body see PITEA, “Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters”, in TREVES et al. (eds.),
relevant case law of domestic courts and the Court of Justice of the European Union (CJEU) will be analyzed. Finally, this article offers concluding remarks on the contribution of Article 9(3) to the objective of rendering access to justice in environmental matters more effective in national jurisdictions.

2 The Relationship between Article 9(3) and Article 9(1) and (2) of the Aarhus Convention

It seems appropriate to begin the analysis concerning Article 9(3) by addressing the relationship between this provision and the Article 9(1) and (2) of the same Convention. This is important in order to highlight the peculiarity of Article 9(3), as well as the main interpretative issues raised by this provision in relation to legal standing requirements.

Article 9(1) and (2) establishes State obligations to ensure the access to justice against acts and omissions regarding the other two pillars of the Aarhus Convention. In particular, under Article 9(1), States have to allow natural and legal persons to challenge acts and omissions relating to the access to information, while under Article 9(2) States must ensure the review of acts and omissions regarding activities whose decision-making procedures are subject to public participation according to Article 6 of the Aarhus Convention. Thus, the scope of application of Article 9(1) and (2) is narrower than that of Article 9(3).

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19 Aarhus Convention, Art. 9(1): “Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law”.

20 Ibid., Art. 9(2): “Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court
than that of Article 9(3). Indeed, the latter concerns the access to justice in case of infringement of any national norm somehow related to the environment.\textsuperscript{21}

Regarding obligations on legal standing, Article 9(1) obliges States to ensure that any person having requested for information on environmental issues is allowed to challenge any act or omission related to the release of that information. Under Article 9(2) \textit{locus standi} must be recognized in favor of the “members of the public concerned”. They are identified by Article 2(5) as those persons having a sufficient interest in contesting the acts or omissions related to the activities covered by Article 9(2) or, alternatively, as those maintaining an impairment of their rights. In determining what would constitute sufficient interest or impairment of rights, States must comply with the objective of the Aarhus Convention to give “the public concerned wide access to justice”. In addition, NGOs promoting the protection of the environment and meeting the conditions established by national law must be presumed to have sufficient interest in taking legal action in environmental matters. This is provided by Article 2(5) which, read in combination with Article 9(2), identifies a presumption of legal standing for environmental NGOs.\textsuperscript{22} This approach reflects the important role that the Aarhus Convention assigns to NGOs in ensuring the effective protection of the environment.\textsuperscript{23} NGOs may be crucial actors in enhancing the implementation of environmental law for two main reasons. First, they may better represent the general interest in the protection of the environment than governmental agencies. Indeed, public authorities often lack the capacities to ensure the respect of environmental laws.\textsuperscript{24}


\textsuperscript{22} Danthinne, Eliantonio and Peeters, \textit{cit. supra} note 16, pp. 413–414.

\textsuperscript{23} ACCC, “Findings and recommendations with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of Act on Public Associations (Communication ACCC/c/2004/05 by Biotica (Republic of Moldova))”, UN Doc ECE/MP.PP/C.1/2005/2/Add.5 (15 March 2005) (ACCC/c/2004/05), para. 16.

\textsuperscript{24} Aragão and Carvalho, \textit{cit. supra} note 1, p. 43.
Moreover, State authorities may prefer not to take action in cases where the potential author of the violation is a public entity. Second, NGOs usually own wide resources and information on environmental matters. Therefore, they may be in a better position to file lawsuits concerning environmental harms than individuals.25

Unlike Article 9(2), Article 9(3) does not expressly establish a presumption of legal standing in favor of environmental NGOs, nor does it refer to standing criteria, such as the impairment of a right or the sufficiency of an interest. Article 9(3) identifies the subjects entitled with legal standing by referring generally to “members of the public”. They are defined by Article 2(4) as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”.

Evidently, the category of public under Article 9(3) is wider than the category of the public concerned addressed by Article 9(2). Moreover, under the former provision, States enjoy a broader discretion than under Article 9(2) in identifying the subjects to be granted access to justice. Indeed, Article 9(3) does not establish which criteria of legal standing States must adopt. It only imposes on any Contracting State the general obligation to ensure that the members of the public would be allowed to have access to justice and defers to domestic legislation the identification of the specific legal standing conditions. In negotiating Article 9(3), States wished to retain wide leeway in the determination of legal standing requirements. This approach is due to the broad scope of application of the provision. While Article 9(2) concerns only acts and omissions regarding permits for specific activities subject to public participation, Article 9(3) covers all other acts and omissions contravening national law related to the environment. In this regard, a stricter provision concerning locus standi would have required significant changes in the domestic legislation of States Parties. By contrast, since the time when the Aarhus Convention was negotiated, States’ prevailing approach was to avoid provisions requiring to modify national laws on legal standing.26

The Findings of the Aarhus Convention Compliance Committee regarding the Criteria for Legal Standing under Article 9(3) of the Aarhus Convention

The ACCC examines compliance issues, makes recommendations, and prepares reports. Although its findings are not legally binding, they are relevant to bring some clarity on how to interpret the provisions of the Aarhus Convention and may produce legal effects. This would be the case, for instance, if national or international courts take the findings of the ACCC into account when they interpret and apply the law, or States adopt legislative acts in order to comply with the views of the Committee. The ACCC consists of independent experts. Its pronouncements to become final must be endorsed by the Meeting of the Parties (MOP) which is composed of all the States Parties to the Aarhus Convention. This functioning of the institutional apparatus established by the Aarhus Convention is important to appraise the value of the ACCC’s pronouncements. With the approval of the MOP, the findings of the ACCC will acquire great relevance to the purposes of interpreting the provisions of the Convention. Indeed, the endorsement of the MOP indicates that there is the consensus of the States Parties on how to interpret treaty provisions. Thus, one can hold that the findings of the ACCC approved by the MOP may be considered relevant agreements to the interpretation of the treaty, as provided by Article 31(3)(a) of the Vienna Convention on the Law of Treaties. By contrast, without the endorsement of the MOP, the ACCC’s findings will be considered less authoritative.

For these reasons, the findings of the ACCC and the position taken by the MOP in their respect may offer important indications on the normative content of Article 9(3) with respect to legal standing.

30 UNECE, Decision 1/7, cit. supra note 17, annex, section I, paras. 1 and 2.
31 DANTHINNE, ELLIANTONIO and PEETERS, cit. supra note 16, p. 419.
In this regard, the Committee clarified why Article 9(3) refers to the members of the public generally. In the Implementation guide, adopted in 2014, the ACCC stated that this wording has the purpose of not only allowing Parties with great flexibility in identifying the subjects to be entitled to sue. Rather, the general reference to the public is aimed at recognizing the active role natural and legal persons may have in enforcing environmental law. As underlined by the ACCC, such recognition emerges also from the Preamble of the Aarhus Convention, where it is established that “effective judicial mechanisms should be accessible to the public, including organization, so that its legitimate interests are protected and the law is enforced”. Thus, Article 9(3) empowers natural and legal persons to enforce environmental law. This is particularly important if one considers that, traditionally, the enforcement of environmental law has been regarded as a prerogative of public entities. The empowerment of private persons to challenge violations of environmental law may significantly enhance the effective implementation of environmental obligations, especially in case of inaction by governmental agencies.

Concerning the normative content of Article 9(3) in relation to legal standing rights, the ACCC clarified that the provision aims at ensuring wide access to justice in environmental matters. It further explained that the formula “the criteria, if any, laid down in national law” should be interpreted as imposing a “self-restraint” on States when limiting the subjects entitled to bring legal actions, because the access to justice should be “the presumption, not the exception”. However, the Committee observed that Article 9(3) does not oblige States to establish a system of actio popularis. Rather, under Article 9(3), States should avoid barring all or almost all members of the public legal standing of individuals and NGOs.
from having access to justice. This statement of the Committee is contained in
the pronouncement concerning the conformity with the Aarhus Convention
of Article 10 of the Regulation No. 1367/2006 of the European Union (the
so-called Aarhus Regulation).40 This provision granted only NGOs the right
to obtain the review of certain acts adopted by European Union (EU) institutions
in the environmental field. The Committee held that in this way the EU failed
to comply with Article 9(3) for the notion of public, as provided by Article
2(4), includes both natural and legal persons. Therefore, the EU could not limit
legal standing solely to legal persons, as NGOs, but it had to also allow natural
persons to have access to review procedures.41

In this view, under Article 9(3), States should allow at least some natural
and legal persons to have access to justice in environmental matters. If, in a
concrete case, only natural persons or only legal persons are entitled to sue,
then a violation of Article 9(3) would materialize, because a category of the
members of the public is barred from bringing proceedings.42

As recommended by the Committee, the requirements that States may
adopt in order to comply with Article 9(3) are the impairment of rights or the
sufficient interest in taking legal action.43 The ACCC underlined how domestic
reviewing bodies have a crucial role in avoiding that these conditions for
legal standing would not produce overly restrictive effects to the access to
justice. Indeed, whereas in practice criteria for legal standing are established
by provisions of procedural law, the determination of the subjects potentially
affected by the challenged act is made by courts on a case-by-case basis.44

40 ACCC, “Findings and recommendations of the Compliance Committee with regard to
communication ACCC/C/2008/32 (part II) concerning compliance by the European
Union”, UN Doc. ece/mp.pp/c.1/2017/7 (2 June 2017) (ACCC/C/2008/32 (part II)).
Concerning the Aarhus Regulation see 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, 6 September 2006, entered into force on 28 September 2006. On the basis of this
Regulation, starting from 29 April 2023 also members of the public other than NGOs can
obtain the review of EU administrative acts. See Aarhus Regulation, Art. 10 (1) and (2),
as amended by Art. 1(2) of Regulation 2021/1767, 8 October 2021, entered into force on 28
October 2021.
41 ACCC, “Findings concerning compliance by the European Union (Part II)”, cit. supra
note 40, para. 93.
42 See RELVE, “Influence of Article 9 (3) of the Aarhus Convention on Legal Standing in
43 ACCC, “Findings with regard to Belgium”, cit. supra note 21, para. 36.
44 DARPO, cit. supra note 2, p. 31.
The Committee clarified how legal standing conditions should be interpreted and applied by national courts and administrative authorities.

Concerning the interest-based approach, the ACCC underlined that, in assessing whether the applicant has sufficient interest in taking legal action, the reviewing body should consider all the various ways in which the environmental harm may affect the plaintiff’s interests. For instance, in a communication regarding Sweden, the Committee had to assess whether Swedish courts took into account all the possible impacts wind turbines might have on the interests of the applicant. In particular, the plaintiff argued that the Swedish courts based their decisions to dismiss the case only on the element of distance between the wind turbine and his property. The Committee stated that, in this case, the reviewing bodies should have considered all the potential factors which could have affected the interest of the individual, including the noise produced by the turbine, as well as its safety in light of the proximity to other human activities. However, the Committee concluded that Sweden did not breach Article 9(3) because there were no sufficient elements to hold that the Swedish courts decided the case by considering distance only.

In a pronouncement regarding the EU compliance with Article 9(3), the Committee considered overly restrictive to require an individual to demonstrate that he or she is affected by environmental harm because of a personal situation differentiating him or her from all other subjects. On this basis, the ACCC declared that the interpretation given by the CJEU to the condition of “individual concern” contained in Article 263(4) TFEU was in contrast with Article 9(3). Indeed, for the fulfillment of this condition, the CJEU requires applicants to show that the contested act has a different impact on them than on the rest of society. According to the ACCC, such an approach effectively bars members of the public from challenging acts or omissions of EU institutions in relation to environmental matters. However, this finding of the Committee was not endorsed by the MOP.

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45 ACCC, “Findings and recommendations with regard to communication ACCC/c/2013/81 concerning compliance by Sweden”, UN Doc. ECE/MP.PP/C.1/2017/4 (29 December 2016).
46 Ibid., paras. 102–103.
The Committee specifically addressed the issue concerning the conditions for legal standing of NGOs under Article 9(3) in its findings with regard to Belgium adopted in 2005. Under Belgian law, NGOs were required to demonstrate sufficient interest in taking legal action. With respect to the fulfillment of this requirement, the longstanding approach of Belgian courts was to require NGOs to show that they had a direct, personal, and legitimate interest in taking legal action. By contrast, the allegation by an NGO that the aim of the legal action corresponded to its statutory objective was not sufficient to meet the conditions for standing. In the communication, the ACCC had to establish whether the case law of Belgian courts entailed a violation of Article 9(3) for it would have the effect of barring all or almost all environmental NGOs from bringing proceedings in environmental matters. In its findings, the Committee recognized that, if such restrictive interpretation had been maintained, Belgium would have breached Article 9(3). Indeed, it is almost impossible for NGOs to demonstrate a personal interest in proceedings, considering that NGOs have the pursuit of general interests as their objective. Thus, the ACCC recognized that NGOs should be differentiated from natural persons when interpreting and applying criteria for standing in environmental matters. Therefore, notwithstanding the lack of specific reference to NGOs in its wording, Article 9(3) has been interpreted by the Committee as entailing favorable conditions for the legal standing of NGOs.

This approach to the locus standi of NGOs has been confirmed by the ACCC in its pronouncements regarding Germany and Austria. These States adopt rather restrictive conditions of legal standing by requiring applicants to demonstrate the impairments of subjective rights. In its findings, the Committee pointed out that the criterion of the impairment of subjective rights when applied to NGOs should be interpreted extensively in order to be compatible with Article 9(3).

49 ACCC, “Findings with regard to Belgium”, cit. supra note 21.
50 Ibid., para. 38.
51 DANTHINNE, ELIANTONIO and PEETERS, cit. supra note 16, p. 415.
52 See ACCC, “Findings with regard to Germany”, cit. supra note 37, para. 100; ACCC, “Findings with regard to Austria”, cit. supra note 38, para. 75.
53 ACCC, “Findings with regard to Germany”, cit. supra note 37, para. 95.
4 The Case Law of the CJEU and National Courts Regarding the Criteria for Legal Standing under Article 9(3) of the Aarhus Convention

As underlined above, domestic judicial and administrative authorities have an essential role in implementing Article 9(3) of the Aarhus Convention. In this view, this section focuses on the analysis of the case law of the CJEU and national courts of some States Parties to the Aarhus Convention with the purpose of assessing the impact of Article 9(3) on national requirements for legal standing.

4.1 The Case Law of the CJEU Regarding Article 9(3) of the Aarhus Convention

Upon the signature of the Aarhus Convention, the EU declared that Member States would have remained responsible for the implementation of Article 9(3) until the EU would have adopted legal instruments to comply with the obligations stemming from the provision. At present, the EU has not adopted these legal acts. However, as the EU has ratified the Convention, Article 9(3) is part of the EU legal order. On this basis, the CJEU could give some preliminary rulings concerning the interpretation of Article 9(3).

In the case known as Slovak Bears I, the Slovak Supreme Court demanded the CJEU to rule on the interpretation of Article 9(3), regarding the right of environmental NGOs to take legal action in environmental matters. In the case referred to the CJEU, the disputed question was whether a Slovak NGO could take part in an administrative proceeding concerning the grant of derogations to the system of species protection. First, the CJEU clarified that, under EU law, Article 9(3) does not have direct effect because it is not sufficiently
precise and unconditional.\textsuperscript{58} However, the Court held that Article 9(3) has indirect effect. Indeed, it pointed out that domestic courts of Member States must interpret national conditions of legal standing in accordance with the objective of wide access to justice in environmental matters enshrined in Article 9(3).\textsuperscript{59} According to the cjeu, a concrete effect of this provision is that Member States must enable environmental NGOs to challenge before judicial or administrative authorities acts or omissions capable of infringing EU environmental law.\textsuperscript{60} With this reasoning, the cjeu appeared to recognize that, according to Article 9(3), environmental NGOs must be presumed to have legal standing in environmental matters,\textsuperscript{61} even if the Aarhus Convention expressly provides this presumption only for acts and omissions covered by Article 9(2). By applying the favorable conditions for legal standing of NGOs enshrined in Article 9(2) also to the violations addressed by Article 9(3), the cjeu significantly broadened the possibilities for NGOs to access justice for the implementation of EU environmental law. In this way, the distinction between the provisions contained in paragraphs 2 and 3 of Article 9 is considerably blurred. In developing this approach, perhaps the cjeu, in its Slovak Bears I judgment, has taken into account the view of the accc in the findings concerning Belgium. Although the Committee did not expressly affirm in these findings that under Article 9(3) environmental NGOs should be presumed to have legal standing, it recognized that the strict interpretation of the interest criterion effectively bars these subjects from having access to justice.

Later on, the cjeu confirmed the view taken in Slovak Bears I in the Protect Natur case, in which the Court was called to clarify whether the Water Framework Directive provides rights that environmental NGOs can directly invoke before judicial or administrative authorities. In this case, the cjeu stated that Article 9(3), “read in conjunction with Article 47 of the Charter, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law”.\textsuperscript{62} It then concluded that

\textsuperscript{58} Case C-240/09, Lesoochranárske zoskupenie vlk v Ministerstvo životného prostredia Slovenskej republiky (Slovak Bears I), 2011. Against this finding of the cjeu, see Berthier, Friel and Betchel, cit. supra note 18, p. 39.
\textsuperscript{59} Court of Justice of the European Union, Slovak Bears I, cit. supra note 58, para. 52.
\textsuperscript{60} Ibid.
\textsuperscript{61} In this sense also Danthine, Eliantonio and Peeters, cit. supra note 16, p. 414.
\textsuperscript{62} Case C-664/15, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd (Protect Natur), 2017, para. 45.
the right to bring proceedings set out in Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing [...] conditions, certain categories of ‘members of the public’, a fortiori ‘the public concerned’, such as environmental organizations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of any right to bring proceedings.63

In this finding, the CJEU expressly linked the notion of “public concerned” contained in Article 2(5) to Article 9(3). Thus, according to the Court, the category of public under Article 9(3) must be intended to include, as minimum, the range of subjects which are the members of the “public concerned” under Article 9(2), with special regard to environmental NGOs.

In both Slovak Bears I and Protect Natur, the CJEU relied on Article 9(3) in order to urge Member States to broaden the access to justice of environmental NGOs. The CJEU did not confirm this extensive approach to legal standing in cases opposing natural and legal persons to EU institutions. Notwithstanding the above mentioned finding of the ACCC concerning Article 263(4) TFEU, the CJEU continued to strictly interpret the criterion of individual concern contained in the provision. This is evident in the recent judgment of the CJEU relating to the case of Carvalho and others v. European Parliament and Council of the EU.64 This case regarded the request of annulment of the Directive No. 2003/87/EC and the Directive No. 96/61/EC of the European Union concerning the reduction of greenhouse gas emissions. According to the applicants, these directives established reduction targets of greenhouse gas emissions that were not sufficiently ambitious to adequately protect their fundamental rights from potential impacts of climate change. The Court declared the case as inadmissible for the applicants did not demonstrate that the “contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons”.65 The applicants tried to fulfill the individual concern criterion by alleging that climate change infringed their fundamental rights due to personal circumstances impacting each of them in different ways.66 Such allegations did not persuade the Court. It considered that, by accepting the argument upheld by the applicant, the criterion of individual concern would have become

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63 Ibid., para. 46.
65 Ibid., para. 46.
66 Ibid., para. 40.
meaningless, as anyone could be granted *locus standi*. The *Carvalho* judgment highlights the paradoxical consequences that the strict interpretation of Article 263(4) **TFEU** may have in situations of environmental harm impacting many people, as in the case of climate change. In such circumstances, it may be almost impossible for individuals to demonstrate that environmental harm affects them personally and differently from the rest of society. Thus, the access to justice results to be more difficult with respect to environmental harms impacting a larger group of people. Considering the difficulties raised by the traditional interpretation of Article 263(4) **TFEU**, the Advocate General (AG) Francis Jacobs, in the *Unión de Pequeños Agricultores* case, suggested another understanding of the provision. According to him, “a person is to be regarded as individually concerned by a [European Union] measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests”. Thus, Jacobs’ view sustains that legal standing should be granted in all cases in which personal interests of the applicant are negatively affected, regardless of whether other members of the society are in the same condition as him or her. Although this understanding of Article 263(4) **TFEU** seems to better ensure the effective access to justice in environmental matters while avoiding an *actio popularis* effect, it has not been endorsed by the CJEU in its following case law.

The *Carvalho* judgment has shown also that the strict interpretation of the personal interest criterion may significantly hinder the effective access to justice in environmental matters when it is applied to cases concerning future and potential risk of environmental damages. In these contexts, the adverse consequences of environmental harm are still unpredictable and uncertain. Thus, it may be particularly burdensome for the applicant to show the specific impact of the environmental harm on his or her personal condition. In such circumstances, a conflict may arise between the criterion of personal interest and the precautionary principle as it is enshrined in several

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67 Ibid., para. 41.
70 The view of Advocate General Jacobs has been followed by the Court of First Instance of the European Union in one case, but the judgment was then rejected by the CJEU. See Court of First Instance of the European Communities, Case T-177/01, *Jégo-Quéré et Cie SA* v. *Commission*, 2002, para. 51.
71 See *Schall*, cit. supra note 5, p. 428.
domestic and international legal instruments, including the TFEU, and it is increasingly applied by international human rights courts in cases concerning environmental matters.

The strict interpretation of Article 263(4) by the CJEU is particularly problematic in cases in which the applicants are environmental NGOs. As mentioned above, these entities aim to protect the public interest in the protection of the environment. Thus, they may find particularly difficult, if not impossible, to demonstrate personal interests in challenging environmental acts.

For all the reasons examined above, some concerns can be raised on the ability of the EU system to ensure the effective access to justice in environmental matters and its coherence with the spirit of the Aarhus Convention. In this regard, the EU argued that, when considering the means available to obtain the review of EU acts, one must also take into account the primary role of national courts of Member States to give full effect to EU law. This reasoning is not totally satisfying. Indeed, the CJEU is the sole interpreter of EU law. Moreover, it can be doubted that means as the preliminary reference from national courts are effective remedies against EU acts. However, one may question whether the broadening of the access to justice in environmental matters under the EU system can come from the evolutive interpretation of Article 263(4) TFEU by the CJEU or whether a legislative intervention may be more appropriate in this field. In favor of the latter option, one may argue that the access to justice is a particularly sensitive issue for Member States and an evolutive interpretation by the CJEU in this field may not find the consensus among Member States.

76 See Ibid.; Berthier, Friel and Betchel, cit. supra note 18.
77 Wolfferen and Eliantonio, cit. supra note 75, p. 152.
4.2 **The Case Law of Domestic Courts regarding Article 9(3) of the Aarhus Convention**

Belgian courts relied on Article 9(3) in several cases concerning the legal standing of NGOs. Belgian law adopts the interest-based approach to *locus standi*. Accordingly, natural and legal persons must show their direct and personal interest in taking legal action. As noted by the ACCC in the findings with regard to Belgium, the strict interpretation by Belgian courts of the interest criterion had the effect of barring NGOs from having access to justice in environmental matters. After the adoption of these findings by the Committee, the approach of Belgian courts to the legal standing of NGOs started to change. In 2013, on the basis of Article 9(3), the Court of Cassation of Belgium, for the first time, departed from its longstanding case law and recognized that NGOs which have as their statutory objective the protection of the environment must be considered to have sufficient interest in bringing proceedings in environmental matters.78 This view has been recently confirmed by the Tribunal of first instance of Brussels in the case opposing the environmental NGO Klimaatzaak to four governmental entities for their inadequate efforts in dealing with climate change.79 In this case, the Tribunal held that the NGO must be granted *locus standi* because it had among its statutory objectives the protection of present and future generations from the effects of climate change. The Tribunal based this conclusion on Article 9(3). In particular, it referred both to the findings of the ACCC regarding Belgium and to the case law of the CJEU relating to Article 9(3).80

Also, the German Federal Administrative Court in its Darmstadt judgment relied on Article 9(3) in order to allow an environmental NGO to have legal standing.81 The case concerned the right of an NGO to challenge an air quality plan before an administrative authority. Under German law, natural and legal persons have *locus standi* if they show that the contested act or

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80 Ibid., pp. 52–54.

omission is liable to impair their subjective rights. As the ACCC found in its pronouncement regarding Germany, this condition made it extremely difficult for environmental NGOs to have access to justice. Thus, Germany adopted legislation to specifically empower environmental NGOs in taking legal actions for the enforcement of certain laws concerning the protection of the environment. According to such legislation, air quality plans adopted by governmental entities on the basis of the EC Directive 2008/50 were not among the acts that NGOs could challenge before judicial or administrative authorities. However, in the Darmstadt case, the German Federal Administrative Court recognized the right of the NGO to contest the air quality plan by interpreting extensively the condition of the impairment of a right. Such extensive interpretation was based on the Slovak Bears I judgment of the CJEU as well as on the findings of the ACCC regarding Article 9(3). The German Court clarified that this understanding of legal standing conditions would be applied only to NGOs meeting the requirements established by German law, as it is established by Article 2(5) of the Aarhus Convention.

Article 9(3) was read in conjunction with Article 2(5) also in the well-known Urgenda case which has been decided by the Supreme Court of the Netherlands. In this case, the Dutch government was found in violation of, inter alia, Articles 2 and 8 of the European Convention of Human Rights for its inadequate action in mitigating climate change. The Court relied on Article 9(3) in order to recognize the right of the NGO Urgenda to take legal action on behalf of the residents of the Netherlands. In this regard, the Dutch Court held that Article 9(3) of the Aarhus Convention, in combination with Article 2(5), “guarantees interest groups access to justice in order to challenge violations of environmental law”.

Two judgments of the Swedish courts are also relevant to the analysis conducted in this article. In one case, the Swedish Supreme Administrative Court had to decide whether an environmental NGO had legal standing to
challenge a permit to realize clear-cutting operations in a mountain forest with high conservation value. Considering the principle of wide access to justice enshrined in Article 9(3) and the interpretation of this provision given by the CJEU in the Slovak Bears I case, the Court held that the NGO had the right to bring the proceeding.

Interestingly, in another case the Swedish Land and Environmental Court of Appeal relied on Article 9(3) to allow the legal standing of an individual. In this case, the applicant challenged a decision of public authorities granting a derogation to the species protection regime. The contested derogation was preliminary to the release of a permit for the realization of sewage pipes in the land owned by the applicant. According to the longstanding case law of Swedish courts, in such cases the plaintiff could not be granted legal standing because the challenged act affected merely public interests. Instead, the applicant could contest the decision in the proceeding concerning the legality of the authorization to realize the sewage pipes in his property. However, the Swedish Court observed that the rationale of such division of the decision-making procedure was nullified by the fact that the entity authorizing the building of the sewage pipes did not question the previous derogation. Therefore, according to the Court, the rationale of precluding the applicant from the possibility to contest the former decision on derogation also became meaningless. Moreover, the Court noted that, in this manner, the applicant had no means to effectively challenge the decision on derogation, notwithstanding the fact that it affected his right to property. The Swedish Court considered that this solution would have been in contrast with Article 9(3) of the Aarhus Convention and with the case law of the CJEU relating to this provision.

This case is interesting because, unlike the case law analyzed above, in this decision, Article 9(3) was used to broaden the access to justice of individuals. However, the applicant was granted legal standing only because the alleged violation of environmental law could cause an infringement of his own right to property. Perhaps, in this case, the Swedish Court could consider the possibility of recognizing *locus standi* also on the basis of the interest of the applicant.
in the protection of the environment more generally. One could argue that the fact that the Court did not resort to this argument is a demonstration of the caution used by national courts when they interpret conditions for legal standing of private persons in environmental matters.91

5 Concluding Remarks

From the analysis conducted above, what emerged is that Article 9(3) significantly contributed to widen the access to justice in environmental matters of NGOs. On the basis of Article 9(3) and the findings of the ACCC concerning this provision, national courts extended the presumption contained in Article 9(2) relating to the fulfillment by environmental NGOs of standing requirements also to acts and omissions covered by Article 9(3). In this regard, the CJEU, with its preliminary rulings on the effects of Article 9(3) in domestic legal orders of Member States, had a crucial role in broadening the access to justice in environmental matters of NGOs before national courts. On the contrary, the right of environmental NGOs to bring action before the CJEU is still limited due to the strict interpretation of the individual concern requirement contained in Article 263(4) TFEU. Certainly, the approach of the Court to this provision raises some concerns about its compatibility with the spirit of the Aarhus Convention and the principle of effective access to justice more generally. However, when wondering whether the CJEU could interpret more extensively the individual concern requirement, it is important to consider the institutional limits of the EU in the field of access to justice.

The impact of Article 9(3) on the broadening of the access to justice of environmental NGOs is an important achievement to the purpose of enhancing the effective implementation of environmental law.

By contrast, the relevance of Article 9(3) to widen the access to justice of individuals has appeared to be rather limited so far. From the analysis of the case law, there was only one case in which the national court referred to Article 9(3) as a basis for extending legal standing rights of individuals. This can be explained by the fact that most of the Contracting States of the Aarhus Convention allows only individuals personally affected to have access to justice.92 Under these systems, courts seem to fear that an extensive interpretation of the interest-based or right-based criteria would lead to admit actio popularis.

91 DARPO, cit. supra note 2, p. 31.
However, the ACCC has shown that States can widen the access to justice of individuals even without the need to establish a system of *actio popularis*. In this regard, two findings of the Committee deserve specific attention. First, in the finding adopted with regard to Article 263(4) TFEU, the ACCC stated that, under Article 9(3) of the Aarhus Convention, individuals should not be required to demonstrate that they are more affected by the environmental harm than the rest of the society. Simple evidence suggesting that the environmental degradation has adverse impacts on the applicants should be sufficient. Second, in the finding with regard to Sweden, the Committee observed that domestic reviewing bodies, in assessing the fulfillment of the interest requirement by plaintiffs, should take into account all the many ways in which an environmental harm may negatively affect the interests of individuals.

These findings of the ACCC, on the one hand, seem to adequately balance the interests of States to limit standing rights and, on the other, the objective to ensure wide access to justice in environmental matters as enshrined in the Aarhus Convention.

It will be interesting to observe whether domestic courts and administrative authorities will endorse these findings of the Committee in their case law. In favor of a positive answer, one may bring the recent case law of international human rights courts and monitoring bodies, in which there was a more liberal approach regarding the victim status. In this case law, legal standing requirements were interpreted and applied so that they could grant individuals access to justice in cases concerning environmental harms potentially affecting the human rights of many people.

In conclusion, the increasingly urgent need to preserve the natural environment is justifying the widening of legal standing before national courts. In this regard, Article 9(3) of the Aarhus Convention appeared to offer a relevant legal basis to the evolutive interpretation of domestic criteria. However, the development towards a more effective access to justice in environmental matters has been necessarily slow. The various national approaches to legal standing are strictly linked to social, political, economic, and legal factors.

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which may differ in each State. Therefore, harmonization seems a hard goal. In this sense, the Compliance Committee of the Aarhus Convention, through its non-binding pronouncements, as well as Article 9(3) with its general nature, are playing an important role in building consensus among States.