Left to interest groups? On the prospects for enforcing environmental law in the European Union

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Abstract

This article highlights important changes in the enforcement of European Union environmental law over the last 25 years. Environmental law has traditionally been reliant on the European Commission, but the Commission has started to withdraw from enforcement. Instead, it is undertaking efforts to 'outsource' enforcement to environmental non-governmental organisations by systematically promoting access for such groups to national courts. While the Commission has indicated that it sees centralised and private enforcement as substitutes, this article evaluates the advantages and drawbacks of each mechanism and comes to the conclusion that both mechanisms have an important role to play. In particular, the private enforcement of EU environmental law is dependent on national opportunity structures that are unlikely to ever be fully liberalised and harmonised by EU procedural law. Private enforcement is therefore not a panacea to compliance problems, and the growing absence of a central enforcing authority is a cause for concern.

Keywords: Access to Justice, European Commission, Implementation, Enforcement, Environmental NGOs, Aarhus Convention

Introduction

Writing about European Union (EU) environmental law in this journal in 1992, Ken Collins and David Earnshaw (1992, p. 214) observed that 'legislation will not be worth the paper it is printed on if policies break down or obligations are not fulfilled at the implementation stage'. While the problem of assuring central policies' practical effect 'on the ground' is somewhat timeless (e.g. Pressman and Wildavsky 1974), Collins, then chairman of the European Parliament's committee on the environment, and his co-author stressed that attention to the implementation of EU environmental law was in 1992 a relatively recent phenomenon. The national implementation of EU law is far from an automatic process. In the case of EU directives (the major legal instrument in EU environmental legislation), it consists of both a formal transposition into national law and an adaptation of national practices that lead to tangible results (Collins and Earnshaw 1992, pp. 215-216, Bondarouk and Mastenbroek 2017, Thomann and Sager 2017). Many different national actors are involved in this process, from legislators to street-level bureaucrats. Results are often not in line with a policy's original intention, for many reasons, including: lack of national administrative capacities, lack of salience, a 'misfit' between the EU policy and national policy traditions, or powerful national interests opposing the policy (Versluis 2007, Treib 2014, Borrass *et al.* 2015). All EU policies are subject to at times serious implementation deficits (Falkner *et al*. 2004, Börzel *et al*. 2010). Any discussion of policy implementation is therefore closely connected to enforcement as a means of remedying apparent implementation failures.

This contribution highlights important changes in how EU environmental law has been enforced over the last 25 years. I discuss why environmental law has traditionally relied on centralised enforcement by the Commission and present data indicating that the Commission has started to withdraw from such enforcement. The Commission is undertaking efforts to 'outsource' enforcement to private actors, in particular to environmental non-governmental organisations (NGOs), by systematically promoting enhanced access for such groups to national courts. While the Commission has indicated that it sees a trade-off between centralised and de-centralised enforcement, I evaluate the advantages and drawbacks of each mechanism and conclude that both mechanisms play an important role and should not be seen as substitutes. In particular, the private enforcement of EU environmental law is dependent on national opportunity structures that EU procedural law is unlikely to

ever fully harmonize. This means that the conditions for private enforcement will remain very uneven across EU member states. Private enforcement is therefore not a panacea to some of the problems that come with a reliance on Commission enforcement, and the growing absence of a central enforcing authority should cause concern.

I structure the contribution as follows. I first juxtapose two mechanisms for the judicial enforcement of EU environmental law. I highlight the traditional centrality of the Commission in this field and discuss the deficits of Commission enforcement. Second, I examine Commission enforcement priorities over time and present data indicating the extent of the Commission's retrenchment from centralised enforcement. Third, I trace the expanding opportunity structure for de-centralised enforcement of environmental law, particularly the increased access to national courts for environmental NGOs in the wake of the Aarhus Convention. Finally, I conclude by discussing the deficits of this process, highlighting its uneven effects across member states, and the resulting need for a continuing presence of the Commission.

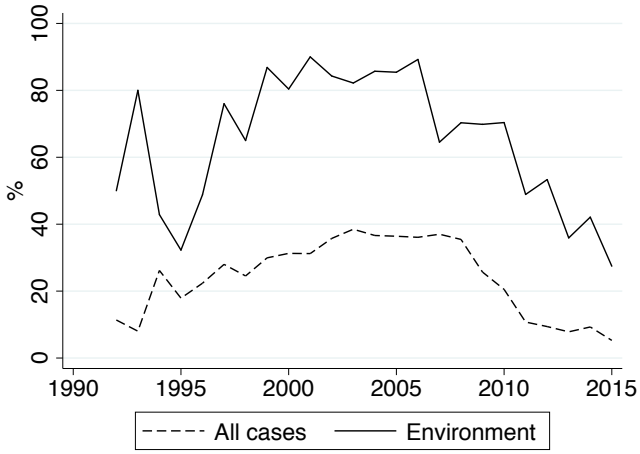
Centralised and de-centralised enforcement

EU treaties allow for two mechanisms by which national compliance with EU law can be judicially enforced: a centralised mechanism in which the Commission initiates infringement proceedings against non-complying member states, and a de-centralised mechanism in which citizens, groups and companies initiate legal proceedings against non-complying national authorities before national courts. National courts have the possibility to refer questions about the proper interpretation of EU law to the EU Court of Justice (CJEU), and such 'preliminary references' constitute a significant part of the CJEU's caseload. National courts also have the possibility to enforce EU law directly. The de-centralised (private) enforcement procedure is what makes the EU legal order unique among international legal orders; its active use by citizens and companies has contributed significantly to EU law's impact 'on the ground'.

EU environmental law, however, has always been an outlier in this regard. Compared to other policy areas, its enforcement is much more reliant on the centralised mechanism of Commission infringement proceedings. Litigation initiated by the Commission typically makes up between 15-40% of the CJEU's overall caseload in any given year, while the remainder primarily consists of preliminary references from national courts in cases that have been initiated by private parties (Figure 1). These

figures look very different for the environmental sector. With few exceptions, between 1992 and 2010 over 60% of all environmental cases that reached the CJEU were brought by the Commission as infringement cases. For the time between 1999 and 2006, the share of infringement procedures was over 80%. Since 2010, the percentage has dropped off steeply but still remains about 20 percentage points above the average.

Figure 1: Share of Commission-initiated cases before the CJEU



Note: Data based on annual reports of the CJEU 1992-2015 and the curia.europa.eu database.

Contrary to many other policy areas, EU environmental law does not vest citizens with individual rights – such as for example a right to clean air, water *etc*. – that could activate access to national courts. Instead, EU environmental law has been drafted as protecting a public good (for a thorough discussion of the lack of rights frames in EU environmental law, see Hilson 2017). Litigation in the public interest has traditionally been absent in most European countries. Barred from access to national courts, citizens and environmental NGOs often had little alternative but to complain to the Commission, and contacting the Commission is still part of the standard procedure of many environmental NGOs. The comparatively high number of complaints the Commission receives about breaches of EU environmental law reflects this situation. According to the Commission's 'annual reports on monitoring the implementation of EU law' (hereafter 'annual monitoring reports'), the environmental sector regularly ranks among the four policy areas subject to the most complaints.

Deficits of centralised enforcement

The debate about the obstacles to private litigation in environmental matters is quite longstanding. Collins and Earnshaw (1992, p. 244) highlighted that restrictive access to courts made the private enforcement of EU environmental law 'fraught with difficulties' and suggested that a 'measure enabling environmental non-governmental organisations and private individuals to bring cases for practical infringements of EC environment legislation in national courts would be an important measure which the Commission might usefully consider'. However, what are the problems with a reliance on the Commission that private enforcement could potentially redress?

Centralised Commission enforcement has numerous advantages. First and foremost, the Commission is comparatively well funded, experienced and well staffed to litigate environmental cases. It wins almost all of the cases that it brings to the CJEU (Börzel *et al.* 2012, p. 456), a success rate that environmental NGOs can only dream of (Darpö 2012, p. 11). The possibility for financial penalties in cases of protracted member state non-compliance has added to the Commission's ability to effectively enforce EU law, and the environmental sector is one of the main beneficiaries. Out of the 33 cases to date in which the CJEU has decided on financial penalties, 14 have concerned environmental law.[1] Infringement proceedings also bear a certain salience, not least since the Commission started issuing press releases with all its infringement decisions. Aggregate statistics about procedures initiated and cases litigated against individual member states are readily available, making for relatively easy 'naming and shaming'. In comparison, data on the use of EU environmental law in national courts are scarce and aggregate statistics for actual incidences of private enforcement are unavailable except for the relatively few cases that get referred to the CJEU for a preliminary ruling.

Nevertheless, centralised enforcement also has numerous important drawbacks. First, the procedure is slow. The Commission states the average duration of an infringement procedure as 26 months, but cases that it refers to the CJEU can last over 50 months overall (European Commission 2007, p. 4). National court cases do not necessarily take less time – there is considerable variation across member states – but the duration of centralised enforcement is particularly problematic since the opening of an infringement procedure has no suspensive effect. Once the Commission has referred a

[1] The CJEU's case database at curia.europa.eu provides these numbers.

case to the CJEU it can ask for the immediate suspension of the activity in question ('interim relief'), but it uses this option rarely, and at this stage it may already be too late (Hedemann-Robinson 2010). Potentially harmful activity will have continued for many months, large projects will have been built and protected species already hunted. As the Commission itself notes, private enforcement can achieve better and faster remedies: 'Only a national tribunal can apply remedies like injunctions to the administrations, cancellation of national decisions, damages, *etc*.' (European Commission 2007, p. 8).

Another limitation lies in the Commission's limited ability to monitor the national implementation of EU environmental law. The Commission relies heavily on citizens and NGOs to flag possible cases of non-compliance (European Commission 2016a, p. 2). The reality of centralised enforcement is therefore closer to a constant fire alarm rather than the police patrol it is often portrayed as (Tallberg 2002). Moreover, the Commission does not pursue all infringements it is alerted to. The Commission follows its own priorities in selecting cases to pursue; these priorities vary over time. The Commission has wide discretion about using the infringement procedure (Eliantonio 2016, pp. 179-180). It is under no obligation to pursue an infringement, even where a member state's breach of obligations is obvious, and retains the right to terminate the procedure at any point regardless of the member state's compliance with its demands (Craig and de Búrca 2011, p. 415). The current CJEU president CJEU Koen Lenaerts described the procedure as 'a political tool at the Commission's disposal' (Lenaerts and Gutiérrez-Fons 2011, p. 4).

The private enforcement of EU environmental law, on the other hand, is independent of the Commission's priorities. From the affected citizens' perspective, directly initiating legal action in a national court can seem more immediately effective than contacting the Commission and waiting for it to act. The ability of individual citizens or NGOs to bring cases to national courts, however, depends on the 'opportunity structure' (Kitschelt 1986, Hilson 2002) offered by national legal systems for bringing legal action. does not only covers rules on legal standing, but also aspects such as the cost and duration of legal proceedings and the types of remedies available (Conant *et al.* 2017). National legal systems rarely offer favourable conditions on all of these aspects. In order to allow for an effective de-centralised enforcement of EU environmental law, EU legislation would need to both harmonise and liberalise

existing national opportunity structures. The persistence of great variation in the conditions for private enforcement of EU environmental law constitutes the central drawback of this mechanism. As shown below, legal orders are slow to change.

The following sections address both mechanisms in more detail. The next section studies the extent to which the enforcement priorities of the Commission pose a problem for the effective enforcement of EU environmental law. I then trace the introduction, promoted by the Commission, of procedural rights aimed at enhancing access to national courts for citizens and environmental NGOs, and discuss the degree to which this effort succeeded in removing obstacles to the de-centralised enforcement of EU environmental law.

Commission enforcement priorities

EU environmental law's traditional dependence on the Commission means that its enforcement is closely bound to the Commission's priorities in pursuing non-compliance. This may be problematic, as recent events illustrate (Čavoški 2015). When Jean-Claude Juncker in 2014 presented the priorities for his new Commission as an agenda for jobs and growth, environmental groups were quick to point out that, with the exception of a reference to climate change, environmental protection was largely absent (e.g. European Environmental Bureau 2015, p. 6, WWF 2015b, p. 13). This concern strengthened when Juncker merged the Commission portfolio for the environment with that for maritime affairs and fisheries. The Commission reinforced this worry when it announced that it would subject the EU's birds and habitats directives (European Commission 2014), two of the central pieces of EU environmental legislation, to its 'Regulatory Fitness and Performance Programme' (REFIT), which aims at 'removing red tape and lowering costs' (European Commission 2015a). The WWF felt compelled to highlight that 'this process is happening in a context that is clearly hostile to nature conservation, as President's Juncker rhetoric on "business-friendly" laws and cutting "green tape"' illustrated (WWF 2015a).

The Juncker Commission by contrast has emphasised the compatibility of environmental law with an agenda for growth. In its latest annual monitoring report, the Commission subsumed the enforcement of environmental law under its priority of 'a new boost for jobs, growth and investment' and highlighted that EU environmental

law 'helps to ensure a level playing field for all Member States and economic operators that need to meet the environmental requirements. Strict enforcement also stimulates the market to find innovative ways to increase resource efficiency and reduce import dependency. Such innovation can give EU companies a competitive edge and create jobs' (European Commission 2016b, p. 5).

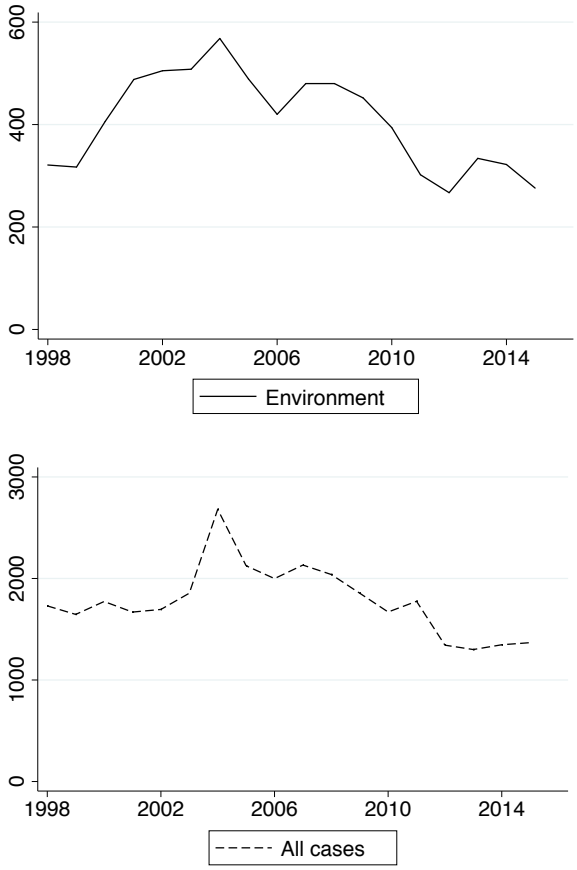
While this is unlikely to significantly calm the nerves of environmental groups, recent data give no indication that the re-adjustment of the Commission's priorities has particularly de-emphasised the enforcement of environmental law. The environment has traditionally constituted one of the Commission's central enforcement priorities and apparently continues to do so. According to the Commission's annual monitoring reports, between 1998 and 2015 the environment has, with very few exceptions, been the policy area with the highest share of open infringement proceedings. On average, 23% of open cases consistently pertained to environmental matters during this time. The pattern for cases of persistent conflict, i.e. those cases that the Commission has referred to the CJEU, also yields no evidence that the Commission is de-prioritising the environment (at least not relative to other policy areas). The first two years of the Juncker Commission replicate a pattern where environmental cases constitute about 20% of all cases that the Commission litigates.[2]

EU environmental law's vulnerability to the Commission's changing enforcement priorities comes in a different guise from the one that environmental NGOs highlight. Since about 2010, there has been a steep drop-off in all indicators of the Commission's enforcement activity, both in its overall caseload and in cases concerning the environment. From 2011 to 2015 the amount of open cases in environmental matters has been at its lowest since the late 1990s (Figure 2); the amount of cases the Commission has referred to the CJEU is as low as it has been in the first half of the 1990s (Figure 3) when the EU had considerably fewer members than it has today. This general decline holds also when looking only at cases of substantive conflict (i.e. excluding cases the Commission routinely initiates when member states fail to notify a transposition measure for a directive). Between 2003-2009, the Commission referred an average of 24 environmental cases to the court

[2] Calculation uses the Commission's database on infringement decisions at http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions.

concerning substantive non-compliance with environmental law. This average dropped to 13 cases between 2010-2016.[3]

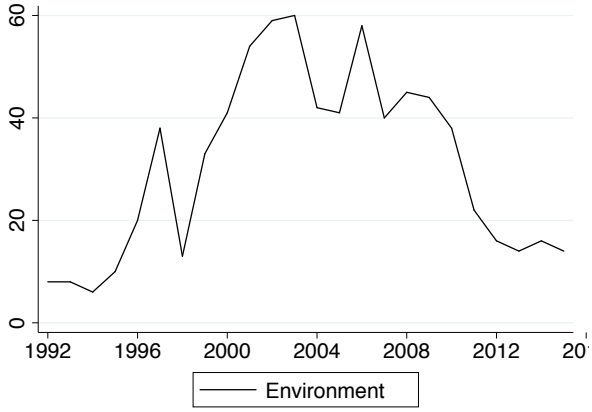
Figures 2(a) and 2(b): Open infringement procedures

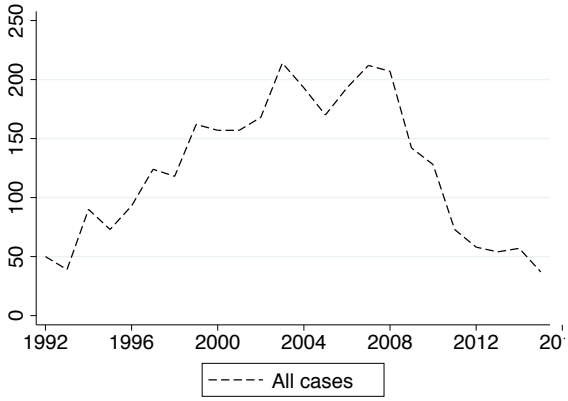


Note: Data based on the Commission's annual monitoring reports 1998-2015.

[3] The Commission's database on infringement decisions allows differentiation between non-notification cases and cases of substantive non-compliance.

Figures 3(a) and 3(b): Number of infringement cases referred to the CJEU





Note: Data based on annual reports of the CJEU 1992-2015 and the curia.europa.eu database.

There are several explanations for the Commission's withdrawal from centralised enforcement. The timing of the drop-off coincides with the introduction of 'EU Pilot', the Commission's mechanism for the informal handling of complaints before initiating a formal infringement procedure. EU Pilot has faced important criticism for delaying Commission action (Smith 2016) and a former head of the legal unit of the Commission's Directorate-General for Environment even accused EU Pilot of having been designed to deter complaints (Krämer 2014, p. 251). However, the Commission itself is reluctant to identify the EU Pilot as the cause of the decrease in its enforcement activity (European Commission 2011, p. 6). Moreover, data on the use of EU Pilot, contained in the Commission's annual monitoring reports show that newly opened EU Pilot cases also declined significantly after 2013. This trend could indicate that member states have improved their compliance record (Börzel and Buzogany 2018). However, recent implementation reports for EU environmental law, including the Commission's own, outline substantial compliance problems – even with older pieces of environmental legislation, which indicates that a decrease in new

environmental legislation also cannot wholly account for the decrease in enforcement measures (IMPEL 2015, European Commission 2017c). The development is however consistent with an increasingly restrained policy activism that has been identified since to the second Barroso Commission (Kassim *et al.* 2017, p. 666). It also coincides with EU environmental policy's entry into a new stage, characterised by rapid contextual change and increasing instability since the start of the economic and financial crisis (Zito *et al*. forthcoming).

The Commission itself offers a different explanation for its reduced enforcement efforts: 'The overall decrease of the number of infringement procedures can be put in relation to the important increase of preliminary rulings under Article 267 TFEU since 2010. The CJEU has addressed conformity issues of national laws in regard of EU legislation in about half of its judgments under Article 267 TFEU since 2010 and identified non conformities in numerous cases' (European Commission 2015b, p. 16). It is correct that over the last decade the number of references to the CJEU with origin in private litigation has significantly increased, both overall and in the environmental sector. First, the next section outlines the legal developments that contributed to this situation; then the following section highlights the problem with the Commission's apparent belief that private enforcement can substitute for its own centralised efforts.

Opportunities for de-centralised enforcement

Where early EU documents touched upon issues of member state compliance with EU environmental measures, such as the EU's first 'action programme' on the environment in 1973, the emphasis was on the Commission's role in monitoring and enforcing (Council 1973, p. 30). Private enforcement of environmental law only became a topic in Commission documents around the time of the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. The resulting 'Rio Declaration', agreed to by all EU member states at the time, stated in its principle 10 that 'effective access to judicial and administrative proceedings [for citizens], including redress and remedy, shall be provided'. In the environmental law section of its 1992 annual monitoring report, the Commission stressed that 'the rise in the number of complaints from Europe's citizens is evidence of […] their limited access to the courts' (European Commission 1993, p. 41). The Fifth Environmental Action Programme stated in 1993 that 'individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests

are protected and that prescribed environmental measures are effectively enforced' (Council 1993, p. 82). From this point on, appeals to facilitate de-centralised enforcement, or increase 'access to justice', became routine. In its 1994 annual monitoring report, the Commission stated that it was considering 'an instrument to facilitate public involvement in the application of Community environmental law via direct access to justice' (European Commission 1995, p. 47). In 1996, the Commission devoted a whole section to access to justice in its communication on 'implementing Community environmental law', in which it acknowledged both the limitations of the centralised approach and the obstacles that private enforcement of environmental law faced in national legal systems. Not only were national procedural rules unfavourable, the environmental sector also suffered from a 'frequent lack of a private interest as an enforcement driving force' (European Commission 1996, p. 12). Therefore, it would be 'necessary to look wider than individuals directly affected and include representative organisations seeking to protect the environment', and to give such environmental NGOs standing in national courts against national authorities, much in the mould of similar rules concerning consumer protection (European Commission 1996, p. 13).

The Aarhus Convention

Around the time of the 1996 Commission communication, negotiations had started in the framework of the United Nations Economic Commission for Europe on a 'convention on access to information, public participation in decision-making and access to justice in environmental matters'. The product of these negotiations, the Aarhus Convention, was signed in 1998 and subsequently ratified by the EU and all EU member states. It confers rights to inclusion in decision-making and private enforcement to the 'public' in the sense of natural and legal persons, their associations, organisations and groups, including non-governmental organisations promoting environmental protection (article 2.4 and article 2.5, Aarhus Convention). As an international treaty, the provisions of the Convention did not automatically create new rights. Both the EU and the member states had to implement the provisions.

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*.). The Commission proposed two directives to implement these two steps in 2000, which passed the EU legislative process with relatively little conflict (resulting in Directive 2003/4 on public access to environmental information and Directive 2003/35 on public participation in planning processes, respectively). In a third step, the Convention mandates 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' that violate environmental laws (article 9.3, Aarhus Convention). This article, if implemented, would allow interest groups to go to court against third parties, including private enterprises, that infringe on any environmental law. It is therefore perhaps not surprising that this article proved the most contentious in the process of implementing the Aarhus Convention. 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 (Poncelet 2012, p. 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' (European Commission 2003recital 9). This would allow interest groups to go to court against public bodies also where they fail to act against environmental pollution or destruction. Since the EU 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 proposal in May 2014. Despite repeated calls by environmental NGOs (e.g. European Environmental Bureau 2015, p. 33), the Commission is not planning to submit a new legislative proposal, but has issued an 'interpretative communication' on existing legislation and case-law (European Commission 2017a). The Aarhus Convention's most far-reaching provision will therefore not be transposed into EU legislation.

Procedural autonomy and the heterogeneity of access to justice

While the Commission has long championed the de-centralised enforcement of EU environmental law, the lack of a broad EU competence to regulate national procedural law, i.e. the 'principle of (national) procedural autonomy', limits concrete efforts. The CJEU has repeatedly emphasised that national procedures must constitute an effective means of enforcing EU rights, and that it must not be more difficult to enforce an EU right than it is to enforce a national right (Craig and de Búrca 2011, pp. 218-220), but national legal systems provide very different opportunity structures to bring environmental cases to court, even when it comes to enforcing national environmental law. With the growing attention to access to justice in environmental matters in the wake of the Aarhus Convention, several cross-national comparative studies assess the state of the procedural diversity within the EU (Prieur 1998, IMPEL 2000). The central questions along which legal systems were found to diverge were the following (Prieur 1998, p. 24): who has standing to appeal, what types of decisions can be appealed, what arguments are admissible, how long do procedures take, what remedies are available, and what are the costs of the proceedings?

Before the ratification of the Aarhus Convention, several countries (Austria, Denmark, Germany and Sweden) did not grant standing to environmental NGOs at all to challenge administrative decisions of any kind (although some German Länder had started to do so under their environmental laws, Prieur 1998, pp. 11-12). The Nordic countries relied primarily on a tradition of appeal to non-judicial bodies, whereas Austria and Germany (and, to some degree, Italy) allowed for judicial review only under restrictive rules of standing and restricted the admissible grounds of appeal to arguments that had previously been used in administrative procedures. Other legal systems allowed for wide access. Ireland and the United Kingdom had liberal standing rules, but costly procedures, 'loser pays' rules (where the losing party has to pay the legal expenses of the winning party) and potential liability for economic losses due to delay, limited litigation. The studies also named costs as significant obstacles in Italy and Germany (see respective sections in Prieur 1998). Countries such as France, Greece, Spain and Portugal offered generous standing (Portugal generally allowed for public interest litigation), but courts in these countries (and Italy) were comparatively slow to process cases.

This diversity meant that the Aarhus Convention would have very different effects across national legal systems and that those effects would likely be strongest where

national procedural rules were most restrictive. However, the Convention's stipulation that judicial procedures should provide 'adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive' (article 9.4, Aarhus Convention) required all national legal systems to adapt to some degree. Since the Convention is about procedural guarantees, EU legislation implementing the Convention entailed a harmonisation of national procedural laws concerning the environment. This legislation can itself be enforced through the EU's regular mechanisms. Importantly, and contrary to substantive environmental law, this procedural environmental law conferred distinct rights on citizens and NGOs that would be enforceable in national courts. Some of these procedural rights are contained in substantive legislation such as the Environmental Impact Directive and the Environmental Liability directive, thereby introducing the EU's strong individual rights regime 'through the back door' to an area where it had traditionally been absent. Eliantonio and Muir have called this practice an 'incidental proceduralisation' of EU environmental law (Eliantonio and Muir 2015). Both the Commission and NGOs themselves have used this new EU procedural rights regime against restrictive national procedural rules in order to facilitate the de-centralised enforcement of substantive EU environmental law (Oliver 2013, pp. 1446-1455).

Litigating procedural rights

As could be expected, efforts to expand procedural rights have occurred place in countries with the most restrictive rules, particularly concerning standing, admissible arguments, and costs. A Swedish NGO (*Djurgården-Lilla Värtans Miljöskyddsförening*), involved in a case concerning construction permits for power lines, challenged a Swedish rule stipulating 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.[4] Sweden was one of only a few EU countries to apply such a numerical criterion for interest group standing; the government itself conceded that only by two environmental groups in Sweden at the time met the criteria (Oliver 2013, p. 1450). On appeal, the Swedish Supreme Court referred the question to the CJEU, which in October 2009 decided that 'national rules must not be liable to nullify Community provisions which provide that […]

[4] Djurgården-Lilla Värtans Miljöskyddsförening stated that it had about 300 members.

environmental protection associations are to be entitled to bring actions before the competent courts' (CJEU 2009, para 45). In reaction, the Swedish government adjusted the applicable law in July 2010 and reduced the membership requirement to 100 members (Swedish Code of Statutes 2010).

In 2008, the German environmental NGO 'BUND', involved in a dispute over the construction of a coal-fired power plant, contested a German principle of administrative law ('*Schutznormtheorie*') that administrative decisions can only be challenged if they infringe on legislative provisions conferring individual rights (as opposed to public interests, Oliver 2013, p. 1452). The responsible German administrative court expressed doubts whether this principle was in conformity with EU law and referred the question to the CJEU, which in May 2011 agreed that NGOs should be able to challenge industrial permits based on public interests (CJEU 2011a, para. 50). In response to this case, the German government adapted parts of the Environmental Appeals Act in November 2012 to grant wider standing for interest groups.

Private litigants also challenged the comparatively high costs of court cases in the UK. Since the losing party in legal proceedings was potentially liable for the total legal costs of the winning party, the costs of a case, in particular if it had gone to appeal, could be very high. In 2011 the UK Supreme Court referred to the CJEU the question whether this rule conflicted with the Aarhus Convention's requirement that judicial review should not be 'prohibitively expensive'. The case had started as a conflict about a permit for a cement factory and went through several stages of appeal. All decisions went against the private citizens that had challenged the permit. After the last appeal at the highest level of the UK court system failed, the winning parties (the permit-issuing authorities) submitted a bill amounting to about 88,000 GBP, for which the main litigant would potentially be liable. The Supreme Court asked the CJEU whether this would run counter to the Aarhus Convention, and the CJEU replied in 2013 that costs must not act as a deterrent to potential litigants in environmental matters (CJEU 2013, para. 35). A cost decision should moreover take account of the litigant's personal circumstances, i.e. costs should neither be objectively or subjectively unreasonable (De Baere and Nowak 2016, p. 1734).

Around the same time, the Commission had also taken the UK government to the CJEU over the cost of legal procedures (CJEU 2014). Its case raised similar arguments, with a particular emphasis on the predictability of a legal procedure's final

costs for the litigant before she engages in it (De Baere and Nowak 2016, p. 1735). While both cases were still pending, the UK enacted changes in its procedural rules that capped the potential costs of environmental cases at 5,000 GBP for individuals and 10,000 GBP for organisations.

Since the signing of the Aarhus Convention, the Commission has repeatedly supported the newly established procedural rights of private litigants in environmental matters in a number of infringement proceedings against member states. It had previously taken the Irish government to court about the high costs of Irish legal procedures, with the result that Ireland no longer applies the 'loser pays' rule in environmental cases (Ryall 2013, p. 4). It also initiated infringement procedures against restrictive rules on standing, such as the German rule of 'material preclusion', which German environmental NGOs identified as particularly onerous. According to this rule, legal challenges to administrative decisions could only rely on arguments that had already been raised in detail during administrative consultation (Bunge 2016, p. 19). Given tight consultation deadlines, the practical effect of this rule was that environmental interest groups needed to invest considerable resources at a very early stage of each permitting procedure in order not to have to forgo important arguments in a possible legal challenge. In its judgment of October 2015, the CJEU agreed with the Commission that a certain reduction in administrative efficiency would have to be accepted in order 'not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety' (CJEU 2015, para. 79-80).

These cases demonstrate that NGOs, individual litigants and the Commission have been successful at slowly chipping away restrictive national procedural rules. Nonetheless, more recent comparative overviews of national procedural law show that these efforts have only limited effect across member states (Milieu 2007, Darpö 2013). CJEU case law in environmental matters appears to have little impact outside the national context from which the case emerged. Exceptions are cases where the national rule in question has a close equivalent in other legal systems, such as the norm of material preclusion in Austria (whose government intervened in the case

against Germany). Relatively few cases have considerable implications outside their national contexts.

One such case concerned the question whether interest groups have a general right to access to justice in environmental matters, despite the fact that this provision of the Aarhus Convention had not been transposed into EU legislation. The underlying conflict was a challenge by a Slovak environmental NGO (*VLK Lesoochranárske zoskupenie*) against a decision by public authorities to issue permits to hunt brown bears, a species that is protected under the EU's Habitats Directive. Slovak law did not grant standing for NGOs in such cases. The Slovak Supreme Court referred the question to the CJEU, which stated in its March 2011 judgment that 'it is for the referring court to interpret, to the fullest extent possible, the procedural rules […] so as to enable an environmental protection organisation […] to challenge before a court a decision […] liable to be contrary to EU environmental law' (CJEU 2011b, para. 50-51). The Slovak Supreme Court followed suit and granted the group standing to challenge the hunting licenses (Brakeland 2014, p. 15).

This 'Slovak bears' case has had considerable impact in countries with restrictive traditions of legal standing, such as Germany or Sweden (but so far not in Austria). National courts in these countries have started applying the CJEU's reasoning to set aside unfavourable national procedural rules and allow interest groups to challenge all sorts of administrative decisions relating to environmental matters. This has been the case regarding German rules on air pollution, particularly limits on nitrogen dioxide in ambient air. EU rules on air pollution require that, where limits for nitrogen oxide are exceeded, national authorities need to draw up a short term action plan indicating how emission levels can be brought in line with existing limits (e.g. by way of a congestion tax or restrictions on diesel cars). In previous case law, the CJEU had held that individuals ('persons directly concerned') could bring a legal challenge if such an action plan was missing, setting aside German rules to the contrary (CJEU 2008, para. 39), but there was no equivalent right of standing for interest groups. Throughout 2011 and 2012, a German environmental NGO (*Deutsche Umwelthilfe*) tested this limitation by bringing a number of cases itself. The responsible lower administrative court relied explicitly on the CJEU's ruling in the 'Slovak bears' case when it granted the NGO standing and ordered the state government to revise its action plan, a ruling that the Federal Administrative Court upheld on appeal (Bundesverwaltungsgericht 2013). Deutsche Umwelthilfe has since, with the help of the British NGO ClientEarth,

challenged multiple local action plans relating to nitrogen dioxide pollution (Clean Air 2017).

Administrative courts in Sweden have also taken up the CJEU's judgment in the 'Slovak bears' case. The first such case concerned a 2011 hunting permit that the Swedish Environmental Protection Agency had issued for the culling of a wolf. The Swedish Society for Nature Conservation (SSNC), one of Sweden's largest environmental NGOs, appealed this decision. Eventually, the Supreme Administrative Court granted standing, specifically referring to the 'Slovak bears' case in setting aside restrictive Swedish procedural rules (Högsta Förvaltningsdomstolen 2012, see also Epstein and Darpö 2013, pp. 258-260). The SSNC has since challenged numerous permits for the hunting of protected large carnivores.

Swedish administrative courts have moreover started to expand the same reasoning to cases not otherwise related to EU environmental law, such as forestry law. The first such case concerned the planned clear-cutting of a privately owned forest that was held to include valuable habitat. The SSNC appealed the initial permit decision to an administrative court. That court granted the SSNC standing with reference to the Aarhus Convention, and voided the permit because of the area's valuable status (Förvaltningsrätten i Luleå 2011), a decision that the Supreme Administrative Court upheld (Högsta Förvaltningsdomstolen 2014). This decision suggests that environmental organisations now face few obstacles to challenge any administrative decision in Sweden that may have environmental consequences (Darpö 2014, p. 5).

Conclusions: Can NGOs replace the Commission?

As these developments show, the Aarhus Convention and its transposition into EU law have improved opportunities for the de-centralised enforcement of EU environmental law. Procedural rights have enabled NGOs to expand the legal opportunity structures to enforce substantive environmental law. Litigation by environmental NGOs is now possible where it was not possible before. Rights of standing, procedural rules and cost burdens have generally improved. Individual examples, such as the numerous air pollution cases, show that increased access to courts can also have a substantial impact on member state compliance with environmental obligations. Nevertheless, while de-centralised enforcement has certainly broadened the options for citizens and environmental groups, it is by no

means a panacea for environmental law's persistent implementation failures. As demonstrated above, distinct differences in the opportunity structure for the private enforcement of environmental law remain despite both legislative and judicial efforts to liberalise and harmonise procedural rules (Eliantonio 2015). Legal traditions are sticky. Procedures remain comparatively expensive in Anglo-Saxon countries, and German-speaking countries are slow to adapt their systems of administrative law, which are traditionally hostile to public interest litigation. Other member states, such as the Netherlands, have enacted restrictive reforms after the ratification of the Aarhus Convention. This diversity has led one prominent expert on EU environmental law to summarise national opportunity structures for private enforcement as 'diverging, random and inconsistent' (Darpö 2013, p. 11).

Perhaps the clearest examples that the efforts to liberalise procedural rules cannot relieve the Commission of its enforcement role are found in some Mediterranean EU member states. Countries like Spain and Greece have long offered comparatively generous access to courts for environmental NGOs, at the same time as the Commission's annual monitoring reports have consistently singled them out as among the worst performers in implementing EU environmental law. The current efforts to increase access to courts are therefore unlikely to solve implementation problems there.

In part, obstacles to private enforcement in these countries lie in deeper problems with the effectiveness of the judicial system, its lack of resources and the training of judges (Moreno Molina 2012, p. 18, Kallia-Antoniou 2013, p. 52). However, an effective judicial system is a necessary condition for functioning private enforcement. The EU has little competence to address these issues outside of providing funds for networks of legal professionals. The recent inclusion of an 'EU Justice Scoreboard' in the European Semester, the EU's framework for monitoring socio-economic developments in the member states, may at least map these issues (European Commission 2017b), but these examples show that the EU's ability EU to enhance national opportunity structures for private enforcement has very concrete limits.

What is more, the private enforcement of environmental law is essentially dependent on organised civil society showing an interest in the matter (Versluis 2007). Private enforcement is more likely to work in countries with more established and better funded environmental movements than in countries where such movements are young or largely absent (Börzel 2006, Slepcevic 2009). Legal mobilisation is also

conditioned by environmental NGOs' alternative channels of influence within a country's political system or their ideological disposition towards law and courts as appropriate venues (Conant *et al.* 2017). There are even significant differences in the use of courts between NGOs active in different sectors of environmental protection. Bird protection NGOs have proven particularly litigious (Vanhala 2017). A primary reliance on de-centralised enforcement may therefore improve the available remedies, but comes at the cost of significant imbalances both between member states and environmental sub-fields.

Accordingly, while the expansion of private access to courts is real, it is also fundamentally uneven, in ways that the EU only has limited capacity to address. Private enforcement can therefore not act as a universal substitute for Commission enforcement, and the Commission's continued presence is necessary to counter the imbalances in private enforcement. There should be no illusions about the efficacy of either mechanism. Both have a role to play. The expansion of private access to courts was perhaps not the only cause of Commission retrenchment, but appears to give the Commission an excuse to do less. Alternatives to Commission enforcement, such as the delegation of direct monitoring, investigation and sanctioning powers to a specialised EU agency, as discussed in Collins and Earnshaw's original article (1992, pp. 238-242) and which increasingly takes place in other policy areas (Scholten 2017), have so far failed to materialise in the environmental sector. The environmental sector rather forms part of a larger trend toward a privatisation of enforcement (Wilman 2015, pp. 14-18). The result for the moment is not a balanced approach, but less and less activity on the part of the Commission. This on-going retrenchment should be a cause for concern.

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