About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs

About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs

Marjan PEETERS*

Within environmental law, Environmental NGOs (hereafter NGOs) – being private actors established by civil society – often enjoy special procedural rights in order to help to achieve the public interest of a sound environment. Particularly when governments fall short in their public task to protect the environment, it will be crucial that NGOs – acting as watchdogs – step in by defending the voiceless interest of a sound environment. This contribution examines how NGOs are indeed able to contribute to the protection of the environment, and which challenges exist when NGOs act in the pursuance of this public interest. Core focus goes to the right of access to environmental information as being currently provided in EU law, and several opportunities and limits will be discussed. In view of the potential great informational power of NGOs, this contribution will also shed a light on the question of accountability of the NGOs themselves, and the way how the right to freedom of expression protects their freedom of speech in case they want to make accusations of malpractice or illegal behaviour of governments or industries.

Keywords: Public interest; NGOs; Aarhus Convention; Procedural rights; Environmental information; Freedom of expression; Strategic Lawsuits; PRTR Protocol; Compliance; Confidentiality

1 INTRODUCTION

Within environmental law, private actors, such as individual citizens but particularly also Environmental NGOs, often enjoy special procedural rights in order to influence the environmental decision-making by governments. This is truly the case at the European continent, where the Aarhus Convention enables citizens and NGOs to influence the development of environmental regulation and its implementation.[1] The background to the idea of strengthening civil society by providing 'green' procedural rights, such as access to environmental information and participation to governmental decision-making, complemented with the right

* Professor of Environmental Policy and Law, Maastricht University.
Email: marjan.peeters@maastrichtuniversity.nl

[1] Convention on Access to information, public participation in decision-making and access to justice in environmental matters, Aarhus, Denmark, 25 June 1998, into force: 30 Oct. 2001.

Peeters, Marjan. 'About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs'. *European Public Law* 24, no. 3 (2018): 449–472.

to address the court in order to enforce those rights, is to give *a voice to the environment*. It is believed that granting such procedural rights ensures that environmental concerns will be better represented in governmental decision-making.[2]

Environmental problems are however often very complex, with multiple and long-term, far-reaching effects. Such problems surpass the individual level and are often too multifarious for one single person to fight against. In view of this, members of civil society have established *Environmental NGOs* with the aim of having a more effective strategy for promoting environmental protection. Environmental NGOs are in this sense a specific form of private actors: they are established by citizens to serve a public interest, in this case the interest of a sound environment. The specific aim of such an NGO is to be decided by the establishers of the NGO, and can be general (a sound environment), but may also concern the protection of specific species (such as the protection of bees), a specific sector (such as environmental consequences of transport) or a specific regulatory instrument (such as critically following the emissions trading instrument).[3] Indeed, since civil society is free to decide whether or not to set up an NGO, and, subsequently, to decide on its specific aim, a rich variety of NGOs has emerged in Europe, with often mutually reinforcing aims, but possibly also with contrasting points of view (such as climate activists supporting wind-energy opposed to nature activists pointing at potential negative effects of wind-turbines for certain species such as migrating birds).

Meanwhile, case law has shown that NGOs can indeed be very powerful, not only with regard to the enforcement of the access to environmental information right,[4] but also with regard to enforcing actions which are more ambitious than those foreseen by governmental action.[5] In this sense, NGOs are indeed to be seen as important private actors in environmental law since they serve the public interest of a sound environment.[6] Also the European Commission recognizes that NGOs 'exercise

---

2 *See* the normative statements in the preamble of the Aarhus Convention, such as 'Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions'.

3 As examples serve, respectively the *World Wildlife Fund*, de *Bijenstichting* (an association aiming at the protection of bees, active in The Netherlands but also a party to Case C-442/14 which will be discussed in s. 3 of this paper), *Transport & Environment*, and *Carbon Market Watch*.

4 *See* s. 3 of this paper.

5 *See* for instance *Urgenda Foundation and 886 Citizens v. The State of The Netherlands*, [2015] C/09/456689/HA ZA 13–1396 ('Urgenda') (appeal pending). For an English translation of the decision, *see* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196 (accessed 6 July 2018).

6 *See* in this respect also the recognition of ENGOs as representing the environmental interest in CJEU case law as discussed by Jan Darpö (2017), On the bright side (of the EU's Janus Face). *The EU Commission's Notice on Access to Justice in Environmental Matters*, (2017)14 J. Eur. Envtl. & Plan. L. 373–398 (2017), e.g. at 390.

a public interest advocacy role'. [7] In principle, through their activities a more effective fulfilment of the public tasks as codified in Article 37 of the Charter of Fundamental Rights of the European Union, Article 3 of the TEU and Article 191 of the TFEU may be the case.[8] Hence, this contribution aims at looking at how private actors – particularly Environmental NGOs – are indeed able to contribute to achieving the public interest goal of the protection of the environment, and which challenges exist when NGOs act in the pursuance of this public interest. Core focus will go to the right of access to environmental information as being currently provided in law. This right of access to environmental information forms the basis for any further influential actions, such as ensuring effective participation in decision-making and addressing courts either for imposing more ambitious actions than that of the public authorities or for blocking environmentally harmful activities. In view of the potential great power of NGOs, this contribution will also shed light on the question of accountability of the NGOs themselves, and the ways how they may be confronted with legal procedures against their informational activities.

The structure of this article is as follows. Section 2 discusses insights from international politics and academic literature on the need for giving a voice to the environment and explains how this has been realized by the Aarhus Convention by giving a specific role to private actors, the NGOs. Section 3 delves into the implementation of the Aarhus Convention in EU law and shows how case law has strengthened the right of access to environmental information, but will also point at some limits to this right. Section 4 discusses the responsibility and accountability of NGOs with regard to publishing information that aims to share malpractice, or even illegality, with the wider public. Section 5 concludes.

2 ENABLING PRIVATE ORGANIZATIONS TO DEFEND THE VOICELESS ENVIRONMENT

2.1 The emergence of environmental procedural rights

Particularly since the emergence of environmental problems in the 1960s and 1970s, civil society has established many informal and formal organizations aiming at the protection and the improvement of the environment. WWF, Greenpeace, and Friends of the Earth are examples of NGOs widely known

[7] European Commission, Communication from the Commission of 28 Apr. 2017, Commission Notice on Access to Justice in Environmental Matters, Brussels, 28 Apr. 2017, C(2017) 2616 final, at 9, and stating that 'Environmental NGOs play an important role in ensuring compliance with the obligations of EU environmental law and enjoy a broad right to protect the environment which national courts need to uphold'. (at 13).

[8] Also Art. 3 TEU and Art. 191 TFEU refer, in different language, to the protection and improvement of the environment. Furthermore, such aim can also be found in other articles, such as Art. 114 TFEU.

by the public. For example, in 1961 it was decided to establish the World Wildlife Fund which has now, after more than fifty years of existence, become a leading nature conservation organization.[9] Greenpeace and Friends of the Earth both exist for more than forty-five years,[10] and problem specific initiatives have emerged such as the 'Climate Action Network' which is 'a network of NGOs working on climate change from around the world'.[11] Along the rise of such organizations, academic literature has built supportive arguments for the establishment of representatives for the environment. The most appealing call for providing a legal representation for the *voiceless environment* is made by Christopher D Stone, in 1972, in his seminal article 'Should trees have standing? Towards legal rights for natural objects'.[12] Stone argued that law should provide that the environment be represented by establishing guardians for nature. In his view, this would not be an unfamiliar construct, as the creation of representation for entities or people who cannot speak for themselves, such as children and mentally disabled people, is already part of the law. Corporations cannot speak either, and are represented by a board as arranged in corporate law. Equally, there should be a voice for the environment. Hence, while environmental movements emerged in society, the cause for giving them some legal force was argued in literature.[13] According to Stone, NGOs could be enabled to apply to the court to be appointed as a guardian, for instance, of a certain piece of land in order to protect its ecological balance against certain industrial (mining) activities.[14] Such guardians then could be empowered with rights of inspection or visitation to determine the condition of a land or water, including monitoring environmental conditions such as checking the effluent of waters, and representing the natural objects in legislative and administrative procedures.[15] Most importantly, the guardian could represent the environment (the specific environmental object) in court without the need to demonstrate that the rights of the members of the NGO were

---

9 Interestingly, the reason for enacting the WWF stems from financial needs, therefore it was decided to establish 'an international fundraising organization to work in collaboration with existing conservation groups and bring substantial financial support to the conservation movement on a worldwide scale'. https://www.worldwildlife.org/about/history (accessed 12 Nov. 2017).

10 Historical background information can be found at: http://www.greenpeace.org/international/en/news/Blogs/makingwaves/40-years-of-inspiring-action/blog/36808/ and http://www.foei.org/about-foei/history (accessed 12 Nov. 2017).

11 *See*: http://www.climatenetwork.org/about/can-charter (accessed 12 Nov. 2017).

12 Published in the S. Cal. L. Rev. 45, 450–501 (1972), https://iseethics.files.wordpress.com/2013/02/stone-christopher-d-should-trees-have-standing.pdf. (accessed 6 July 2018).

13 *See* for his later views, basically confirming his earlier arguments: Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and The Environment* (3d ed., Oxford University Press 2010). The legal construct by identifying guardians for nature would according to Stone not imply an absolute protection for the environment: at 53 – and *see also* his thoughts on irreparable damage, at 20.

14 Stone, *supra* n. 13, at 9.

15 *Ibid*., at 9.

affected.[16] At the same time, Stone does not uphold that such a strong procedural right conferred on NGOs is a solution for everything, nor that the rights for the environment would have an absolute character.[17] Particularly with climate change, he points at the fact that the political questions of how much to reduce greenhouse gases are ill-suited for courts.[18]

Next to this seminal academic plea for constructing legal rights for representing the environment, international political developments, such as declarations adopted by the United Nations, have placed emphasis on strengthening environmental policies and law. The argument made by Stone was published in the same year as the first UN Declaration of the United Nations Conference on the Environment, also known as the Stockholm Declaration, was agreed on.[19] However, it was only twenty years later, in the United Nations Rio Declaration on Environment and Development, that the importance of procedural rights was recognized.[20] This Declaration stipulates in its principle X that 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes'. It also stressed the necessity of effective access to judicial and administrative proceedings, since, without that, procedural rights would be toothless. Interestingly, however, the Rio Declaration did not yet refer to the role that organized groups (such as ENGOs) can play.[21] For Europe, this gap is filled by the Aarhus Convention which has been developed under the auspices of the United Nations Economic Commission for Europe (UNECE).[22]

---

16 This is then 'a suit in the objects own name' Stone, *supra* n. 13, at xii & 3, fn. 26: Stone limits his argumentation to natural objects; this may raise questions on how to defend then the ecosystem, including the (relationship and balance of) many different elements, including flora and fauna.

17 Stone, *supra* n. 13, at 4: 'Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have'.

18 Stone, *supra* n. 13, at 34; this view has of course to be situated in the specific jurisdictional context of the US.

19 Available at: http://www.un-documents.net/unchedec.htm (accessed 12 Dec. 2017).

20 Available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (accessed 12 Dec. 2017).

21 This is also not (explicitly) the case in the World Charter for Nature, adopted by the United Nations General Assembly on 28 Oct. 1982, no A/RES/37/7. However, in a resolution adopted on 14 Dec. 1990 (A/RES/45/94) the UNGA 'calls upon Member States and intergovernmental and non-governmental organizations dealing with environmental questions to enhance their efforts towards ensuring a better and healthier environment'. The First European Charter on Environment and Health, adopted by the Ministers of the Environment and Health of European countries and by the Commission of the European Communities on 8 Dec. 1989, only states that 'Non-governmental organizations also play an important role in disseminating information to the public and promoting public awareness and response' and hence does not foresee any legal position for ENGOs.

22 Meanwhile, UNECE includes fifty-six Member States in Europe, North America and Asia. All interested United Nations Member States may participate in the work of UNECE, *see* further:

2.2 The Aarhus Convention: a special avenue for environmental NGOs

While there does not yet exist a global treaty on procedural environmental rights, the Aarhus Convention has a pan-European reach, and it may even evolve into a global treaty providing environmental procedural rights since countries from other continents may become a party as well.[23] However, thus far, there is not much appetite for making use of this opportunity. Procedural rights are hence scattered across national legal systems around the world. But also within other legal frameworks on the European continent there are relevant developments, such as the recognition of for instance the duty the inform citizens about environmental risks as established by the European Court of Human Rights,[24] and are appearing into international environmental treaties too, albeit often only weakly provided.[25]

The Aarhus Convention deliberately strengthens the legal position of NGOs, particularly by providing that they can participate to governmental decision-making, notably also where it concerns specific projects that may have a significant effect on the environment.[26] This right can be enforced before a court of law and/or another independent and impartial body established by law.[27] Next to this, NGOs enjoy the right of access to environmental information, which is a right belonging to the public at large (*actio popularis*). While access to information is also possible for citizens, the role of NGOs in collecting environmental information is crucial for holding governments to account.[28] Information about environmental problems, and about governmental policies and decisions related to that, is often very complex and specific, so that specialized organizations are

---

https://www.unece.org/mission.html (accessed 27 Dec. 2017). There are 47 parties to the Aarhus Convention as of 16 Oct. 2017.

23 Art. 19(3) AC: Accession is possible for any UN member with the approval of the meeting of the Parties.

24 *See* further: Jonathan Verschuuren, *Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe*, in *Regional Environmental Law* 363–385 (Werner Scholtz & Jonathan Verschuuren eds, Edward Elgar 2015).

25 For instance, Art. 6 of the UNFCCC obliges Parties to the convention to promote and facilitate – within their respective capacity – 'public access to information on climate change and its effects', next to 'Public participation in addressing climate change and its effects and developing adequate responses'. Sometimes more specific provisions can be found e.g. Art. 23 of Cartagena Protocol on Biosafety to the Convention on Biological Diversity. In both instances, the acts of the parties should be in accordance with their national laws. As far as is known by this author, there is not yet any systematic study on the appearance, design and enforceability of environmental procedural rights in multilateral environmental agreements.

26 Art. 6 AC jo Art. 2(5) AC, stipulating that 'non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest', thereby providing that ENGO's enjoy the same rights as 'the public concerned'.

27 Art. 9(2) AC.

28 In this respect, Gerd Winter already argued that environmental information is very often not only of individual but of collective interest: Gerd Winter, *Freedom of Environmental Information*, in *European Environmental Law* 87 (Gerd Winter ed., Darthmouth Publishing company 1996).

needed in order to effectively understand it, and, from that perspective, and if needed, criticize governments (and companies) about short falling or detrimental action.[29] Therefore, the Aarhus Convention bestowed upon private actors – especially NGOs – procedural rights so that they can support the achievement of the public interest of having a sound environment. Hence, the main aim of NGOs, which is to protect and improve the environment, aligns with the public task of governments, including EU institutions, to conduct sufficiently ambitious environmental policies as codified in the Charter of Fundamental Rights of the European Union and as codified in various national constitutions. In essence, one could say that if governments fall short of their task to protect and improve the environment, NGOs may step in in order to try to uphold this public interest concern.[30] The specific role that NGOs envision to play, being a watchdog in order to ensure compliance with set standards, and, moreover, to achieve more ambitious standards to protect and improve the environment, is particularly important in case of short-falling governmental action. Non-compliance is unfortunately omnipresent in environmental law, and watchdogs are in this respect needed in order to ensure that the public task of the protection of the environment is sufficiently fulfilled.[31]

2.3 The scope of what should be protected

Basically, Stone proposed that 'natural objects would have standing in their own right, through a guardian'.[32] Obviously, the protection of the environment is broader than only the protection of natural objects: it includes also species and, in a wider sense, the quality of the whole ecosystem matters. For instance, in terms of the Convention on Biological Diversity, protection should be given to 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems'.[33] Moreover, the protection of the ecosystems in such a wide sense

---

[29] Of course, this presumes that ENGOs have sufficient capacity and expertise for collecting and understanding this information, which is a point of concern. Nonetheless, collective action through ENGO seems anyway often more efficient than individual citizen action.

[30] Particularly also addressing non-compliance with environmental legislation is seen as a task for Environmental ENGOs, and, in this respect, there is much discussion of how to improve access to justice that NGOs can address non-compliance by governments and private actors, *See* Darpö, *supra* n. 6 discussing Art. 9(3) of the Aarhus Convention.

[31] In this respect, the identification of fraud with emission devices in cars was detected by a technician connected to a not-for-profit organization dedicated to reducing vehicle emissions, *see*: Harry Kretchmer, *The Man Who Discovered the Volkswagen Emissions Scandal* (13 Oct. 2015), http://www.bbc.com/news/business-34519184 (accessed 16 Jan. 2018).

[32] Stone, *supra* n. 13, at 17–18.

[33] Convention of Biological Diversity, Art. 2 jo Art. 1.

benefits future generations, at least if we assume that they will also prefer a sound environment, including beautiful rivers, forests, landscapes, etc. In this vein, the Aarhus Convention emphasizes in its preamble 'the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'. Legal scholarship argued that such a construct (to represent future generations in court) would not be unfamiliar to current law, at least not US law: Daniel Farber stated that 'the law has for many, many years allowed appointment of lawyers to represent future individuals'.[34] He points at a civil law provision that is used in estate or trust cases when there is a conflict of interest between existing beneficiaries and future ones; such a construct could be provided, in analogy, for future generations that have the right to a sound environment. Meanwhile, in various jurisdictions, case law has already accepted that the right of future generations may be defended before court.[35] Moreover, it is also allowed in some cases that children may defend this future concern, such as in the seminal decision of the Supreme Court of the Philippines laid down already in 1993, granting children standing for protecting their right to a sound environment, with which they also can ensure the protection of that right for the generations to come.[36] In this vein, specific NGOs can specifically focus on present *and* future generations, such as 'Our Children's Trust' that aims to elevate 'the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations'.[37] This US-based group cooperates with social movements in other jurisdictions, and has for instance supported the claim by a Pakistan girl of seven years old contesting the operation of coal and other polluting fossil fuel activities.[38] The Pakistan Supreme Court has decided to hear this claim, that aims to protect the concern of present and future generations. In sum, in view of the development of serious environmental problems, such as the problem of climate change that may have long-term effects, NGOs also take up the role of defending the stake of future generations for a sound environment.

---

[34] Dan Farber, *Appointing Guardians to Represent Future Generations* (9 May 2016), http://legal-planet.org/2016/05/09/appointing-guardians-to-represent-future-generations/ (accessed 15 Dec. 2017).

[35] As has been done in the Urgenda court decision, *supra* n. 5, at paras 4.76, 4.89 & 4.91–2.

[36] Supreme Court Decision of the Philippines, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources*, 30 July 1993, 33 I.L.M., at 173–206 (1994): http://www.crin.org/en/library/legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources. (accessed 6 July 2018) The court stated inter alia 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come'.

[37] *See*: https://www.ourchildrenstrust.org/mission-statement/ (accessed 6 July 2018) The terms of reference point at the specific focus of a healthy climate – this serious problem with possible serious long-term effects is very fit for a discussion whether future generations should be represented in the courts. However, we recall the opinion of Stone pointing at the question whether courts are suited to deal with the (largely) political questions.

[38] *See*: https://elaw.org/children-making-case-climate (accessed 6 July 2018)

2.4 The multiform existence of environmental NGOs

The terms of reference of NGOs can vary widely, and, as discussed above, can even include the aim of defending the right of future generations to live in a sound environment. Indeed, Stone emphasized that there is no monolithic environmental movement, and that NGOs can have conflicting goals; it would even be unreasonable to expect unity within the environmental social movements.[39] In his words, 'environmentalism is full of other sides'.[40] Hence, providing procedural rights to NGOs may lead to manifold and unpredictable actions. However, the diversity among NGOs can be qualified as a strength rather than a weakness in view of reaching a smart mix of regulation – in order to effectively protect public interests – as discussed by Gunningham, Sinclair and Grabosky.[41] In their study, they focus on how an optimal mix of regulatory approaches for an effective environmental protection can be designed, which includes a discussion of the various roles that can be played by governments, polluters, and third parties such as NGOs. In this vein, they assert various roles to environmental groups, such as fulfilling a watchdog role based on collecting and disseminating information, which is particularly relevant in case governments fall short in taking care of their public task to protect the environment. In their view, access to environmental information can play an important supportive role to other regulatory approaches.[42] However, whether and how the available procedural rights will be used is unpredictable and depends on the terms of reference NGOs have, the strategies they wish to employ, and their capacities, next to the specific way in which, in a specific jurisdiction, the right has been provided.

3 ACCESS TO ENVIRONMENTAL INFORMATION IN EU LAW

3.1 Implementation in EU law

In EU law, the right to environmental information is regulated in secondary legislation implementing the Aarhus Convention.[43] This right has been provided

---

39 Stone, *supra* n. 13,, at 143.

40 *Ibid*., at 144.

41 Neil Gunningham Neil, Darren Sinclair, with contributions from Peter Grabosky, Instruments for Environmental Protection, Ch. 2, to: Neil Gunningham & Peter Grabosky, *Smart Regulation. Designing Environmental Policy*, 94 (Clarendon Press Oxford 1998).

42 Gunningham, Sinclair & Grabosky, *ibid*., at 65 (and, from the same book, at 427–428 – concluding chapter by Gunningham & Sinclair). *See* for a discussion of advantages and disadvantages of the right to access environmental information: Winter, *supra* n. 28.

43 *See* for the approval of the AC: Council Decision 2005/370/EC of 17 Feb. 2005 on the conclusion of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17 May 2005, at 1–3).

at two levels: first, it is made applicable to information held by EU institutions and EU bodies, and secondly, to information held by public authorities of Member States.[44] The implementation of the Aarhus Convention in EU law provides some specific guarantees that add to the general right to information as provided to EU citizens and representative groups.[45]

The right to request environmental information held by the government can be used by anyone. There is no legal requirement to state an interest, so there is no issue of standing.[46] However, to be able to file a lawsuit before the Court of Justice of the EU in case an EU institution or body refuses to disclose requested environmental information, legal personality is required (see Article 263, fourth paragraph TFEU). In this sense, informal NGOs are not able to start a lawsuit in order to check the legality of for instance a decision of the European Commission to refuse to disclose requested environmental information.[47] This could as such be solved in a pragmatic way if one member of the informal NGO would be willing to take up such a legal procedure.

Furthermore, and in line with the Aarhus Convention, a wide and non-exhaustive approach is adopted with regard to what is to be understood by 'environmental information'.[48] The information can be requested from 'public authorities', and also private entities may be covered by this definition in case they exercise public authority or perform a public function.[49] The environmental information to be released by governments can even find its origin in

---

[44] *See* respectively Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 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, [2006] O.J. L 264/13, and Directive 2003/4/EC of the European Parliament and of the Council of 28 Jan. 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] O.J. L 41/26 (hereafter Directive 2003/4/EC).

[45] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31 May 2001, at 43–48). Moreover, Art. 11 TEU calls for an open and transparent dialogue with representative associations and civil society, and Art. 15 TFEU provides any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the right of access to documents of the Union's institutions, bodies, offices and agencies. Art. 42 of the Charter of Fundamental Rights of the European Union also lays down the right of access to documents of the institutions.

[46] *See* for instance Art. 3 jo Art. 2(5) Directive 2003/4/EC: 'Applicant' shall mean any natural or legal person requesting environmental information.

[47] *See* about a case where an ENGO was not found admissible to start a legal procedure before the CJEU: T-168/13, *European Platform Against Windfarms (EPAW) v. European Commission*, discussed by Thirza Moolenaar & Sandra Nobrega, *Access to Justice: Environmental Non-Governmental Organizations According to the Aarhus Regulation*, 2016(2) ELNI Rev. 76–84 (2016).

[48] *See* for instance Art. 2(1) Directive 2003/4/EC.

[49] Juliana Zuluaga Madrid, *Access to Environmental Information from Private Entities: A Rights-Based Approach*, 26(1) Rev. Eur. Community & Int'l Envtl. L. 38–53, 38 (2017).

information submitted by industries to governmental authorities, such as emission reports showing the performance of an industrial installation, or results of laboratory tests examining possible effects on the environment coming from new products or chemicals. However, in such a case, it lays within the discretion of the public authority to refuse to fulfil the request for disclosure in case the confidentiality of commercial and industrial information is protected by law in order to protect a legitimate economic interest.[50] Nonetheless, according to the Aarhus Convention, information on emissions which is relevant for the protection of the environment shall be disclosed.[51] Also other grounds for refusal apply, such as those related to information in the sphere of 'international relations, national defence or public security'. It is in principle for the discretion of the public authority to which the request of information is submitted whether to make use of these grounds, although a restrictive interpretation is prescribed.[52] However, and importantly, in case of a full or partial refusal to disclose requested information, the applicant should have the opportunity to address a court.[53] Meanwhile, various court decisions have been laid down by the CJEU regarding the right to access environmental information, some of which turned out to be supportive for the NGOs.[54]

---

[50] This is at least the case according the Aarhus Convention. In the EU secondary legislation applicable to EU institutions, a more restrictive approach is taken meaning that some information *has* to be refused, unless there is an overriding public interest in disclosure (Art. 4(2) Regulation 1049/2001). According to Art. 6 of Regulation 1367/2006, an overriding public interest shall be deemed to exist where the information requested relates to emissions into the environment. Winter, *supra* n. 28 points at the possibility that industries may be willing to declare information as secret (at 84), and that authorities may use discretion for using a ground to refuse in a way that a wide application of the exemption is taken (at 86).

[51] *See* Art. 4(4)(d) of the AC (implemented differently in EU secondary legislation, *see* footnote above). *See* in this respect also the Declaration by the European Community with respect to certain provisions on access to information attached to Council Decision 2005/370/EC of 17 Feb. 2005 (mentioned above).

[52] The ground for refusal are provided in Art. 4, paras 3 and 4 of the AC.

[53] Art. 6, Directive 2003/4 formulates this as follows: 'a court of law or another independent and impartial body established by law'.

[54] *See* particularly C-442/14, *Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden* [23 Nov. 2016], and C-673/13, *European Commission v. Stichting Greenpeace Nederland and Pesticide Action Network Europe* [23 Nov. 2017], to be discussed in the next session, but for instance also C-279/12, *Fish Legal and Emily Shirley v. Information Commissioner and Others* 19 Dec. 2013]; C-515/11, *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*, [18 July 2013] and C-615/13, *Client Earth and Pesticide Action Network v. EFSA* [16 July 2015]. *See* for some problems with exercising the right to access to environmental information in the field of climate change: Marjan Peeters & Sandra Nóbrega, *Climate Change-Related Aarhus Conflicts: How Successful Are Procedural Rights in EU Climate Law?*, 23(3) Rev. Eur. Community & Int'l Envtl. L. 354–366 (2014).

3.2 Tendency towards environmental friendly case law (but hard to achieve)

While the Aarhus Convention requires that the grounds for refusal have to be interpreted in a restrictive way, thereby not only taking into account the 'public interest' served by disclosure, but also 'whether the information requested relates to emissions into the environment', these decisive terms remain undefined in the Convention.[55] This uncertainty is also the case with regard to the protection of confidential business information, which is not applicable in case of 'information on emissions which is relevant for the protection of the environment'. Such information has to be disclosed.[56] Hence, while the Convention aims to provide strong protection of disclosure of information on emissions into or relevant for the protection of the environment, legal uncertainty rests with the interpretation of these terms. Particularly where the request concerns information submitted to governments by private operators, one can imagine that these operators argue for specific explanations, thereby trying to prevent disclosure of 'their' information to the public. Indeed, in this respect one can see a clash between the interests of the companies against those of NGOs willing to protect the environment, for which knowledge on potential harmful effects is crucial.[57] It is precisely on this issue that the Court of Justice of the EU has developed an important interpretation, which happened in a preliminary ruling in a case that was started by two NGOs before a national court.[58] The CJEU clarified the terminology used in Directive 2003/4/EC in a transparency-friendly way, so for the benefit of the NGOs.[59] The 'environment-friendly' interpretation by the court can be illustrated by the fact that it moved to an even wider interpretation than explicitly foreseen by the

---

55 Art. 4(4) AC, and, in EU secondary law, Art. 4(2) Directive 2003/4/EC: 'Member States may not (…) provide for a request to be refused where the request relates to information on emissions into the environment'; Art. 6(1) Regulation (EC) 1367/2006: 'an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment'. (*see* in this respect also Art. 4(2) Regulation 1049/2001).

56 Art. 4(4)(d) AC: Disclosure may be refused if this would adversely affect 'The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed'.

57 This is only one of the serious complexities when governments have the task to provide transparency; *see* for a comprehensive discussion of the complexities with regard to transparency Fisher (noting that 'While transparency may be a truism in regards to public administration, its operation is profoundly complex': E. Fisher, *Transparency and Administrative Law: A Critical Evaluation*, 63 Current Legal Probs. 272, 272–314 (2010).

58 C-442/14, *supra* n. 54, originating from a request from a Dutch NGO aiming at the protection of bees for disclosure of documents submitted by Bayer during procedures for the authorization of the placing on the Dutch market of certain plant protection products and biocides.

59 Moreover, in an earlier verdict, the CJEU ruled that for applying this ground, assessments have to be carried out in each individual case, *see* C-266/09 *Stichting Natuur en Milieu and Others v. College voor de toelating van gewasbeschermingsmiddelen en biociden* [16 Dec. 2010].

Implementing Guide to the Aarhus Convention published on the UNECE website.[60] This guide developed by experts (who often are well-known environmental law experts, and of which some are or were members to the Compliance Committee to the Convention) provides an elaborated explanation of the meaning and application of the Aarhus Convention provisions, and can at least not be qualified as a document arguing for a restrictive interpretation of the provisions of the Convention. According to the CJEU, this Guide has no legal status, although it may be taken into consideration, next to other relevant material.[61] The liberal interpretation of the Court rests on the fact that the term 'emissions' does not only cover emissions from industrial installations, for instance to water or air, but also 'the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use'.[62] Hence, the Court interpreted the definition in such a way that it also covers products of substances that are brought into the environment. While the Implementation Guide also favours a wide approach (stating that 'a case can be made that all information on emissions is relevant to the protection of the environment'), it only gave an example related to emissions coming from installations.[63] Moreover, *information on emissions into the environment* is also widely interpreted, since it:

> covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance's drift during that application, whether the data comes from studies performed entirely or in part in the field, or from laboratory or translocation studies.[64]

---

60 'Environmental friendly' is here to be understood as friendly towards the right to access to environmental information. The second edition of this Implementation Guide is available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf. (accessed 6 July 2018) *See* for the narrow interpretation in the Implementation Guide, para. 69 of the Court decision; in the following paragraphs the Court moves to a wider interpretation of emissions than restricting it to 'emissions emanating from certain industrial installations'. *See* in this line the opinion related to the interpretation of 'emissions', particularly the paras 58 and 78.

61 *See* about the legal status para. 70 of the Court decision. The introduction to the Implementation Guide (at 9) also explains its non-legal binding character, but also explains that it inter alia draws on 'other international law instruments in the area of the environment and human rights, decisions adopted by the Meeting of the Parties to the Aarhus Convention, findings of the Aarhus Convention Compliance Committee'. In this sense, it aims to provide normative guidance.

62 C-442/14, *supra* n. 54, verdict under (2). *See* about the relationship between different secondary acts on the confidentiality of information part 1 of the verdict.

63 Implementation Guide, *supra* n. 60, at 88.

64 However, the Court also provided a restriction, meaning that 'only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed

As a kind of ultimate limit, the Court considers that (only) purely hypothetical emissions are not covered.[65] With these wide interpretations, the Court gave a broad meaning to the right to access environmental information.

The Court confirmed the broad interpretation of 'emissions in the environment' in a second judgment, laid down on the same day, related to a decision adopted by the European Commission to refuse information contained in documents about glyphosate, which had been annulled by the General Court.[66] However, the European Commission argued for a restrictive interpretation of the exception to the protection of confidential business information, meaning that information on emissions into the environment shall be deemed as an overriding public interest.[67] In this vein, it pointed at the duty of EU-officials to respect the obligation of professional secrecy, in particular concerning information about undertakings, as codified in Article 339 TFEU.[68] The Court stressed that the purpose of access to information is to promote more effective public participation, thereby increasing the accountability of decision-making.[69] Nonetheless, the Court argued that there should still be some possibility for the authorities to consider whether or not to disclose information based on the ground that such a refusal would have an adverse effect on the protection of the commercial interests. In this sense, according to the CJEU, the General Court took a too superficial approach by stating that it is sufficient that information relates, in a sufficiently direct manner, to emissions into the environment.[70] The CJEU also explicitly points at the fact that upholding the (environmental friendly) approach of the General Court would 'constitute a disproportionate interference with the protection of business secrecy' as is ensured by Article 339 TFEU.[71] Consequently, there is still uncertainty, for instance with regard to what can be understood as 'information [which] relates to emissions into the environment', which is for the General Court to decide in this specific case. This also illustrates the long time that is

---

where it is possible to separate those data from the other information contained in that source, which is for the referring court to assess'.

65 C-442/14, *supra* n. 54, para. 80.

66 C-673/13, *supra* n. 54. In this case, the information was provided by a German authority to the European Commission; the German authority refused disclosure by the Commission. It is also important to understand that for this Commission decision, Regulation 1367/2006 applies instead of Directive 2003/4. The text of the Regulation (read in combination with Regulation 1049/2001) is more protective towards confidential business information compared to Directive 2003/4/EC.

67 The General Court considered that this is the case if there 'is a "sufficiently direct" link between the information concerned and emissions into the environment', se C-673/13, *supra* n. 54, para. 44. According to the Commission, this has no legal basis, and the vague nature of that criterion raises serious problems in terms of legal certainty.

68 C-673/13, *supra* n. 54, para. 39.

69 *Ibid*., para. 80.

70 *Ibid*., para. 81–82.

71 *Ibid*., para. 81.

needed for settling the legal dispute: the appeal before the CJEU was initiated on 17 December 2013, and the decision came almost three years later, on 23 November 2016. While the General Court decided for the benefit of the NGOs, the European Commission was successful in its appeal, after which the case continues before the General Court. Obviously, such a procedure requires much capacity and endurance from NGOs, which assumedly are less equipped for delivering this compared to the authorities and the companies. So, while access to information is necessary to restore the unbalanced distribution of knowledge among the ones who pollute, and the ones that try to protect the environment against pollution, enforcing this right may still mean a high, perhaps sometimes too high burden for NGOs.[72] So, while access to information is a necessary pre-requisite for NGOs to fulfil the watchdog role for ensuring the public interest of a sound environment, the costs and lengths of court procedures might entail a serious limitation to carry out these tasks effectively.

3.3 Clarifying the limits

Further case law is needed to clarify the possibilities but also the legitimate limits to the right of access to environmental information. For instance, it has yet to be crystallized to what extent information can be disclosed by authorities in cases of (presumed) non-compliance by operators, for which administrative and criminal prosecutions take place. One may expect that Environmental NGOs have a special interest in detecting non-compliance, and in sharing (potential) non-compliance with the wider public with the aim of achieving more environmental friendly behaviour by the polluters. Moreover, NGOs can play a role for encouraging administrative enforcement, and, in this vein, getting information concerning inspection and other enforcement activities remains crucial.[73] While illegal waste dumping or activities damaging nature (such as chopping trees) may be detected on the spot (and could for instance be filmed by NGOs), many other illegal activities cannot be easily identified by NGOs, such as the release of carbon dioxide or other substances. Asking for information related to inspection and other enforcement activities by governments has understandably its limits, necessary to protect the legitimate concerns of operators, and necessary to protect an effective administrative and criminal prosecution. Also here, one may expect that companies will hire expert lawyers to defend their interests, which may turn out in an unbalanced power position vis-à-vis the NGOs.

---

[72] More empirical research would be required as to the practical limits to ENGOs for enforcing the right to access to information.

[73] Gunningham, Sinclair & Grabosky, *supra* n. 41, at 96 (referring to John Braithwaite).

4 DEALING WITH INFORMATION: RESPONSIBILITY AND ACCOUNTABILITY OF ENVIRONMENTAL NGO'S

4.1 Constructing and publishing environmental information

The Aarhus Convention, although important, has also its limits: it only enables to request information *held* by the government.[74] Having no access to information held by private actors is particularly a sincere limit in case a shift takes place from governmental to *private* regulation.[75] The public, including NGOs, is then dependent on the extent of which private regulatory approaches contain transparency provisions.[76] Moreover, there is no legal right provided in the Aarhus Convention for the public to request directly with the polluters information held by them.[77] So, while governments traditionally enjoy the right to monitor industrial activities and inspect industrial sites in order to check the compliance behaviour of those who are regulated, NGOs may face severe limits for retrieving information relevant for identifying non-compliant behaviour.[78]

The Aarhus Convention only provides that Parties 'shall encourage operators' to inform the public regularly of the environmental impact of their activities and products.[79] Hence, NGOs may feel the need to 'construct' environmental information, thereby filling in remaining gaps in the factual information on a certain matter, and to provide value judgments on it, even amounting to qualifying the behaviour as malpractice, or as illegal.[80] NGOs

---

74 Also some justifications for holding information confidential are provided *See* Art. 4, para. 4 of the Aarhus Convention; one of the grounds for refusing information is if disclosure would adversely affect international relations. Also, in case law, decisions not to disclose (immediately) information have been found valid, *see* for instance C-612/13, *Client Earth v. European Commission* [16 July 2015]; CFI joined Cases T-424/14 and T 425/14 (under appeal) *Client Earth v. European Commission* [13 Nov. 2015] and C-524/09, *Ville de Lyon/Caisse des dépôts et consignations* [22 Dec. 2010].

75 *See* for such a shift Marjan Peeters, *Inspection and Market-Based Regulation Through Emissions Trading, The Striking Reliance on Self-Monitoring, Self-Reporting and Verification*, 2(1) Utrecht L. Rev. 177–195 (2006).

76 S. Romppanen, *New Governance in Context Evaluating the EU Biofuels Regime*, Dissertation, Publications of the University of Eastern Finland, 49 and 106 ff (2015), http://epublications.uef.fi/pub/urn_isbn_978-952-61-1763-8/urn_isbn_978-952-61-1763-8.pdfRomppanenhttp://epublications.uef.fi/pub/urn_isbn_978-952-61-1763-8/urn_isbn_978-952-61-1763-8.pdf (accessed 6 July 2018) (pointing at the weak legislative and non-binding provisions as regards to the transparency related to the certification regime for biofuels).

77 *See* on this issue Madrid, *supra* n. 49.

78 The ECtHR has ruled that based on Art. 8 ECHR, governments have a positive obligation to provide citizens with information which could enable them to assess whether or not the emissions of a plant could adversely affect their lives and home, *see Guerra and others v. Italy,* App no 14967/89 (ECHR 19 Feb. 1998), as discussed by Birgit Peters, *Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention*, 2017(0) J. Envtl. L. 1–27 (2017).

79 Art. 5(6) AC.

80 *See* e.g. two ECtHR decisions: *VAK (Vides Aizsardzības Klubs) v. Latvia*, application No 57829/00, 27 May 2009, and *Steel and Morris v. the United Kingdom*, Application no. 68416/01, 15 Feb. 2005.

may also engage into alternative approaches such as direct filming of certain activities.[81] Subsequently, NGOs may wish to use traditional and modern media to share this information with the wider public, in order to try to influence the behaviour of polluters to more environmental-friendly action, or to influence governments to take action. Instead, challenging directly to court illegality is, if any way possible, not always the most effective or efficient option: there can be uncertainty related to the potential success, but also such procedures may take a long time and many costs. For that reason, NGOs may chose for faster and perhaps even more effective avenues, such as bringing information on malpractice or illegality by an authority or a company to the 'court of opinion' of the public.[82] Particularly with the existence of internet and social media, NGOs can inform society quickly. Through their own websites, NGOs can cast doubt on the sustainability of a certain activity, and can urge for stopping or altering the behaviour. Of course, traditional media (TV news programmes, newspapers) and modern social media can pick up such messages and give more weight to it.

The sharing of information with the wider public by NGOs may also concern information disclosed by governments upon request. The Aarhus Convention does not regulate what NGOs may do with such acquired environmental information. For instance, may NGOs publicly shame companies based on the information that is disclosed to them? What will happen in case an NGO does not interpret the given information in the correct way? Indeed, if information is disclosed, it is not certain that the received information is understood correctly, or that the value judgments given to it are legitimate.[83] Misinformation of the public by NGOs may imply reputational damage to the industry that is reported on.[84] For instance, it is suggested in literature that distribution of information 'can directly influence the price of a firm's stock, serving to reward good environmental performers and punish the bad'.[85] While publishing information can be very influential, this power seemingly also implies

---

[81] Fiona Donson, *Libel Cases and Public Debate – Some Reflections on Whether Europe Should be Concerned About SLAPPS*, 19(1) Rev. Eur. Community & Int'l Envtl. L. 83–94 (2010), discusses (at 87) the Protection of Harassment Act that may be invoked by the companies.

[82] Of course, outside the field of environmental policy and law, the question of how to deal with (false) accusations is of utmost relevance, such as in the '#metoo' development. *See* for a discussion a special issue of Law and Contemporary Problems: *The Court of Public Opinion: The Practice and Ethics of Trying Cases in the Media*, 71(4) (Autumn 2008), https://scholarship.law.duke.edu/lcp/vol71/iss4/. (accessed on 6 July 2018)

[83] Fisher, *supra* n. 57, at 294. *See also* Gunningham, Sinclair & Grabosky, *supra* n. 41, about the fear of companies that the public can misunderstand information (at 65).

[84] *See* for an apology of an ENGO for any reputational damage it may have caused to the specific industry on which it was reporting: https://sandbag.org.uk/2011/11/17/note-of-correction-to-thyssenkrupp-figures-in-sandbags-klimagoldesel (accessed 28 Nov. 2017).

[85] Gunningham, Sinclair & Grabosky, *supra* n. 41, at 64. Of course, this may also happen if the government would publish information on for instance illegal behaviour of an industry.

that a certain responsibility rests on NGOs to ensure that the information, including interpretations of the collected information, is correct.[86] If not, they may be accused of causing reputational damage, and may be held accountable for the economic damage that may occur as a result of the accusations made. However, the issue of how to deal in a responsible way with acquired information is not regulated by the Aarhus Convention, and questions of liability of NGOs are covered by other legal frameworks, such as national tort law.

4.2 Holding environmental NGOs to account versus freedom of expression

One way of holding NGOs to account is that the ones who feel damaged, being 'blamed' or 'shamed' by informational actions by NGOs, undertake legal actions to, for instance, prevent further information disclosure, or to claim correction of published information or compensation of economic damage. This strategy – taking NGOs to court – is called SLAPPs, which stands for: Strategic Lawsuits Against Public Participation.[87] A SLAPP is a civil complaint against an NGO with the purpose to silence the criticism.[88] Since already the threat of a legal action has the aim of silencing NGOs, it remains unclear to what extent this approach has already had an effect in practice.[89]

While publicly made accusations of detrimental or even illegal behaviour may amount to negative reputation to companies or authorities before even a court has ruled on the question whether any wrong-doing has occurred, Environmental NGOs have still some room for making allegations of malpractice or illegal behaviour. This can be derived from two cases related to Article 10 ECHR which guarantees the right to freedom of expression. The ECtHR acknowledges that NGOs acting as watchdogs are essential in a democratic society,[90] and that 'a certain degree of hyperbole and exaggeration could be tolerated, and even expected'.[91] However, this freedom of expression is according to the ECtHR not unlimited: firstly, a principle of 'good faith in order to provide accurate and

---

86 *See* for a discussion of the dilemma how to develop statements having a sufficient scientific basis Patrick Moore, *Confessions of a Greenpeace Dropout. The Making of a Sensible Environmentalist* (Beatty Street Publishing Inc. 2010).

87 RECIEL published a special issue on SLAPPS: vol 19(1) (2010). *See also* Gunningham, Sinclair & Grabowsky, *supra* n. 41, at 130. SLAPPS are not unique for environmental issues, but may happen as well in other areas, such as food safety.

88 Donson, *supra* n. 81, at 84.

89 Hugh Wilkins, *Editorial*, 19(1) Rev. Eur. Community & Int'l Env. L. 1 (2010). Interestingly, it seems that in Canada and the US more reports of SLAPPS are made in literature compared to the European continent, although a systematic analysis would be needed to understand the reality. *See* about the different legal cultures in the US and Europe: Donson, *supra* n. 81.

90 *See* the Information Note on the Court's Case-law No. 64 (summary by the registry) of *VAK v. Latvia* (refer *supra* n. 80), May 2004.

91 *Steel and Morris v. the United Kingdom* (Press release issued by the Registrar).

reliable information' applies, and, secondly, it is acknowledged that commercial actors can protect their interests, not only for the benefit of their shareholders and employees, but also 'for the wider economic good'.[92] Of course, the core question whether an ENGO has sufficient arguments for making the accusation of environmentally harming, or even illegal behaviour is to be determined on a case-by case basis by a court. This implies that there is some (or even substantial) 'up front' legal uncertainty at the side of Environmental NGOs. In this respect, it is of utmost relevance that the ECtHR has emphasized that there should be, in view of Article 6§1 ECHR, equality of arms in case a company (in this case, McDonalds) sues environmental activists (two individuals connected to a local, informal environmental group who distributed leaflets with accusations related to McDonalds' behaviour).[93] Legally seen, there was no possibility for McDonalds to sue the NGO since it had no legal personality, so, instead, the citizens working within the informal group were sued.[94] In this specific case, the two individuals had to defend themselves against a libel claim, and the procedure took 313 court days, involving 40,000 pages of documentary evidence and 130 oral witnesses. Since, according to the ECtHR, also small and informal campaign groups need to carry out their activities effectively, protection is given not only for the freedom of expression, but also for the right of the individuals to get legal aid needed to defend the case properly in court.[95]

In sum, according to the ECtHR, NGOs enjoy freedom of expression, through which they can fulfil their watchdog role, but this freedom is not unlimited. Basically, NGOs have freedom to make accusations of unwished or illegal behaviour of public and private actors as long as they are able to substantiate the allegation.[96] Given the fact that bringing information to the public court of opinion may be very influential, some control on this power is necessary in order not only to protect the legitimate interests of businesses, but ultimately also to ensure that the public is well-informed. The two ECtHR cases show as such a balanced approach between on the one hand the freedom of expression, including providing equality of arms to environmental activists against a multinational, and on the other hand the protection of the interests of the accused ones. Nonetheless, it seems to be unavoidable that NGOs will face some legal uncertainty if they seek the wider public with accusations of malpractice and illegal behaviour. In this respect, public authorities are of course usually better equipped to address illegal behaviour by polluters, thereby using competences to revoke or to amend permits,

---

92 *Ibid*.
93 *Steel and Morris v. the United Kingdom*.
94 Donson, *supra* n. 81, at 85.
95 *See* for further discussion of libel cases: Donson, *supra* n. 81.
96 Verschuuren, *supra* n. 24, at 372, referring to *VAK v. Latvia*.

and competences to monitor, inspect, and to impose sanctions. The legality of such governmental activities can of course be contested by industries before the court, and also here governments are usually better equipped than NGOs, having capacity and expertise to defend the legality of the governmental decision-making in court.

4.3 Access to information held by private actors and protection of whistleblowers

As long as NGOs face limits to collecting information, since the Aarhus Convention only provides that they can address governments, and, moreover, since grounds for refusal apply, a more progressive approach would be the adoption of a provision entailing that requests for information can be submitted by NGOs to companies. In fact, in several jurisdictions outside the EU (such as Colombia and South Africa) citizens have already the right to request information from companies if such information is needed for the protection of their individual human rights.[97] As such, the protection of an individual right has a different scope compared to the argument made by Stone, who argued for a strong representation of natural objects in law. Nonetheless, providing a right to access environmental information that has an impact on the enjoyment of individual rights, such as the right to enjoy private life, but also the right to life as enshrined in the ECHR, could amount to a meaningful new instrument in environmental law that not only protects individuals, but, to some extent, also ensures better environmental protection. And, in such cases, the individuals can be supported by NGOs offering their expertise and capacity for arguing the claims.[98]

EU law does not provide a general right for citizens to request environmental rights from industries, nor does the Aarhus Convention. Alternatively, under the Aarhus Convention, a Protocol is adopted through which inventories of pollution from industrial sites (and other sources) are made available to the public (this is the 'Kiev Protocol on Pollutant Release and Transfer Registers' which became

[97] Madrid, *supra* n. 49, at 43 – *see also* her discussion of the argument of the Colombian Constitutional Court about the necessity to compensate power asymmetries in society. *See also* the need to guarantee access to information in the possession of the defendant or a third party: Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 from 29 Sept. 2017, Elements for the draft legally binding instrument on Transnational Corporations and other business enterprises with respect to human rights, at 10–11, (accessed on 6 July 2018:) http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

[98] For instance, Friends of the Earth has supported Nigerian family in a claim against Shell: *see* https://milieudefensie.nl/english/shell/courtcase/our-courtcase-against-shell (accessed 4 Jan. 2018). Part of the claim is to force Shell to make public some internal documents. *See* Jesse & Verschuuren (2011), at 160.

binding on 8 October 2009, further referred to as the PRTR Protocol).[99] The scope of the Protocol basically follows the EU Industrial Emissions Directive, broadened with some activities (such as some diffuse sources) and substances.[100]

The aim of the PRTR Protocol is clearly to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers also covering individual industrial facilities.[101] The mechanism is based on reporting obligations of operators towards competent authorities in Member States, and this information has to be collected in a registry that has to be made available to the public.[102] At the same time, the PRTR Protocol also has a confidentiality clause largely resembling the confidentiality clause of the Aarhus Convention. For instance, if the disclosure of information would adversely affect 'The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature', the requested information may be refused.[103]

Compliance with the PRTR Protocol means basically that environmental information that has to be reported by industries to authorities will become transparent to the public. Consequently, the UNECE website mentions that 'no company will want to be identified as among the biggest polluters'.[104] Moreover, the PRTR Protocol provides protection to members of the public meaning that each Party 'shall take the necessary measures to require that employees of a facility and members of the public who report a violation by a facility of national laws implementing this Protocol to public authorities are not penalized, persecuted or harassed by that facility or public authorities for their actions in reporting the violation'.[105]

---

[99] The EU is a party to this protocol, *see* Council Decision of 2 Dec. 2005 on the conclusion, on behalf of the European Community, of the UN-ECE Protocol on Pollutant Release and Transfer Registers; OJ L32 of 04 Feb. 2006, *see* for further information: http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=6681. (accessed on 6 July 2018).

[100] *See* the Guidance on Implementation of the Protocol on Pollutant Release and Transfer Registers, 17 (2008), published on the UNECE website, https://www.unece.org/fileadmin/DAM/env/pp/prtr/guidance/PRTR_May_2008_for_CD.pdf (accessed 3 Jan. 2018); *see also* the explanation on the website of the European Commission, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l28149&from=EN (accessed on 3 Jan. 2018).

[101] *See* for the objective Art. 1 PRTR.

[102] *See* in this respect the EU Regulation Art. 5: Regulation (EC) 166/2006 of the European Parliament and of the Council of 18 Jan. 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (Text with EEA relevance).

[103] PRTR Art. 12.

[104] https://www.unece.org/env/pp/prtr.html (accessed on 3 Jan. 2018). This is repeated on the website of the EU Commission: 'the Protocol is expected to contribute promoting a downward trend of pollution, as no company will want to be identified as among the biggest polluters', published at http://ec.europa.eu/environment/industry/stationary/eper/legislation.htm (accessed 3 Jan. 2018).

[105] PRTR Art. 3(3). Environmental Non_Governmental Organizations belong to members of the public, *see* Art. 1(3). *See* for a clause protecting persons making use of the rights provided in the Aarhus

How this provision has been implemented, and how it can be applied vis-à-vis protection that courts may be willing to give to businesses defending their economic interests particularly in case of false accusations, has yet to be examined.[106] Moreover, the scope of this provision is limited, since it only covers violations of national laws *implementing the Protocol.*[107] Environmental NGOs may have a much broader interest in collecting information, such as getting knowledge of laboratory tests within companies, or getting knowledge on safety procedures as employed in companies with a view of preventing environmental accidents. Anyway, within the EU, there is no specific provision for the protection of employees or members of the public reporting a violation included in the Regulation implementing the PRTR Protocol.[108] In fact, the protection of whistle-blowers is yet to be developed within EU law. One particular issue is to clarify which legal basis (if any) can be used for adopting legislation on this matter.[109]

In sum, within EU law there is no provision enabling Environmental NGOs to request information from private actors in relation to their activities that could potentially damage the environment. To some extent the PRTR Protocol may be helpful since it obliges companies to report environmental data to competent authorities, which information has to be disclosed in a publicly available registry. Within this limited scope, there exists an international obligation to protect

---

Convention article 3(8), stating that each party shall ensure that persons exercising their rights in conformity with the Convention shall not be penalized, persecuted or harassed in any way for their involvement.

106 The Guidance on Implementation of the Protocol on Pollutant Release and Transfer Registers, 2008, published on the UNECE website https://www.unece.org/fileadmin/DAM/env/pp/prtr/guidance/PRTR_May_2008_for_CD.pdf (accessed 3 Jan. 2018) gives only a very short explanation on this matter (at 12).

107 As prescribed in Art. 3(3) PRTR.

108 Regulation (EC) 166/2006 of the EUropean Parliament and of the Council of 18 Jan. 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/C (Text with EEA relevance). The UNECE website does not list an implementation report by the EU. Only reports from a number of Member States have been published, such as from Germany. This report mentions, shortly, that Art. 3(3) of the PRTR Protocol has been implemented (but its explanation of this implementation only relates only to employees). *See* https://www.unece.org/fileadmin/DAM/env/pp/prtr/PRTR_NIRs/PRTR_NIRs_2014/Germany_PRTR_NIR_2014_Deutsch.pdf (accessed 3 Jan. 2018). Also the implementation report of the Flemish Region of Belgium explains shortly the implementation of Art. 3(3) PRTR Protocol, thereby referring to constitutional rights related to freedom of expression, and, to cut it short, the right to enjoy a sound environment.

109 Kafteranis discusses the protection of whistle-blowers at EU level: Dimitrios Kafteranis, *Protection of Whistleblowers in the European Union: The Promising Parliament Resolution and the Challenge for the European Commission*, blog University of Oxford, Faculty of Law (14 Dec. 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/12/protection-whistleblowers-european-union-promising-parliament (accessed 3 Jan. 2018). Moreover, a distinction can made between the protection of employees, and the protection of third persons 'necessary in a democratic society' such as NGOs. Kafteranis refers to case law of the ECtHR, stating that 'the whistleblower should, in the first place, raise concerns internally, and if this is not possible, he should address himself to the competent authorities. Only as a last resort should he address himself to the public'.

members of the public, including Environmental NGOs, who report a violation by a facility of the laws implementing the Protocol.[110] This specific provision has however not been provided in the implementing EU regulation.[111]

5 CONCLUSION

Particularly when governments fall short in their public task to protect the environment, and/or when industries or other polluters do not take sufficient responsibility for taking care of the environment, private actors – either as individuals or represented by NGOs -will be crucial to defend the public interest of a sound environment. In this respect, the ability of NGOs to acquire relevant information is a necessity for carrying out effective strategies. The Aarhus Convention has strengthened the toolbox of NGOs by establishing the right to request environmental information held by the government.[112] However, industries may ask the governments to keep information confidential, and, in this respect, governments may decide to withhold certain information from the public. Nonetheless, the CJEU has laid down a decision that is supportive towards achieving transparency in the environmental domain by stretching the wording of what is to be understood by information on 'emissions'. Still, many barriers may be faced by NGOs, such as the costs of procedures, remaining legal uncertainty but also the threat of being sued by the ones who are subjected to the informational activities of the NGOs. While the ECtHR recognizes the importance of NGOs as watchdogs in a democratic society, the freedom of expression is not unlimited. The extent of which allegations made by private parties such as Environmental NGOs have to be substantiated is not clear, and shall be determined on a case-by-case basis by a court. In this sense, the environmental watchdogs are still confronted with up-front legal uncertainty about their room of manoeuvre when using information as a tool to protect the environment, particularly if they do so by explicitly addressing the behaviour of authorities and companies. The PRTR

---

[110] Meanwhile, the 'adoption of protective measures to avoid the use of "chilling effect"' strategies 'by transnational corporations and other business enterprises to "discourage individual or collective claims against them"' is recognized as an element for a draft legally binding instrument with respect to human rights, *see* note from the Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 from 29 Sept. 2017, *Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* 10, http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf (accessed 6 July 2018)

[111] In the course of developing this article, no evidence could be found explaining this gap. One reason may be the lack of, or sensitivity around the competence for regulating this matter.

[112] As indicated before, this right can be used by anyone, but given the complexity that may go beyond the capacity of a single individual, and the often general interest character of environmental information, Environmental NGOs play an important role.

Protocol interestingly prescribes that members of the public who notify a violation should be protected, but this is limited to the laws needed for implementing this Protocol and hence has thus a very restrictive scope. Moreover, this provision has not been provided in the EU regulation implementing the Protocol.

If we want to take the possibility that NGOs help to serve the public interest of a sound interest seriously, it could be considered to broaden their capabilities. Evidently, the capabilities of NGOs are still limited since both the Aarhus Convention and the PRTR Protocol do not include a right for private parties wishing to take care of the public interest of a sound environment to request information *directly from industries*. Of course, when discussing (and, perhaps, legislating) such a right, the interest of industries to have a private sphere for making their business decisions, and for operating their installations, has to be respected. Furthermore, an increased strengthening of the legal position and rights of NGOs may necessitate attention to the way how these private parties make use of their green power, and to the legal limits for shaming and blaming polluters. At the same time, the environment needs to have sufficient representation in law, and the collection and distribution of environmental information is an important tool for promoting environmental protection. Ultimately, however, the difficulty of finding the balance between these perspectives should not delay the debate about empowering NGOs in such a way that they can effectively contribute to taking care of the public interest of a sound environment.