

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**



Constitutional Affairs

Justice, Freedom and Security

Gender Equality

Legal and Parliamentary Affairs

Petitions

**Standing up for your
right(s) in Europe**

Locus Standi

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Standing up for your right(s) in Europe

A Comparative study on Legal Standing (*Locus Standi*) before the EU and Member States' Courts

STUDY

Abstract

The aim of this study is to provide an in-depth and objective comparative analysis of legal provisions, doctrine and case-law on *locus standi* before civil, criminal and administrative courts of selected legal systems, and before the EU courts. This analysis serves as the basis for several recommendations in this area.

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHORS

Dr. M. (Mariolina) Eliantonio
Prof. dr. Ch.W. (Chris) Backes
Prof. dr. C.H. (Remco) van Rhee
Prof. dr. T.N.B.M. (Taru) Spronken
Ms. Anna Berlee, LL.M.

RESPONSIBLE ADMINISTRATOR

Ms. Danaï PAPADOPOULOU
Policy Department C - Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

LINGUISTIC VERSION

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in August 2012.
© European Union, 2012.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	6
LIST OF TABLES	7
LIST OF MAPS	7
LIST OF COUNTRY REPORTERS AND REVIEWERS	8
EXECUTIVE SUMMARY	12
1. BACKGROUND AND AIM OF THE STUDY	19
1.1. Definitions, sources and scope of the study	20
1.2. Structure of the study	23
1.3. Methodology	24
2. ANALYSIS OF <i>LOCUS STANDI</i> BEFORE THE CJEU	25
2.1. Introduction	26
2.2. The rationale of standing	26
2.3. The variations in standing before the EU Courts	26
2.4. Third party intervention before the EU Courts	36
2.5. Multi-party litigation at EU level	39
2.6. The protection of public interests before the EU Courts	39
2.7. Beyond the <i>Plaumann</i> orthodoxy: the EU Courts' practice in the application of the <i>Plaumann</i> doctrine	40
2.8. "Individual concern" as a tool for the administration of justice?	44
2.9. Influence of general principles	45
2.10. Accession to the ECHR	46
2.11. The EU and the Aarhus Convention	47
2.12. Conclusion: general strictness with some exceptions	49
3. COMPARATIVE ANALYSIS OF <i>LOCUS STANDI</i> BEFORE NATIONAL CIVIL COURTS	52
3.1. Court system	52
3.2. Specialisation	53
3.3. Definition of a civil claim	53
3.4. Definition, rationale and conditions of <i>locus standi</i>	53
3.5. <i>Locus Standi</i> of public authorities	54
3.6. Standing of entities lacking legal personality	55
3.7. Standing: declaratory and injunctive relief	55

3.8.	<i>Locus standi</i> and third parties to the action	55
3.9.	<i>Locus standi</i> on appeal	56
3.10.	Collective interest litigation and <i>locus standi</i>	57
3.11.	<i>Actio popularis</i> (public interest litigation) and <i>locus standi</i>	60
3.12.	Alternatives to collective interest litigation	60
3.13.	Strictness in the application of <i>locus standi</i> at the national level	61
3.14.	Standing as a tool for the administration of justice?	62
3.15.	Human rights as a basis for standing	62
3.16.	EU law and national <i>locus standi</i> requirements	63
3.17.	Influence of EU law on purely national cases (no cross-border litigation)	63
3.18.	Final remarks: a French particularity	64
4.	COMPARATIVE ANALYSIS OF <i>LOCUS STANDI</i> BEFORE NATIONAL ADMINISTRATIVE COURTS	65
4.1.	Court systems in administrative law	65
4.2.	Type of administrative action which may be challenged before administrative courts	67
4.3.	Types of remedies available before administrative courts	68
4.4.	General and specialised administrative courts?	68
4.5.	How many instances?	69
4.6.	The rationale of standing	69
4.7.	Variations in standing	74
4.8.	Third party intervention before administrative courts	81
4.9.	Multi-party litigation	81
4.10.	Influence of EU law	82
4.11.	Final remarks	86
5.	COMPARATIVE ANALYSIS OF <i>LOCUS STANDI</i> OF VICTIMS OF CRIME BEFORE CRIMINAL COURTS	87
5.1.	Court systems in criminal law	87
5.2.	Definition of victims of crime in relation to <i>locus standi</i>	88
5.3.	Different types of standing before a criminal court	91
5.4.	Procedural requirements in standing rules and courts' practice	99
5.5.	Information provided to victims of crime	110
5.6.	Influence of EU law	111
6.	COMPARISONS AND RECOMMENDATIONS	113
6.1.	Comparison EU and national level	113

6.2.	Horizontal comparison of findings in civil, criminal and administrative law	114
6.3.	Recommendations	116
REFERENCES		123
ANNEX I – QUESTIONNAIRE FOR COUNTRY REPORTERS ON CIVIL LAW		126
ANNEX II – QUESTIONNAIRE FOR COUNTRY REPORTERS ON ADMINISTRATIVE LAW		129
ANNEX III – QUESTIONNAIRE FOR COUNTRY REPORTERS ON CRIMINAL LAW		132
ANNEX IV – GUIDANCE DOCUMENT FOR COUNTRY REPORTERS		134
ANNEX V – GUIDANCE DOCUMENT FOR COUNTRY REVIEWERS		135
ANNEX VI – COUNTRY REPORTS		136

LIST OF ABBREVIATIONS

AC	Aarhus Convention
AG	Advocate General
CC	Civil Code
CCP	Code of Criminal Procedure
CFI	Court of First Instance
CJ	Court of Justice
CJEU	Court of Justice of the EU
CPS	Crown Prosecution Service
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GC	General Court
KapMuG	Kapitalanleger-Musterverfahrensgesetz
NGO	Non-governmental organisation
PIG	Public interest group
TFEU	Treaty on the Functioning of the European Union
VWGO	Verwaltungsgerichtsordnung; Code of Administrative Court Procedure

LIST OF TABLES

Table 1: Specialisation of Courts	53
Table 2: Collective Interest Actions	60
Table 3: <i>Actio popularis</i>	60
Table 4: Alternatives to Collective Interest Litigation	61
Table 5: Strict or Lenient on Standing in Civil Matters	62
Table 6: Judicial Policy Tool	62
Table 7: Civil Law and Human Rights	63
Table 8: Civil Law and EU Law	64
Table 9: Administrative Courts	66
Table 10: Types of Administrative Courts	68
Table 11: Administrative Law Instances	69
Table 12: Right-based or Interest-based	70
Table 13: Objection Procedure Required?	73
Table 14: Differences in Instances of Court	74
Table 15: Differing Requirements Depending On Area of Administrative Law	75
Table 16: Public Interest Groups in Administrative Law	76
Table 17: Representation of Collective Interests in Administrative Law	78
Table 18: Public Authorities in Administrative Law	79
Table 19: Human Rights in Administrative Law	80
Table 20: Influence of Aarhus Convention	83
Table 21: Scope of the Term "Victim"	91
Table 22: Private Prosecution	94
Table 23: Possibilities of a Victim to have a Decision not to Prosecute Reviewed	96
Table 24: Right to Compensation in Criminal Proceedings	97
Table 25: Division of Standing between Criminal and Civil Courts	98
Table 26: Right to be Heard in Court	99
Table 27: Types of Standing of Victims in Criminal Proceedings	99
Table 28: Information Given to Victims	111

LIST OF MAPS

Map 1: Geographical spread of study	22
-------------------------------------	----

LIST OF COUNTRY REPORTERS AND REVIEWERS

BELGIUM

Country reporters

- For civil law: **Prof. Benoît Allemeersch**
(Katholieke Universiteit Leuven)
- For administrative law: **Prof. Luc Lavrysen**
(Universiteit Gent)
- For criminal law: **Ms. Katrien. Lauwaert**
(Université de Liège)

Country reviewers

- For civil law: Preferred to remain anonymous
- For administrative law: Preferred to remain anonymous
- For criminal law: **Prof. Gert Vermeulen**
(Universiteit Gent)

ENGLAND AND WALES

Country reporters

- For civil law: **Mr. Keith Uff**
(University of Birmingham)
- For administrative law: **Prof. Richard Macrory**
(University College London)
- For criminal law: **Prof. Ed Lloyd-Cape**
(University of the West of England)

Country reviewers

- For civil law: Preferred to remain anonymous
- For administrative law: **Dr. Michael Varney**
(University of Hull)
- For criminal law: **Prof. Jacqueline Hodgson**
(University of Warwick)

FRANCE

Country reporters

- For civil law: **Dr. Bérengère Mélin-Soucramanien**
(Université Montesquieu-Bordeaux IV)
- For administrative law: **Prof. Olivier Dubos**
(Université Montesquieu-Bordeaux IV)
- For criminal law: **Ass. Prof. Claire-Marie Saas**
(Université de Nantes)

Country reviewers

- For civil law: **Prof. Frédérique Ferrand**

- For administrative law: (Université Jean Moulin Lyon 3)
Dr. Marie-Laure Basilien-Gainche
(Université Sorbonne Nouvelle Paris 3)
- For criminal law: Preferred to remain anonymous

GERMANY

Country reporters

- For civil law: **Prof. Tanja Domej**
(Universität Zürich)
- For administrative law: **Dr. Angela Schwerdtfeger**
(Friedrich-Schiller-Universität)
- For criminal law: **Prof. Joachim Vogel**
(Eberhard Karls Universität Tübingen)

Country reviewers

- For civil law: Preferred to remain anonymous
- For administrative law: Preferred to remain anonymous
- For criminal law: Preferred to remain anonymous

HUNGARY

Country reporters

- For civil law: **Dr. Miklos Kengyel**
(Pécsi Tudományegyetem) &
Ass. Prof. Viktória Harsági
(Pázmány Péter Katolikus Egyetem)
- For administrative law: **Dr. Tibor Lajos Sepsi**
(Eötvös Loránd Tudományegyetem)
- For criminal law: **Dr. András Kádár**
(Hungarian Helsinki Committee)

Country reviewers

- For civil law: Preferred to remain anonymous
- For administrative law: **Dr. András Kovács**
(judge)
- For criminal law: Preferred to remain anonymous

ITALY

Country reporters

- For civil law: **Prof. Elisabetta Silvestri**
(Università di Pavia)
- For administrative law: **Prof. Roberto Caranta**
(Università degli Studi di Torino)
- For criminal law: **Prof. Silvia Allegrezza**
(Università di Bologna)

Country reviewers

- For civil law: **Dr. Francesca Ferrari**
(University of Insubria)
- For administrative law: **Dr. Mariolina Elia Antonio**
(Maastricht University)
- For criminal law: **Ass. Prof. Michele Caianiello**
(Università di Bologna)

THE NETHERLANDS

Country reporters

- For civil law: **Prof. Remco van Rhee**
(Maastricht University)
- For administrative law: **Dr. Daniëlle Wenders**
(Maastricht University) & **Dr. Sander Jansen**
(Maastricht University)
- For criminal law: **Dr. Jacques Claessen**
(Maastricht University)

Country reviewers

- For civil law: **Prof. Ton Jongbloed**
(Universiteit Utrecht)
- For administrative law: **Prof. Chris Backes**
(Maastricht University)
- For criminal law: **Prof. Taru Spronken**
(Maastricht University)

POLAND

Country reporters

- For civil law: **Prof. Elwira Marszałkowska-Krześ**
(Uniwersytet Wrocławski) & **Prof. Jacek Gołaczyński**
(Uniwersytet Wrocławski)
- For administrative law: **Dr. Jerzy Jendrośka**
(Uniwersytet Opolski) & **Dr. Magdalena Bar**
- For criminal law: **Dr. Małgorzata Wąsek-Wiaderek**
(Katolicki Uniwersytet Lubelski Jana Pawła II)

Country reviewers

- For civil law: Preferred to remain anonymous
- For administrative law: Preferred to remain anonymous
- For criminal law: **Prof. Paweł Wiliński**
(Uniwersytet im. Adama Mickiewicza)

SWEDEN

Country reporters

- For civil law: **Prof. Torbjörn Andersson**
(Uppsala Universitet)
- For administrative law: **Prof. Jan Darpö**
(Uppsala Universitet)
- For criminal law: **Dr. Maria Bergström**
(Uppsala Universitet)

Country reviewers

- For civil law: **Prof. Per Henrik Lindblom**
(Uppsala Universitet)
- For administrative law: Preferred to remain anonymous
- For criminal law: Preferred to remain anonymous

TURKEY

Country reporters

- For civil law: **Dr. Leyla Keser Berber**
(İstanbul Bilgi Üniversitesi) & **Erdem Akyazili, LLM**
- For administrative law: **Prof. Cemil Kaya**
(İstanbul Üniversitesi)
- For criminal law: **Dr. İdil Elveriş**
(İstanbul Bilgi Üniversitesi)

Country reviewers

- For civil law: **Murat R. Özsunay**
(lawyer)
- For administrative law: **Mr. Tunahan Gür**
- For criminal law: **Dr. Rağıp Barış Erman**
(İstanbul Bilgi Üniversitesi)

EXECUTIVE SUMMARY

The aim of this study is to provide a comparative analysis of legal provisions, doctrine and case-law on *locus standi* before civil, administrative and criminal courts of selected legal systems and before the EU courts.

Apart from the EU legal system, the study focuses on the legal systems of nine Member States of the European Union (Belgium; England and Wales;¹ France; Germany; Hungary; Italy; Netherlands; Poland; Sweden) and the legal system of one non-EU Member State (Turkey).

For the purposes of this study, *locus standi* is understood as including the provisions (and their jurisprudential interpretation) regulating the identification of the (groups of) persons who are allowed to bring a claim before national civil, criminal and administrative courts, as well as before the EU courts.

Locus standi before the EU courts

At EU level, the focus was placed on direct actions (i.e. actions for annulment, actions for failure to act and actions for damages) and the appeal procedure before the CJ.

The requirements of standing at first instance change according to the type of action brought. Apart from this differentiation, there are, formally, no further requirements applicable on the basis of the field of substantive law at hand, or the claimant's nature.

In actions for annulment, a natural or legal person may bring such an action only in certain specific circumstances, namely only "against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

The CJ has consistently held that a measure is of direct concern only if it affects the applicant's legal position directly *and* it leaves no discretion to the addressees of the measure who are entrusted with its implementation.

Despite some attempts by the CFI and Advocate General Jacobs to change the definition, the definition of individual concern, first given in the *Plaumann* case, is still the reference for determining "individual concern". In that case the CJ established that private parties are able to seek judicial review of decisions not expressly addressed to them only if they can distinguish themselves from all other persons, not only actually but also potentially. The *Plaumann* test constitutes, thus, a very restrictive approach to individual standing, which has sparked a vast amount of academic debate and criticism.

¹ In the United Kingdom (UK) there are three separate legal systems: the law of England and Wales, the law of Scotland, and the law of Northern Ireland. Reflecting national autonomy, there are differences in the legal provisions, doctrine and case law on *locus standi* before civil, criminal and administrative courts in the constituent nations of the UK. It is noted that the United Kingdom of Great Britain and Northern Ireland is a Member State of the EU. For the purposes of this study, the position in England and Wales has been selected.

The strict application of the *Plaumann* test in the environmental field has led to public interest groups (PIGs) always being denied individual concern. This strictness stands in contrast with the relative openness of the CJ to protect economic rights and the acceptance of a less strict interpretation of individual concern in specific economic policy fields.

Despite the CJ's assertion that the system of remedies created by the Treaties is complete (because of the combination of actions for annulment and preliminary rulings), when an EU measure does not require any implementing act at the national level, the CJ's reliance on the preliminary ruling proceedings results in a complete lack of judicial protection in some cases. Even when applicants are able to gain access to national courts, it is doubtful whether the preliminary reference procedure effectively guarantees the right to access to justice. Furthermore, it is doubtful whether the requirement of "individual concern" and its *Plaumann* interpretation comply with the requirements prescribed by Article 6 ECHR.

The GC and the CJ have had the opportunity, on several occasions, to comment upon the compliance of Article 263(4) TFEU (and formerly of Article 230(4) EC) with Article 9 of the Aarhus Convention, and they have invariably come to the conclusion that this international instrument, and the transposing Aarhus Regulation, did not require any change in the *Plaumann* interpretation of the criterion of individual concern. The EU Courts seem to have ignored the requirements mandated by the Convention, since they have interpreted the criteria laid down in Article 230 EC so strictly that they bar all environmental organisations from challenging environmental measures. Indeed, the *Plaumann* test developed by the EU Courts with regard to the requirement of individual concern (Article 230 EC) does not seem to comply with the requirements of Articles 9(2) and (3) of the Aarhus Convention: the application of the test to environmental and health issues means, in practice, that no NGO is ever able to challenge an environmental measure before the EU Courts.

***Locus standi* before national civil courts**

While civil courts deal with "civil claims", a definition of what is a civil claim in each of the legal systems under consideration may not be readily available. In most cases such claims are defined in a negative way, e.g. all claims which are not criminal or administrative in nature.

Locus standi before the civil courts in the ten selected legal systems is regulated in a similar fashion. In general, only natural and legal persons as holders of rights under private law have standing, provided they have a direct personal interest in the action (i.e. the claim should concern an effective, tangible or moral advantage for the claimant). Claimants who do not have such an interest will have their action declared inadmissible, usually *ex officio*.

Apart from France, where public authorities only have standing before administrative courts, public authorities in the other legal systems may have standing before civil courts. In most legal systems concerned, the fact that public authorities act in private capacity and not in the exercise of state power (*imperium*) is usually a prerequisite for public authorities' legal standing before civil courts.

Legal standing for entities lacking legal personality is problematic before the civil courts in all legal systems examined. Furthermore, in all legal systems may third parties intervene between the original parties to the civil action - usually upon condition that they meet the general standing requirements mentioned above.

The personal interest requirement as regards standing before the civil courts means that, in several legal systems, actions for collective interests² - in which these interests are represented by a member of the group or by a third party (including legal persons) acting on behalf of the group - are problematic. Such litigation is not possible in Hungary. Limited possibilities exist in Belgium and France. In Germany, test case procedures may be brought under the *Kapitalanleger-Musterverfahrensgesetz*. In contrast, the other legal systems under consideration are not as strict on this issue. England and Wales seem to have the most extended possibilities with their representative actions, group actions and derivative actions, allowing standing to both natural persons and legal persons (opt-out).

A real alternative to collective interest litigation can only be found in The Netherlands: natural or legal persons having caused harm and a foundation or association representing the interests of those who have suffered harm may submit an agreement reached by them to the Court of Appeal in Amsterdam in order to have it sanctioned as an agreement applicable to all who have suffered harm in the context of the agreement. The decision is not binding for those who opt-out.

The *actio popularis* - i.e. litigation for "general", "public" or "diffuse interests", which should be distinguished from collective interests - is even more problematic than collective interest litigation before the civil courts. If allowed, such actions may only be brought by the Attorney-General in France and Hungary. This is also the case in the Netherlands, with, however, some exceptions. Furthermore, in Sweden the Consumer Ombudsman is mentioned as having standing in such cases.

Finally, it should be mentioned that, (1) generally speaking, in civil suits standing is not used as a tool for the administration of justice and the implementation of judicial policies in the legal systems concerned, perhaps with the exception of Sweden. (2) Human rights law is not used as a basis for standing, with some rare exceptions in Poland. And (3) EU legislation on standing is according to the national reporters duly implemented in the nine Member States examined. The influence of EU law on standing in purely national civil cases is either absent or only marginal in the legal systems considered. However, in the Netherlands the right to effective legal protection under EU law is also used in domestic cases, where applicants other than natural and legal persons are granted standing in situations where otherwise there would have been an obvious failure to afford legal protection. This entitlement to an effective remedy has also appeared in Polish case law.

***Locus standi* before national administrative courts**

The study demonstrates an enormous variety as to how judicial review of administrative action is organised in the Member States and to whom and how *locus standi* is granted. It is hard to say whether there is something like a level playing field in this area.

Some national systems of judicial review in administrative law cases are very complex. The complexity of some national systems of judicial protection may also be detrimental to effective judicial protection. However, this does not seem to give rise to any EU legislative initiatives towards harmonising judicial protection in administrative courts across the EU.

² An action for collective interests should be distinguished from an action for general, public or diffuse interests (the so-called *actio popularis*). See *infra* 3.11.

In the majority of the legal systems under review, access to administrative courts is possible for anyone who demonstrates sufficient interest. Only Germany requires applicants to claim the administrative measure at stake infringes any subjective public right of the applicant - this requirement is applied strictly. On the other hand, interest-based systems usually require a direct, actual and certain interest. Most country reporters admit that these criteria are applied quite leniently and surely less strictly than the interpretation of the EU Courts of the same criterion contained in Article 263(4) TFEU.

Legal systems differ with regard to the question of whether an objection procedure is required as a prerequisite for legal standing. If this is the case, the structure and function of such a procedure differ from one system to another.

In all legal systems apart from Germany, PIGs also have standing when they defend the public interest. The requirements for PIGs to lodge proceedings before courts differ. In certain legal systems (e.g. Germany, Italy, Sweden), PIGs have to be registered or have to meet minimum size criteria. In few of the legal systems examined, the criteria for PIGs *locus standi* seem to be used as a tool for the administration of justice (e.g. Belgium, Netherlands). In certain legal systems there are doubts as to whether the application of the standing criteria for such groups is compatible with the Aarhus Convention provisions.

Organisations which represent the interest of a group do have standing in each of the legal systems, except for Germany and Hungary. In some countries, such organisations need to have legal personality (e.g. Italy), while in other countries (e.g. UK, France) this is not required.

Human rights law is, except for Germany and Sweden, seldom used as an autonomous basis for standing. Nevertheless, it has influenced and widened the interpretation of the existing criteria, at least in some legal systems. The principle of effective judicial protection does not seem to have exerted a significant influence on court practice in any of the legal systems examined.

In half of the legal systems the Convention has widened access to court in environmental law cases. However, German law does not comply with the requirements of the Aarhus Convention, while other reporters (England and Wales, Poland) doubt whether the application of the *locus standi* criteria is in accordance with the requirements of the Convention. Legislative activism may be desirable where poor compliance is, even partly, due to the lack of clarity of the legal consequences of the Aarhus Convention itself, e.g. with regard to the scope of Article 9(2) in conjunction with Article 6(1)(b) and of Article 9(3) Aarhus Convention. As far as the latter provision is concerned, the fact that it does not have direct effect may be an extra argument for legislative action from the part of the EU.

***Locus standi* for victims of crime before national criminal courts**

In each of the legal systems covered in this study, except for England and Wales, victims of crime have standing in criminal proceedings, although the intensity and scope of their possibility to participate in the criminal investigation and subsequent criminal prosecution and trial vary.

Victims are defined essentially as natural or legal persons that have suffered from direct harm caused by a criminal offence. This includes heirs and successors of victims whose death is the result of a criminal offence. Only in Belgium and France is standing also provided for family members of victims.

In specific situations that are defined by law and jurisprudence in France, Italy, Belgium and Poland PIGs that aim to combat racism and discrimination, human trafficking, domestic violence, environmental crimes etc. are granted standing by the law. Sometimes they can also claim damages for themselves. These legal entities do not have standing to bring a claim on behalf of victims, but are acting as distinct civil parties. In some cases, victims have to expressly consent to the admission of PIGs as interested parties.

Types of standing vary. In general, one can distinguish between issuing a prosecution, reviewing a decision not to prosecute or participating alongside the prosecutor, and acting as a civil party claiming compensation.

Most of the legal systems allow for some kind of private prosecution. In England and Wales, where the victim has no standing in criminal proceedings, any private individual (not only a victim of crime), may undertake a private prosecution that may be taken over by the Public Prosecutor. Private prosecution is normally restricted to minor offences and/or to situations where the Public Prosecutor has declined or discontinued a prosecution.

Different from private prosecution is the possibility existing in Hungary, Germany and Poland for victims or aggrieved parties to act as a substitute, accessory or auxiliary prosecutor in parallel with the Public Prosecutor or, as is the case in Poland and Hungary, to take over the prosecution if the Public Prosecutor drops the charges. The latter differs from private prosecution in that the initial decision to prosecute is taken by the Public Prosecutor. In the capacities of substitute, accessory or auxiliary prosecutor, the victim is vested with procedural rights that are more or less equivalent to those of the Public Prosecutor. This kind of standing may be also granted in serious cases.

Except for England and Wales and Belgium, all systems allow for the possibility to have the decision of the prosecutor not to bring charges reviewed. In Belgium the absence of review is simply compensated by the ability to institute private prosecution, should the prosecutor drop the charges.

Standing with regard to claims for compensation in criminal proceedings is provided for in each of the legal systems except for in England and Wales and Turkey, where compensation in criminal proceedings may be awarded by the courts *proprio motu* and is left to the court's discretion. In the majority of the legal systems a claim may be brought either in criminal or in civil court. The *res iudicata* principle applies, meaning that the same claim cannot be brought before the civil court when the criminal court has decided on the claim, and *vice versa*.

Only in Hungary, the Netherlands and Poland does the victim have a right to be heard during the court hearing (victim impact statement), irrespective of having filed a claim for damages or acting otherwise as a witness or part of the prosecution.

Except for Sweden and Turkey, all jurisdictions apply expedited criminal proceedings that may affect the *locus standi* of victims. In most systems victims have the right to appeal or oppose these kind of proceedings except for England and Wales and Italy, where victims in case of expedited proceedings may be definitely deprived of their possibility to participate in the criminal proceedings.

Recommendations

CJEU

The CJEU should, in order to comply with the Aarhus Convention, consider environmental NGOs which fulfil the 'criteria for entitlement' under Article 11 of the Aarhus Regulation to be individually concerned for the purpose of bringing an annulment action against EU measures affecting the environment.

Should the CJEU not change its current interpretation of the notion of individual concern, a paragraph could also be added to Article 263 TFEU by way of a Treaty revision, to the effect that NGOs that fulfil the requirements of Article 11 of the Aarhus Regulation do not need to prove individual concern.

Alternatively, one could envisage the creation of a specialised court for environmental matters attached to the GC pursuant to Article 257 TFEU. The establishing regulation would give this specialised court jurisdiction for matters falling within the scope of the Aarhus Convention, and provide that environmental NGOs which fulfil the requirements of Article 11 of the Aarhus Regulation are entitled to bring an action before the court.

Civil Law

A crystal-clear aspect of the present approach to standing before civil courts in Europe in actions for collective interests and the *actio popularis* is the rejection, in each of the national systems examined, of the American model of class actions. Another clear point is that the existing national procedural frameworks as regards e.g. third party intervention, joinder of parties and interpleader in civil actions are insufficient for handling actions involving collective interests. Furthermore, it seems that only opt-in collective interest litigation is compatible with all the national legislations studied here.

As regards the identification of the group members in collective interest litigation before the civil courts, the requirement that the interests of the group members should be similar in nature should not be applied too strictly, if actions were to be allowed in a sufficient number of relevant cases.

In order to prevent abusive collective interest litigation or an abusive *actio popularis*, procedures should be in place, in order to define who will be given standing as a representative of the group or may bring an action in the general interest before civil courts. In the opinion of the authors of this report, the easiest solution is to allow only certain approved organisations to bring an action in collective interest litigation or bring an *actio popularis*.

In the opinion of the authors of this report, any future EU legislation on standing in collective interest litigation and/or *actio popularis* should be horizontal and not sector-specific, in order to make this litigation visible at European level.

Administrative Law

Specific requirements or criteria for granting standing, such as the need to claim the infringement of a right, may never be discussed and evaluated as such but rather examined as part of a whole system of judicial review.

According to the authors of the report, European action to harmonise national law and practice of *locus standi* would be required only to the extent that *locus standi* requirements hinder effective judicial protection, and not simply to resolve the complexity of some national systems of judicial protection.

In the field of environmental law, legislative activism may be desirable or needed where poor compliance is, even partly, due to the lack of clarity of the legal consequences of the Aarhus Convention. That is true with regard to the scope of Article 9(2) in combination with Article 6(1)(b) and the scope of Article 9(3) of the Aarhus Convention. The fact that Article 9(3) does not have direct effect could be an additional argument for legislative action by the EU. Furthermore, there remain shortcomings in the application of the Aarhus Convention, which may now require European legislative initiatives.

Criminal Law

All legal systems examined contain provisions regulating *locus standi* of victims in criminal proceedings, with the exception of England and Wales, where these issues are dealt with outside the criminal trial. Whether legislation on this matter should be harmonised at EU level is rather a political decision.

However, one recommendation is made here, in order to protect the victim's *locus standi* in cases of expedited criminal proceedings or mediation. More particularly, a provision could be added to Article 10 (Rights in the event of a decision not to prosecute) of the proposed Directive establishing minimum standards on the rights, support and protection of victims of crime COM (2011) 275 specifically addressing the situation where expedited criminal proceedings or mediation are applied. The authors regard the Belgian solution in case of expedited criminal proceedings as best practice: a transaction³ (or other kind of expedited criminal proceeding) should be only possible if the defendant first compensates the (non-disputed) part of the damages caused to the victim and admits civil responsibility for what happened in writing, leading to a non-refutable presumption of fault by the defendant in case the victim brings an additional claim (the disputed part) to a civil court. A similar solution may be applied in cases of criminal mediation.

³ This is a procedure by which criminal prosecution is avoided by an agreement with the Public Prosecutor to pay a fine or accept any other measure to prevent the continuation of the prosecution.

1. BACKGROUND AND AIM OF THE STUDY

The aim of this study is to provide an in-depth and objective comparative analysis of legal provisions, doctrine and case-law on *locus standi* before civil, criminal and administrative courts of selected legal systems and before the CJEU.

At EU level, this topic has been at the core of heated debate especially as regards the standing of natural and legal persons (i.e. the so-called “non-privileged applicants”), given the CJEU's restrictive interpretation of the requirement of “individual and direct concern” under Article 263(4) TFEU.⁴ This discussion has been renewed after the modification of Article 263(4) TFEU brought by the Lisbon Treaty and the subsequent interpretative uncertainties surrounding the notion of “regulatory act” contained in this provision.⁵

At national level, the principle of national procedural autonomy applies, and thus national rules on standing vary across the Member States. The autonomy of the Member States is limited, however, not only by secondary sector-specific legislation (such as Directive 2007/66/EC – the so-called Remedies Directive – in the field of public procurement, or Directive 2003/35/EC concerning access to justice in the context of projects which are likely to have a significant impact on the environment), but also by the general principle of effective judicial protection and, more recently, by the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights. As a consequence, the different national standing rules may have to be set aside or interpreted in the light and objectives of EU law by the national courts. One of the questions arising is to what extent the rules on standing have been influenced by the European Union and whether the current differences impair a uniform and effective application of EU law before the national courts.

At EU level, some efforts have been made in order to improve access to justice by means of legislation. In the area of administrative law, the Commission has presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, which has, however, been stalled in the Council for several years.⁶ In the area of civil law, a public consultation has been launched with the theme: “Towards a Coherent European Approach to Collective Redress”,⁷ which builds upon other documents, such as the Commission Green Paper on consumer collective redress.⁸ From a criminal law point of view, the issue of standing is to be placed within the context of the protection of the rights of victims, which is a strategic priority and has been placed high on the EU agenda. In particular, the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, followed by the Council Directive 2004/80/EC of 29 April 2004 and the Commission Directive 2006/337/EC of 19 April 2006, all relating to the compensation of crime victims, aimed to improve victims' rights.

⁴ C Koch, ‘Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy’ E.L. Rev. 2005, 30(4), 511-527; F Ragolle, ‘Access to justice for private applicants in the Community legal order: recent (r)evolutions’ E.L. Rev. 2003, 28(1), 90-101.

⁵ S Balthasar, ‘Locus standi rules for challenges to regulatory acts by private applicants: the new Article 263(4) TFEU’ E.L. Rev. 2010, 35(4), 542-550.

⁶ European Commission (2003), *Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters*, COM(2003) 624 final, Brussels.

⁷ European Commission (2011), *Commission staff working document public consultation: Towards a Coherent European Approach to Collective Redress*, SEC(2011) 173 final, Brussels.

⁸ European Commission (2008), *Green paper on Consumer Collective Redress*, COM(2008) 794 final, Brussels.

Nevertheless, the European Parliament has called upon the Council to adopt a comprehensive legal framework offering victims of crime the widest protection.⁹ In a 2009 study of the Project "Victims in Europe"¹⁰ and an impact assessment of the Commission,¹¹ it was concluded that it is necessary to replace the 2001 Framework Decision with a new directive containing concrete obligations on the rights of victims. A proposal for such a directive establishing minimum standards on the rights, support and protection of victims of crime has been launched on 18 May 2011.¹² It includes elements that are of importance for the standing of victims in criminal proceedings such as to have a decision not to prosecute reviewed, and to be able to obtain a decision on compensation in the course of criminal proceedings.

1.1. Definitions,¹³ sources and scope of the study

Definition of locus standi

For the purpose of this study, *locus standi* shall be understood as including the provisions (and their jurisprudential interpretation) regulating the identification of the (groups of) persons and the conditions they should meet in order to bring a claim before the national civil, criminal and administrative courts, as well as before the CJEU. In administrative and civil law, the study deals with the position of natural and legal persons. When dealing with criminal law, questions of *locus standi* only apply to the position of victims of a crime. The definition of a victim, in each of the national systems selected, has, therefore, been examined.

Other conditions for access to a court (such as the availability of legal aid, the costs of the proceedings and supportive measures for victims in criminal proceedings) have not been addressed.¹⁴ While the project team recognises the importance of the issues of costs of the proceedings and protecting and respecting victims of crime in relation to standing, these aspects fall outside the scope of the project.

⁹ European Parliament (2009), *European Parliament resolution of 26 November 2009 on the elimination of violence against women*, P7_TA(2009)0098, Strasbourg.

¹⁰ Project Victims in Europe. Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union (2009) a PDF of the study can be obtained on: http://www.apav.pt/vine/images/report_vine_eng.pdf.

¹¹ Commission Staff Working Document Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, Impact Assessment, SEC(2009)358.

¹² European Commission (2011), *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, COM(2011) 275 final, Brussels.

¹³ Please note that, throughout the study, when the masculine pronouns and adjectives such as « he » and « his » are used, they should be taken to mean « he or she » and « his or her » unless they refer to specifically identifiable individuals.

¹⁴ On that point, see e.g. Ch Hodges, *et al.* (2009), 'Costs and Funding of Civil Litigation, A Comparative Study', Legal Research Paper Series, Paper N. 55/2009, December 2009.

As there is no common understanding of many legal terms in the areas covered by this study, we have to define a few notions. Thus, we use the following terms as explained here:

(law)suit:	a suit before a court
appeal:	appeal (or higher appeal) against a decision of a court of first instance (or a court of appeal) at a court of appeal (or a court of higher appeal)
objection procedure:	a procedure against an administrative act, decided by the administration, either the administrative body which took the original decision (or acted otherwise) or a different (higher) administrative body. Objection procedures before higher administrative bodies are often (but not in this study) indicated as administrative appeal
ordinary courts:	courts which rule on all kinds of cases (civil and criminal or civil, criminal and administrative law cases), elsewhere sometimes referred to as "general courts". In civil matters, these courts should be distinguished from specific first instance courts dealing with particular subject matters, such as lower first instance courts which are usually small claims courts.
public interest groups:	groups (with or without legal personality) that aim to protect public interests, such as the environment
organisations / associations:	entities that depending on the legal system in which they operate need to have legal personality or do not need legal personality

Please note that not all country reporters and reviewers used this terminology and that, when they did so, they may have had a different understanding of the terms and concepts used in this study.

Sources reviewed

In order to provide an in-depth and objective comparative analysis of legal provisions and doctrine on *locus standi* before civil, criminal and administrative courts of some selected legal systems, and before the CJEU, the study examines and discusses the relevant legislation and case-law. However, as there may be significant differences between what the law states and what actually happens in practice, the study also provides as much knowledge as possible not only of the relevant provisions on *locus standi* before the national courts and CJEU but also of how these provisions are put into practice.

Selection of legal systems

Apart from the EU legal system, the study focuses on the legal systems of nine Member States of the European Union (Belgium; England and Wales;¹⁵ France; Germany; Hungary; Italy; Netherlands; Poland; Sweden) and of one non-EU State (Turkey).

¹⁵ In the United Kingdom (UK) there are three separate legal systems: the law of England and Wales, the law of Scotland, and the law of Northern Ireland. Reflecting national autonomy, there are differences in the legal provisions, doctrine and case-law on *locus standi* before civil, criminal and administrative courts in the constituent nations of the UK. It is noted that the United Kingdom of Great Britain and Northern Ireland is a Member State of the EU. For the purposes of this study, the position in England and Wales has been selected.

These ten legal systems have been selected because they represent all major legal families within the European Union and also reflect both the common law as well as the civil law tradition, combining “old” Member States (England and Wales, Germany, Netherlands, Italy, Belgium and France) with newer Member States (Hungary, Poland, Sweden).

Furthermore, this selection allows for a sound geographical spread, from Scandinavia (Sweden), Eastern Europe (Hungary, Poland), and Western Europe (England and Wales, Germany, Netherlands) to Southern Europe (Italy, Turkey).

Map 1: Geographical spread of study



Legend: Except for the legal systems included in this study, EU Member States are indicated in dark blue. The legal systems included in this study are indicated in green.

Finally, the countries represent different legal theories with regard to *locus standi*. For example, concerning judicial review of administrative action, two Member States of the EU (Germany, Austria) have a strict individual rights-based approach, namely the claimant must rely on subjective public rights, whilst the other Member States grant standing for everyone who claims to have a (sufficient) interest. The study includes an analysis as to what extent a particular approach to standing within one area of the law (for instance,

administrative law) is also to be found in another area (such as civil or criminal law). The (possible) overlap between different areas is therefore also discussed.

In addition to these EU Member States, Turkey is also analysed. Firstly, Turkey is party to the European Convention on Human Rights. Secondly, Turkey may be of special interest because it is a candidate country for EU accession. Thirdly, it is an important legal order at the European/Asian border. Fourthly, as far as administrative law is concerned, it is interesting in that it has not yet signed the Aarhus Convention.

1.2. Structure of the study

The study is composed of two main parts focusing respectively on EU and national regimes and a conclusion in which a comparison is made between the legal theory and practice of legal standing rules before the CJEU, on the one hand, and the Member States on the other hand. Furthermore, the results of the study with regard to civil, administrative and criminal law are compared. Recommendations are made.

More particularly, the first part focuses on the legal framework concerning *locus standi* before EU Courts in actions for annulment, actions for failure to act and damages actions. In this part, the relevant (primary and secondary) rules and case-law of the CJEU are analysed. The analysis shows whether there are peculiarities in the standing approach in a specific policy area (such as environmental policy) and tries to explain such peculiarities. Furthermore, the analysis highlights the current limitations concerning standing for the defence of general interests (such as in environmental claims), as well as the extent to which third parties are granted standing. Finally, this part discusses the implications of the EU accession to the Aarhus Convention and of the future EU accession to the ECHR for the issue of standing.

The second part builds upon national reports for each selected legal system.¹⁶ It contains a comparative analysis of the national provisions and courts' practice based on the results of the national *locus standi* reports. The comparative analysis highlights similarities and differences among different legal systems and different fields of each national system. Where appropriate, the key findings of the national reports are summarised in one or more table(s) to enable a clear and schematic presentation of the data.

The national reports themselves are to be found in Annex III. Each national report consists of three parts (written by three different country reporters), dealing with civil, criminal and administrative law, so as to ensure the most complete and reliable picture of the current rules and practices on standing in the legal systems analysed. The questionnaires submitted to the country reporters may be found in Annexes I, II and III for administrative, civil and criminal law, respectively.

In the third part the findings of the first and second part are compared. This conclusive chapter stresses the congruities and differences between the legal standing criteria in the Member States, on the one hand, and before the EU Courts, on the other. Moreover, the

¹⁶ The country reports (Belgium, England and Wales, France, Germany, Hungary, Italy; Netherlands, Poland, Sweden and Turkey) may be obtained upon request from the Policy Department C: Citizens' rights and Constitutional Affairs, European Parliament (poldep-citizens@europarl.europa.eu).

findings with regard to the different fields of law in the Member States are compared. On the basis of the thorough analyses of the *status quo* in the EU and Member States' legal systems, recommendations have also been developed in this part, including suggestions on the possible improvements to the standing requirements in the EU and national legal systems.

1.3. Methodology

On the basis of a "Guidance Document for Country Reporters" (to be found in Annex IV), three country reporters (for civil, criminal and administrative law, respectively) for each legal system answered the set of questions contained in the draft questionnaires (Annex I, II, III).

In order to ensure comparability, the questions submitted to the reporters for civil, criminal and administrative law, as well as the scheme followed to write the report on the EU legal system, have been drafted in a similar way as far as possible. However, in all three areas of law and in the EU legal system, some specific questions and problems arise, which have to be addressed in the respective reports. The questionnaires have thus been adapted to reflect the specific problems which are salient in the specific field of law involved.

On the basis of the replies received from the country reporters, as far as standing before national courts is concerned, a comparative report has been drafted by the responsible project team member (Prof. Backes for administrative law; Prof. Van Rhee for civil law; Prof. Spronken for criminal law) on the basis of the questionnaires submitted by the country reporters. The report on the EU legal system has been drafted by Dr. Eliantonio.

To ensure the highest quality possible and reliability of the country reports and of the general conclusions based on these reports, the country reports were reviewed by national experts. These country reviewers had the task of correcting any factual errors; making appropriate suggestions regarding the clarity of the report, taking into account the requirement that it be readily understood by readers from other legal systems; considering the validity of any conclusions drawn from the available evidence and making any appropriate suggestions. A written report of these corrections and suggestions was given to, and discussed with, the reporter and the research project team (these reports are not included in this study). In order to ensure comparability, effectiveness and quality of their contributions, and as it was the case with the reporters, a document explaining the role of the reviewers was submitted to the latter.

After the results of the reporters were received and reviewed by the reviewers, all members of the project team worked in close cooperation with each other, in order to write the third part of the report, where cross-area and cross-level comparisons are made, and recommendations are proposed.

2. ANALYSIS OF *LOCUS STANDI* BEFORE THE CJEU

SOME KEY FINDINGS

- The requirements of standing at first instance change according to the type of action brought. Apart from this differentiation, there are, formally, no further requirements applicable on the basis of the field of substantive law at hand, or the claimant's nature.
- The EU Courts, except in occasional instances, have been very strict with the control of the standing requirements. This control has essentially been exerted through the strict interpretation of the requirement of "individual concern", which has not changed since the *Plaumann* case.
- The strict application of the *Plaumann* test in the environmental field has led to public interest groups (PIGs) always being denied individual concern.
- This strictness stands in contrast with the relative openness of the CJEU to protect economic rights and the acceptance of a less strict interpretation of individual concern in specific economic policy fields.
- Not only are PIGs unable to directly challenge EU measures allegedly taken in violation of EU environmental law, but, due to the CJEU's case-law, they are also unable to intervene in action for annulment proceedings.
- The interpretation by the EU Courts of the requirement of individual concern provided in Article 263(4) TFEU does not seem to comply with the requirements of Articles 9(2) and (3) of the Aarhus Convention.
- The question, which has not yet been decided and which may be posed in the future, is whether the requirement of individual concern and its *Plaumann* interpretation comply with the requirements prescribed by Article 6 ECHR.
- Despite the CJ's assertion that the system of remedies created by the Treaties is complete (because of the combination between the actions for annulment and the preliminary rulings), when an EU measure does not require any implementing act at the national level, the CJ's reliance on the preliminary ruling proceedings results in a complete lack of judicial protection.
- Even when applicants are able to gain access to national courts, it is doubtful whether the preliminary reference procedure effectively guarantees the right to access to justice.

2.1. Introduction

There are two courts of general jurisdiction at the EU level, the Court of Justice (CJ) and the General Court (GC) (formerly, i.e. before the entry into force of the Lisbon Treaty, called the Court of First Instance – CFI).¹⁷ For the purposes of the current analysis, there are two procedures which are of relevance:

- direct actions (i.e. actions brought by natural or legal persons against an institution, body, agency or office of the EU, regardless of the case): the action for annulment (Art. 263 TFEU), the action for failure to act (Art. 265 TFEU) and the action for non-contractual liability of the EU (Art. 268 and 340 TFEU). When a natural or legal person brings one of these actions, the competent court is the GC.
- the appeal procedure before the CJ against a decision of the GC (Art. 256 TFEU) in one of the procedures mentioned above.¹⁸

The action for annulment, governed by Article 263 TFEU is aimed at requesting the annulment of a measure of an institution, body agency or office of the EU which has binding effect vis-à-vis third parties. The action for failure to act, governed by Article 265 TFEU, addresses the lack of action of an institution, office, agency or body of the EU in situations in which it was obliged to act. The action for non-contractual liability of the EU, governed by Article 340(2) TFEU, is aimed at making good any damage caused to an individual by the EU institutions or its servants.

2.2. The rationale of standing

At EU level, standing is a distinct procedural requirement, in the sense that it is a requirement for the admissibility of the claim. As such, therefore, it is always checked by the EU Courts before examining the merits of the claim.

2.3. The variations in standing before the EU Courts

The requirements of standing at first instance vary according to the type of action brought. Apart from this differentiation, there are, formally, no further requirements applicable on the basis of the field of substantive law at hand, or the claimant's nature (within the category of "natural and legal persons" as defined below).¹⁹

The standing requirements for the three types of direct action mentioned above will be analysed together with the standing rules for appeal cases.

¹⁷ The one specialised court, i.e. the Civil Service Tribunal, which deals with staff cases, will not be examined further in this report.

¹⁸ According to Article 256 TFEU, decisions given by the General Court may be subject to a right of appeal to the Court of Justice on points of law only.

¹⁹ Under section 2.6. below, however, it will be shown that, while there are formally no variations in standing, practically the application of the standing requirements result in different outcomes depending on the policy field and the claimant's nature at stake.

2.3.1. Action for annulment

Article 263 TFEU, which governs the action for annulment, distinguishes three types of applicants: the “privileged applicants” (Member States, the Commission, the Council, and the European Parliament), the “semi-privileged applicants” (the European Central Bank and the Court of Auditors), and the “non-privileged applicants” (natural and legal persons). This distinction is significant, because applicants with different status have to meet different requirements in order to gain standing in the annulment procedure. Hence, while privileged applicants have direct and unrestricted *locus standi*, and semi-privileged applicants have standing to challenge measures affecting their prerogatives, natural and legal persons have only a limited access to the EU Courts. The standing requirements of individual applicants, which are the focus of this report, are laid down in Article 263(4) TFEU. In particular, a natural or legal person may bring an action for annulment only in some specific circumstances, namely in cases of challenges “against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. The definition provided above gives rise to several questions, which will be answered below.

A. What are “natural and legal persons”?

Article 263(4) TFEU mentions, as non-privileged applicants, “natural or legal persons”. While the definition of what constitutes a natural person is quite straightforward, it could prove more difficult to define a “legal person”, given that national laws may have different views on the attribution of legal personality. According to the CJEU case-law, it is in principle national law which determines whether the applicant has legal personality.²⁰ Often, however, entities without legal personality have been admitted to bring an action for annulment. In order for them to be able to do so, they must be entitled and in a position to act as a responsible body in legal matters.²¹ Consequently, the concept of “legal persons” has acquired an autonomous EU meaning which may not coincide with the national one. Applying this concept, also local governments²² and special types of governments²³ have been considered “legal persons” for the purposes of bringing an action for annulment.

According to Article 263(4) TFEU, standing is uncontroversial for natural and legal persons challenging a measure addressed to them. When this is not the case, however, they must either prove that the act is of direct and individual concern to them, or that they are challenging a regulatory act which is of direct concern to them and does not entail implementing measures.

²⁰ Case C-18/57 *Firme J. Nold KG v High Authority of the European Coal and Steel Community* [1959] ECR 41, para. 48-49; case C-50/84 *Srl Bensider and others v Commission of the European Communities* [1984] ECR 3991, para. 7.

²¹ Case C-175/73 *Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities* [1974] ECR 917, para. 7-17; case C-18/74 *General Union of Personnel of European Organisation s v Commission of the European Communities* [1974] ECR 933, para. 3-11.

²² Case C-417/04 *P Regione Siciliana v Commission of the European Communities* [2006] ECR I-03881.

²³ Case C-298/89 *Government of Gibraltar v Council of the European Communities* [1993] I-03605.

B. What does "direct concern" mean?

The CJEU has consistently held that a measure is of direct concern only if it affects the applicant's legal position directly *and* it leaves no discretion to the addressees of the measure who are entrusted with its implementation. In other words, a direct link between the challenged measure and the loss or damage that the applicant has suffered must be established.²⁴ Moreover, the implementation must be automatic and result from EU rules without the application of other intermediate rules. If the measure leaves national authorities of the Member States a degree of discretion as to how the measure should be implemented, the applicant will not be considered to be directly concerned.²⁵

Under certain exceptional circumstances, the CJEU has considered the applicants to be directly concerned even where the challenged measure leaves those entrusted with its implementation a degree of discretion. In particular, the CJEU has held that direct concern exists -even if there is discretion- in case, at the time when the measure was adopted, there was no real doubt as to how the discretion would be exercised,²⁶ or where it is in theory possible for the addressees of the measure not to give effect to the EU measure but their intention to act in conformity with it is not in question.²⁷

In general, the application of this test to regulations or decisions addressed to third parties is relatively straightforward. Taking this definition into account, however, an application brought against a Directive has always been considered inadmissible, because a Directive *per se* leaves the Member States free to choose the form and method of implementation and has hence been considered incapable of producing direct legal consequences²⁸ in the applicant's legal sphere.²⁹

This requirement of direct concern is relatively straightforward compared to the requirement of individual concern.³⁰

²⁴ Cases C-41-44/70 *NV International Fruit Company and others v Commission of the European Communities* [1971] ECR 411; case C-207/86 *Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco) v Commission of the European Communities* [1988] ECR 2151, para. 12. Recently, C-417/04 P *Regione Siciliana v Commission of the European Communities* [2006] ECR I-03881.

²⁵ See, for example, case C-69/69 *SA Alcan Aluminium Raeren and others v Commission of the European Communities* [1970] ECR 385; case C-222/83 *Municipality of Differdange and Others v Commission of the European Communities* [1984] ECR 2889.

²⁶ Case 11/82 *Piraiki-Patraiki v Commission of the European Communities* [1985] 207; cases C-445/07 P and C-455/07 P *Commission of the European Communities v Ente per le Ville Vesuviane and Ente per le Ville Vesuviane v Commission of the European Communities* [2009] ECR I-07993.

²⁷ Case C-417/04 P *Regione Siciliana v Commission of the European Communities* [2006] ECR I-03881.

²⁸ Please note that this concept of 'direct legal consequences' needs to be distinguished from the concept of direct effect, which has been recognised for Directives.

²⁹ Case T-223/01 *Japan Tobacco Inc. and JT International SA v European Parliament and Council of the European Union* [2002] ECR II-3259 para. 45-50; joined cases T-172 and 175 to 177/98 *Salamander AG, Una Film "City Revue" GmbH, Alma Media Group Advertising SA & Co. Partnership, Panel Two and Four Advertising SA, Rythmos Outdoor Advertising SA, Media Center Advertising SA, Zino Davidoff SA and Davidoff & Cie SA v European Parliament and Council of the European Union* [2000] ECR II-2487, para. 54.

³⁰ Albor-Llorens correctly notes that the lower profile of the test of direct concern is due to the fact that the CJ has been less rigid and more consistent in the interpretation of this concept. Furthermore, since the tests of individual and direct concern are cumulative, the Court has frequently denied standing to private applicant on grounds of lack of individual concern, without even consider the requirement of direct concern. A Albor-Llorens, 'The standing of private parties to challenge community measures: has the European Court missed the boat?' [2003] 62 Cambridge LJ 87.

C. What does "individual concern" mean?

The requirement of "individual concern" is more problematic. This was first defined in the *Plaumann* case, which still remains the reference for determining "individual concern".³¹ In this case, the CJEU established that private parties are able to seek judicial review of decisions not expressly addressed to them only if they can distinguish themselves from all other persons, not only actually but also potentially. In other words, the applicants must show that the decision "affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".³² As a result, individual concern cannot be established when the applicant operates a trade which could be engaged in by any other person at any time. In particular, the applicant has to show, according to the case-law developed by the CJEU, that, at the time when the decision was adopted, it belonged to a so-called "closed class", which is differently affected by the EU measure than all other persons.³³

The *Plaumann* test constitutes a very restrictive approach to individual standing, which has sparked a vast amount of academic debate and criticism,³⁴ and has been challenged even from within the EU Courts.

The question of the appropriateness of the CJEU's approach was dramatically called into question by Advocate General Jacobs in the *Union de Pequeños Agricultores (UPA)* case³⁵ and by the, then, CFI in the *Jégo-Quéré* case.³⁶ To avoid depriving the applicants of their right to effective judicial protection, AG Jacobs proposed, and the CFI applied, new, more relaxed, tests of individual concern which would have allowed the applicants to proceed.

In particular, by way of reform, AG Jacobs proposed that a person "be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests".³⁷ The CFI, in turn, concluded that, although an amendment to the letter of the

³¹ Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95.

³² Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95, para. 107.

³³ E.g. joined cases C-106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission of the European Economic Community* [1965] 405.

³⁴ For criticism on the standing requirements of individual applicants under Article 230 EC, see, *ex multis*, A Arnall, 'Private applicants and the action for annulment under Article 173 of the EC Treaty' [1995] 32 CML Rev 7; A Ward, 'Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity' [2003] 22 Yearbook Eur Law 45; A Arnall, 'Private Applicants and the Action for Annulment since *Codorniu*' [2001] 38 CML Rev 7; JM Martin Cortés, 'Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' [2004] 11 MJ Eur Comp Law 233; A Ward, 'Amsterdam and Amendment to Article 230: An Opportunity Lost or Simply Deferred?' in A Dashwood and A Johnston, *The Future of the Judicial System of the European Union* (Hart Publishing 2001) 37; A Abaquense de Parfouru, 'Locus Standi of Private Applicants under the Article 230 EC Action for Annulment: Any Lessons to be Learnt from France?' [2007] 14 MJ Eur Comp Law 361; A Cygan, 'Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC' [2003] 52 Int Comp Law Quarterly 995; X Lewis, 'Standing of Private Claimants to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?' [2006-2007] 30 Fordham Int LJ 1496.

³⁵ Opinion of Advocate General Jacobs in case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

³⁶ Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365.

³⁷ Opinion of the AG in case T-173/98 *Unión de Pequeños Agricultores v Council of the European Union* [1999] ECR II-3357, para. 60. In this context, the AG also highlighted the perverse effects of the *Plaumann* test, namely that the greater the number of persons affected by a measure, the less likely than an action under Article 230(4) TEC (i.e. the pre-Lisbon equivalent of Article 263(4) TFEU) would succeed.

then Article 230 EC (now Article 263(4) TFEU) fell outside its jurisdiction, the *Plaumann* formula had to be modified if a right to effective judicial protection was to be upheld in the Community legal order. In particular, the Court emphasised that, in its view, there was no compelling reason to interpret the concept of a person individually concerned in such a way as to require that an individual seeking to contest the validity of a measure of general application be distinguished from all other persons affected by that measure in the same way as the addressee. It thus developed its own test of standing, holding that:

"in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly *if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him*. In order to clearly emphasize that this change of approach with respect to the requirement of individual concern, the CFI added that the number and situation of other persons that are or could be equally affected by the measure challenged by the applicant are not pertinent issues".³⁸ (emphasis added)

However, the CJ – in the *UPA* case and in the appeal brought by the Commission against the judgment of the CFI in the *Jégo-Quéré* case³⁹ – issued a judgment in favour of maintaining the traditional interpretation of the "individual concern" test.⁴⁰ Specifically with regard to the new interpretation of individual concern that the CFI had developed, the CJ explained that

"[A]lthough the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty".⁴¹

According to the CJ, the CFI's interpretation of the standing requirements under Article 230(4) EC had the effect of removing all meaning from the requirement of individual concern and could thus not be accepted. According to the CJ, if the "individual concern" test

³⁸ Case T-177/01 *Jégo-Quéré v Commission of the European Communities* [2002] ECR II-2365, para. 51. With regard to the differences between the test of standing developed by AG Jacobs and that of the CFI, see JM Cortés Martín, 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' [2004] 11 MJ Eur Comp Law 242-245; T Tridimas and S Poli, "'Locus Standi' of Individuals under Article 230(4): the Return of Euridice?' in T Tridimas and S Poli, *Making community law: the legacy of Advocate General Francis Jacobs at the European Court of Justice* (Edward Elgar Publishing 2008) 79; M Granger, 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jégo-Quéré et Cie SA v Commission* and *Unión de Pequeños Agricultores v Council*'. [2003] 66 ML Rev 133; A Albor-Llorens, 'The standing of private parties to challenge community measures: has the European Court missed the boat?' 84.

³⁹ Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2002] ECR I-3425.

⁴⁰ Many scholars have considered these rulings by the CJ as a missed opportunity to broaden the access to the Community courts by private litigants and regarded the CJ's rulings as unconvincing. See, for example, C Koch, 'European Community – Challenge of Community Fisheries Regulation – Admissibility of Individual Applications under Article 230(4)' [2004] 98 American J Int Law 819; D Chalmers and G Monti, *European Union Law* (4th Ed.) (CUP 2006) 432-433; C Brown and J Morijn 'Comment on *Jégo-Quéré*' 41 [2004] CML Rev 1654; F Ragolle, 'Access to justice for private applicants in the Community legal order: recent (r)evolutions' [2003] 28 EL Rev 101; A Albor-Llorens, 'The standing of private parties to challenge community measures: has the European Court missed the boat?' 92; JM Cortés Martín, 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' 245 ('this judgment [i.e. the CJ's judgment in *UPA*] gave the CJ an opportunity to confirm the solution proposed by AG Jacobs or the analysis established by the CFI in the *Jégo-Quéré* case, thereby avoiding once and for all, to the benefit of the fundamental principle of effective judicial protection, a potential quagmire that could persist in its case-law in the realm of judicial protection of individuals').

⁴¹ Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2002] ECR I-3425, para. 36.

needed to be reformed, such reform had to come from Treaty revision rather than from judicial decision-making.⁴²

The reform came with the Treaty of Lisbon and led to the formulation of Article 263(4) TFEU mentioned above. The Treaty of Lisbon modified the standing requirements for non-privileged applicants only marginally, i.e. dispensing with the need to show individual concern in relation to a regulatory act that does not entail implementing measures.

D. What does “regulatory act” mean?

From an examination of Article 263(4) TFEU, it seems clear that the basic policy underlying the system of judicial review has not been changed vis-à-vis the old Article 230(4) EC:⁴³ individuals wishing to challenge acts that are not addressed to them still have to prove individual and direct concern. The relaxation of the standing rules will only apply to situations in which two requirements are met: first, when the measure under challenge is a regulatory act, and second, when the measure in question does not entail implementing measures.

In order to assess the potential impact of this change, the meaning of the phrase “regulatory act” must be explained first. The phrase “regulatory act” is, like the amendment itself, a leftover from the Constitutional Treaty,⁴⁴ although no definition of a “regulatory act” can be found, neither in the Constitutional Treaty nor in the Treaty of Lisbon.⁴⁵ However, in the light of the distinction made between legislative acts⁴⁶ and non-legislative acts of general application,⁴⁷ the latter acts can be generally regarded as “regulatory acts” within the meaning of Article 263(4).⁴⁸ These acts can thus certainly be implementing and delegated regulations adopted under Articles 290 and 291(2) TFEU and possibly also decisions of general application.⁴⁹

The issue of the identification of a “regulatory act” was raised and became of particular significance in *Inuit*, in which the applicants were seeking the annulment of a regulation concerning the trade in seal products and interim measures in the form of an order of suspension of the operation of the regulation itself. Having carried out a literal, historical

⁴² Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, paras. 44-45.

⁴³ The “old” Article 230(4) EC provided that natural and legal persons could bring “proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”.

⁴⁴ The Convention for the Future of Europe took the view that a relaxation of the test of individual concern would be desirable. See Final Report of Discussion Circle CONV 636/03. This relaxation was later introduced in Article III-270(4) of the Constitutional Treaty. For a detailed account of the alternatives considered by the Discussion Circle, see R Barents, ‘The Court of Justice in the Draft Constitution’ [2004] 11 Maastricht Journal of European and Comparative Law 130.

⁴⁵ Koch regards this omission as regrettable, especially because it concerns ‘a provision which directly impacts on private parties’ procedural rights’. C Koch, ‘*Locus standi* of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ rights to an effective remedy’ [2005] 30 EL Rev 520.

⁴⁶ According to Article 289(3) TFEU, a legislative act is an act adopted in accordance with a legislative procedure, either the ordinary procedure or a special legislative procedure.

⁴⁷ According to Article 290(1) TFEU, “a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act”.

⁴⁸ C Brown and J Morijn, ‘Comment on *Jégo-Quéré*’ 1655.

⁴⁹ C Koch, ‘*Locus standi* of private applicants under the EU Constitution: preserving gaps in the protection of individuals’ rights to an effective remedy’ 519-521. For a further discussion on this topic, see S Balthasar, ‘*Locus Standi* Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU’ [2010] 35 EL Rev 542.

and teleological interpretation of Article 263(4) TFEU, the GC concluded that regulatory acts are to be considered "all acts of general application apart from legislative acts".⁵⁰

Furthermore, the *locus standi* of individual applicants is broadened in the Treaty only with regard to regulatory acts which do not require implementing measures, that is, when the applicant could only obtain access to justice by breaching the provisions of the contested measure and invoking its invalidity as a defence in criminal or administrative proceedings against him before a national court.

E. A "complete" system of remedies?

The CJEU has, on several occasions, justified this restrictive approach to the standing of private applicants in annulment actions by referring to the idea of a "complete system of remedies" created by the EC Treaty (now TFEU).⁵¹ In the Court's view, this system is complete because an EU measure may be challenged either through a direct action under Article 263 TFEU or through the preliminary ruling procedure pursuant to Article 267 TFEU. Hence, according to the CJEU, a restrictive interpretation of "individual concern" does not create a gap in the judicial protection, because individuals have the option to bring actions against the national implementation measures of EU measures before the national courts, which creates the obligation, pursuant to Article 267 TFEU and the CJEU's ruling in *Foto-Frost*,⁵² to refer the questions of validity of EU measures to the CJEU.⁵³ However, for all the reasons highlighted by AG Jacobs in the *UPA* case,⁵⁴ an indirect challenge of EU measures at the national level may not be regarded as adequate substitute for a direct action before the European judicature, and may result in the denial of any remedy, or of an effective remedy.⁵⁵

The first situation arises when the contested EU measure does not require any implementing act at the national level. In this situation, the only way for the applicants to have access to court would be to violate the rules laid down in the contested EU measure and rely on the invalidity of this measure in domestic proceedings. It has been considered that this option is theoretically possible, but cannot be sustained in a Union based on the rule of law.⁵⁶ As AG Jacobs put it, individuals "cannot be required to breach the law in order to gain access to justice".⁵⁷ Hence, in such situations, the CJEU's reliance on the preliminary ruling proceedings would result in a complete lack of judicial protection.

⁵⁰ Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR 0000, para. 56. The same has been recently confirmed in the case T-262/10 *Microban International and Microban (Europe) v Commission* [2011] ECR II-0000.

⁵¹ Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

⁵² Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁵³ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

⁵⁴ Opinion of Advocate General Jacobs in case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

⁵⁵ C Koch, 'Locus Standi of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy' 515.

⁵⁶ C Koch, 'Locus Standi of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy' 515; F Ragolle, 'Access to justice for private applicants in the Community legal order: recent (r)evolutions' 91; A Albor-Llorens, 'The standing of private parties to challenge community measures: has the European Court missed the boat?' 87.

⁵⁷ Opinion of Advocate General Jacobs in case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para. 43. The dilemma for individuals in such situations is explained by Corthaut: 'either [the individual] obeys the regulation in spite of her doubts as to its validity – which may result in unnecessary losses – or she may choose to violate the regulation and hope that her hunch about its invalidity proves correct – if so, she walks free, otherwise little can save her from potentially severe punishment'. T

The second situation arises when applicants are able to gain access to national courts. For such situations, in the CJEU's view, "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection".⁵⁸

However, several problems can be observed with regard to the CJEU's reliance on national courts as the appropriate forum for cases in which the validity of EU legislation is in question. For instance, the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the CJEU or might err in their assessment of the validity of an EU measure and decline to refer a question to the CJEU on that basis. In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might not include all measures whose validity is being challenged before the national court. Furthermore, proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.

These problems are exacerbated by the situation created by the CJEU's ruling in *Textilwerke Deggendorf v. Germany*, where the Court held that litigants are precluded from bringing Article 267 TFEU validity proceedings before national courts if they "without any doubt" would have been entitled to bring an annulment action within the two-month deadline provided in Article 263(5) TFEU.⁵⁹ However, it is not always an easy assessment to decide whether the applicant falls within a "closed class", entitled to standing before the GC. This means that it may not be an easy choice for applicants to determine whether they are amongst the group bound to seek an annulment remedy or whether they should instead seize the national courts.

The changes discussed above brought by the Treaty of Lisbon only partially resolve the issues highlighted by AG Jacobs and are connected to the need to provide for a complete system of judicial protection. To return to the distinction made above, it can be argued that these amendments aim solely at overcoming the problems created in the situations of "complete lack of remedy". In these cases, access to the EU Courts has been made easier. However, even in such situations not all of the problems for private applicants have been solved in this way. By way of an illustration, an applicant such as *Jégo-Quéré* will, under the new regime, be granted standing, since he would be challenging a regulatory measure which does not entail implementing measures. Hence, under the new formulation contained in Article 263(4) TFEU, he would only need to demonstrate direct concern. In contrast, an applicant such as UPA would still face great difficulties in exercising its right to an effective legal remedy, since it would not be challenging a regulatory act, and would thus still need to demonstrate individual concern – the lack of which was the very reason why it was not granted standing. This situation would consequently lead to a "complete lack of remedy" since, as in the case of *Jégo-Quéré*, there would not be any national measure which UPA

Corthaut, 'Comment on *Jégo-Quéré*' [2002/2003] 9 Columbia Journal of European Law 143. This situation is exactly what prompted the CFI to relax the test of standing in the *Jégo-Quéré* case and declare the action admissible.

⁵⁸ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para. 41.

⁵⁹ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833.

could have challenged. Therefore, the preliminary ruling procedure would not have been open to the applicant.⁶⁰ This result is clearly not to be favoured since it makes the possibility of access to court dependent on the nature of the act (regulatory or not) that is being challenged.⁶¹ To illustrate – using the facts of *Jego-Quéré*: if the Union would set the size of the fishing nets by a legislative act, the fishing company would still have to show direct and individual concern. However, if the size of the fishing nets would be set by a regulatory act implementing a legislative act, the fishing company would have standing automatically. This has correctly been regarded as an absurd result, since it contradicts the CJEU's case-law according to which the content, and not the form, of the act is decisive for whether it can be challenged with an action for annulment.⁶²

Furthermore, the problems connected to the situation of "lack of an effective remedy" remain.⁶³ The question whether the alternative route of challenge of EU measures via the preliminary reference procedure effectively guarantees the right to access to justice of individuals will continue to be posed also with the new formulation of Article 263(4) TFEU,⁶⁴ since the problems of the use of the preliminary reference procedure highlighted by AG Jacobs still remain unresolved. The same can be argued with regard to the choice imposed by the Court to litigants through its *Textilwerke Deggendorf* ruling.

2.3.2. Action for failure to act

The last paragraph of Article 265 TFEU grants standing to those individual and legal persons who can claim that the EU institutions, bodies, agencies or offices have failed to address them an act other than a recommendation or opinion.

The EU Courts have taken this provision to mean that an action brought by a national or legal person can be only be admissible if it relates to failure to adopt an act which has a direct influence on that person's legal position.⁶⁵ Consequently, actions for failure to adopt measures of general application have consistently been held as inadmissible.⁶⁶

⁶⁰ J Usher 'Direct and Individual Concern – An Effective Remedy or a Conventional Solution' [2005] 28 EL Rev 599; JM Cortés Martín 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads', 599; A Abaquesse de Parfouru 'Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?', 401. This test is thus much stricter than that proposed by both the AG in *UPA* and the CFI in *Jégo-Quéré*. As Lewis points out that this test is more restrictive, since the more generous rules of standing only apply to challenges against regulatory acts. X Lewis 'Standing of Private Claimants to Annul Generally Applicable European Community Measures: if the System is Broken, where Should it be Fixed?' 1352. See also A Dashwood and A Johnston 'The institutions of the enlarged EU under the regime of the Constitutional Treaty' [2004] 41 CML Rev 1509.

⁶¹ C Koch 'Locus Standi of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy', 526. Sceptical also J Usher 'Direct and individual concern – an effective remedy or a conventional solution?', 599; A Arnall 'A constitutional court for Europe?' [2005] 11 Cambridge Yearbook Eur Leg Studies 29.

⁶² R Barents 'The Court of Justice in the draft Constitution' 134.

⁶³ C Koch 'Locus Standi of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy' 519.

⁶⁴ A Abaquesse de Parfouru 'Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?' 401-402; C Brown and J Morijn 'Comment on *Jégo-Quéré*' 1659.

⁶⁵ Case C-6/70 *Gilberto Borromeo Arese and others v Commission of the European Communities* [1970] ECR 815; case C-15/70 *Amedeo Chevalley v Commission of the European Communities* [1970] ECR 975; case C-371/89 *Maria-Theresia Emrich v Commission of the European Communities* [1990] ECR I-1555 para. 6; case T-5/94 *J v Commission of the European Communities* [1994] ECR II-391, para. 16.

⁶⁶ Case C-15/71 *C. Mackprang jr. v Commission of the European Communities* [1971] ECR 797, para. 4; case C-134/73 *Holtz & Willemsen GmbH v Council of the European Communities* [1974] ECR 1, para. 5.

However, in spite of the more stringent wording of Article 265(3) TFEU in comparison with Article 263(4), the CJEU has held that the two provisions prescribe one and the same method of recourse.⁶⁷ Consequently, according to the CJEU, the scope of the action for failure to act is not confined to the defendant institution's failure to adopt a particular measure addressed to the applicant: this means that it is, in principle, possible to challenge a failure to adopt a measure of general application, but the requirements of individual and direct concern will have to be met.⁶⁸ Hence, *mutatis mutandis*, all considerations made below and above concerning the *locus standi* for individuals in annulment actions may be applied with regard to actions for failure to act.

2.3.3. Action for damages

Any natural or legal person who claims to have been injured by acts or conduct of an EU institution or its officials or servants may seek compensation for the damages allegedly suffered.⁶⁹ This is not explicitly stated in the provisions governing the action for damages, i.e. Articles 268 and 340 TFEU but may be derived from the way in which these provisions are phrased.

Concerning the action for damages, it must be clarified that according to the CJEU's case-law, an application for damages is an independent remedy which may be claimed independently of all other remedies based on national or EU law:⁷⁰ this has been argued in relation to both proceedings for failure to act⁷¹ and proceedings for annulment.⁷²

At the same time, however, the Court requires applicants to first seek redress before the national courts (which may, if necessary, apply to the Court for a preliminary question of validity under Article 267 TFEU) before turning to Article 340 TFEU damages.⁷³ Nevertheless, this requirement only applies if such national proceedings would have afforded the applicant with an effective remedy.⁷⁴ The CJEU, however, has not been clear in defining the criteria to determine the correct avenue for those seeking compensation for damage suffered as a result of unlawful EU measures,⁷⁵ and it has, at times, heard claims

⁶⁷ Case C-68/95 *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, para. 59; case T-17/96 *Télévision française 1 SA (TF1) v Commission of the European Communities* [1999] ECR II-1757, para. 27; case T-103/99 *Associazione delle cantine sociali venete v European Ombudsman and European Parliament* [2000] ECR II-4165.

⁶⁸ See e.g. case C-247/87 *Star Fruit Company SA v Commission of the European Communities* [1989] ECR 291, para. 13.

⁶⁹ Case C-118/83 *CMC Cooperativa muratori e cementisti and others v Commission of the European Communities* [1985] ECR 2325.

⁷⁰ Case C-4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECR 325; case C-5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 975; case C-234/02 *P. European Ombudsman v Frank Lamberts* [2004] ECR I-2803.

⁷¹ Case C-4/69 *Alfons Lütticke GmbH v Commission of the European Communities* [1971] ECR 325.

⁷² Case C-5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 975.

⁷³ Joined cases C-116 and 124/77 *G. R. Amylum NV and Tunnel Refineries Limited v Council and Commission of the European Communities* [1979] ECR 3497; case C-12/79 *Hans-Otto Wagner GmbH Agrarhandel KG v Commission of the European Communities* [1979] ECR 3657; case C-217/81 *Compagnie Interagra SA v Commission of the European Communities* [1982] ECR 2233.

⁷⁴ Case C-63/89 *Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA v Council of the European Communities and Commission of the European Communities* [1991] ECR I-1799. The CFI clarified that, if the fault is clearly attributable to the EU institutions and not the national institutions, there is no need to pursue the domestic avenues because national remedies cannot guarantee effective judicial protection. Case T-52/99 *T. Port GmbH & Co. KG v Commission of the European Communities* [2001] ECR II-981.

⁷⁵ A Ward 'Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post-Jégo-Quéré' [2001] 4 Cambridge Yearbook of Eur Leg Studies 424.

for damages without providing an explanation as to why they were admissible despite the fact that the applicants had not instigated an Article 267 TFEU validity claim before the national courts.⁷⁶

Hence, similar considerations concerning the difficulty in choosing the right forum for challenging the validity of EU action may be made with regard to the uncertainty surrounding the avenues for damages actions.

2.3.4. Appeal

In the EU legal system, permission of the GC or the CJ is not required in order to bring an appeal.

According to Article 56 of the Statute of the CJ, an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions,⁷⁷ provided that the appeal, if successful, is likely to procure an advantage to the party bringing it.⁷⁸

However, interveners⁷⁹ in the first instance proceedings other than the Member States and the institutions of the Union may bring such an appeal only where the appealed decision directly affects them.⁸⁰ Doctrine suggests that the interest which an intervener must show is the same interest that has to be shown in order to obtain leave to intervene in the first instance proceedings. However, because of the fact-finding activity already carried out at first instance, the CJEU has a more concrete basis than the GC when appraising the interest of the intervener. It is, therefore, considered possible that the intervener at first instance will be refused leave to appeal.⁸¹

2.4. Third party intervention before the EU Courts

According to Article 40 of the Statute of the Court of Justice, individuals may intervene in cases before the Court of Justice where they can establish "an interest in the result of a case submitted to the Court". On the basis of the same article, an application to intervene shall be limited to supporting the form of order sought by one of the parties. Furthermore, natural or legal persons may not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

⁷⁶ Case C-63/89 *Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA v Council of the European Communities and Commission of the European Communities* [1991] ECR I-1799; case C-352/98 P. *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* [2000] ECR I-5291; further on this point see P. Oliver 'Joint liability of the Community and the Member States' in T Heukels and A McDonnell, *The Action for Damages in Community law* (Kluwer 1997) 285.

⁷⁷ Case C-383/99 P *Procter & Gamble Company v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2001] ECR I-6251.

⁷⁸ Case C-19/93 P *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission of the European Communities* [1995] ECR I-3319.

⁷⁹ See below under 2.4.2. for an examination of the rules concerning intervention before the EU Courts.

⁸⁰ Case C-200/92 P *Imperial Chemical Industries plc (ICI) v Commission of the European Communities* [1999] ECR I-4399, para. 22-33; joined cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power plc, British Coal Corporation, PowerGen (UK) plc and Commission of the European Communities v National Association of Licensed Opencast Operators (NALOO)* [2003] ECR I-11421.

⁸¹ K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union* (Sweet & Maxwell 2006) (2nd Ed) 461.

2.4.1. What does “interest in the result of a case submitted to the Court” mean?

According to the EU Courts' case-law, “an interest in the result of a case submitted to the Court” will exist if the intervenor's legal position or economic situation might actually be directly affected by the ruling.⁸² Not unlikely *vis-à-vis* standing for main applicants, the EU Courts have been rather strict with regard to interveners and have held that, in order to be granted leave to intervene, it is not sufficient for the intervenor to be in a similar situation to one of the parties in the proceedings and, for that reason, to maintain that he/she has an indirect interest in the ruling of the GC or the CJ.⁸³ Similarly, the CJEU has held that a person's interest in one of the pleas raised by a party to the proceedings succeeding or failing is insufficient, if the operative part of the decision to be taken by the court has no bearing on that party's legal position or economic situation.⁸⁴

In the context of an action for damages, it is, therefore, very difficult to obtain leave to intervene, since it is very difficult for a person to show that he/she has a direct interest in the Court's ruling. Since the form of order sought by the applicant is aimed towards obtaining compensation for the damages allegedly sustained by him/her, a potential intervenor can hardly be able to claim a direct interest in the outcome of the proceedings. At most, he/she would be able to claim an indirect interest in a judgment which may influence the way in which the EU institutions would, for the future, treat the potential intervenor's legal position.⁸⁵ However, such an interest has been deemed insufficient by the CJEU.⁸⁶

In the context of actions for annulment, it is certainly possible to obtain leave in proceedings against an individual measure addressed to a specific natural or legal person. Hence, it has been considered that a person to whom a decision is addressed has an interest in intervening in the annulment proceedings brought by another addressee of the decision⁸⁷ and, in the same way, that a competitor of an undertaking which allegedly violated EU competition law has an interest in intervening in support of the form of order sought by the Commission.⁸⁸ If, instead, the prospective intervenor can only establish an

⁸² Case C-40/79 *Mrs P v Commission of the European Communities* [1981] ECR 361. For example, an undertaking who is the subject of a complaint brought against it before the Commission for violation of competition rules has an interest in intervening in the action for failure to act brought by the complainant against the Commission, because it has an interest in the court not calling the Commission upon acting against it. Case T-74/92 *Ladbroke Racing Deutschland GmbH v Commission of the European Communities* [1995] ECR II-115, para. 8-9. Similarly, an undertaking which brought a complaint which caused the Commission to find a violation of competition rules has an interest in the proceedings brought against the Commission by the undertaking which had been found in violation of those competition rules. Case T-35/91 *Eurosport Consortium v Commission of the European Communities* [1991] ECR II-1359.

⁸³ Joined cases C-186/02 P and C-188/02 P *Ramondín SA and Ramondín Cápsulas SA (C-186/02 P) and Territorio Histórico de Álava - Diputación Foral de Álava (C-188/02 P) v Commission of the European Communities* [2004] ECR I-10653; case T-87/92 *BVBA Kruidvat v Commission of the European Communities* [1996] ECR II-1931.

⁸⁴ Joined cases C-151/97 P and C-157/97 P *National Power plc and PowerGen plc v British Coal Corporation and Commission of the European Communities* [1997] ECR I-3491.

⁸⁵ K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union* (Sweet & Maxwell 2006) (2nd Ed) 571.

⁸⁶ T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council of the European Union and Commission of the European Communities* [1997] ECR I-351, para. 15-21.

⁸⁷ Case C-245/95 P *Commission of the European Communities v NTN Corporation and Koyo Seiko Co. Ltd. and Council of the European Union* [1998] ECR I-401.

⁸⁸ Case T-201/04 R *Microsoft Corp. v Commission of the European Communities* [2004] II-4463.

interest based on alleged similarities between his situation and the one of the parties in the main proceedings, the application will be dismissed according to established case-law.⁸⁹

2.4.2. Intervention of associations

According to the case-law of the EU Courts, in general, associations have the right to intervene if the outcome of the proceedings is liable to affect the *collective* interest defended by the association.⁹⁰ This means that, unlike individuals, such associations do not have to show that their own legal position or economic situation is likely to be affected by the outcome of the proceedings, nor that of each and every single member of the association. Instead, they will be considered to have an interest in intervening if this interest coincides with that of the majority of its members and its intervention will allow the CJEU to better assess the situation at stake.⁹¹ It has been considered that this more flexible approach somehow compensates for the rather restrictive attitude towards applications for interventions by individuals.⁹²

However, the same does not apply for associations defending public interests. For public interest groups (PIGs), such as environmental associations, it is very difficult, if not impossible, to obtain leave to intervene, since they can hardly, if at all, demonstrate that the outcome of the main proceedings is liable to affect the interest of the association, given that, these associations defend public interests which are not imputable to a specific group of individuals. If an environmental association does not represent the interests of a certain, well-defined group of individuals, it has to prove that its own legal position or economic situation is likely to be affected by the outcome of the case.

Emblematic in this sense is the *Autonomous Region of the Azores* case⁹³ in which the Autonomous Region sought the annulment in part of a regulation on the management of the fishing effort relating to Community fishing areas and resources. Three environmental associations, Seas at Risk, the WWF and Stichting Greenpeace Council, sought leave to intervene in the case in support of the applicant. However, leave to intervene was denied on the grounds that their interest was too wide to be representative of the interests of the Azorean fishermen affected by the contested EU Regulation.

2.4.3. Position of the original parties and appeal

Third parties cannot be prevented from intervening by the original parties to the action. However, according to Article 93(2) of the Rules of Procedure of the Court of Justice and Article 116(1) of the Rules of Procedure of the General Court, the President of the Court

⁸⁹ Case T-191/96 *CAS Succhi di Frutta SpA v Commission of the European Communities* [1998] ECR II-573; C-155/98 P-I *Spyridoula Celia Alexopoulou v Commission of the European Communities* [1998] I-4943; C-188/02 P *Ramondin SA and Ramondin Cápsulas SA (C-186/02 P) and Territorio Histórico de Álava - Diputación Foral de Álava (C-188/02 P) v Commission of the European Communities* [2004] ECR I-10653, where a local authority basing its request to intervene on the similarity of an aid regime applicable on its region to that applicable in another region where the latter has been declared incompatible with the common market, was refused leave (para. 14-17).

⁹⁰ Case T-87/92 *BVBA Kruidvat v Commission of the European Communities* [1996] ECR II-1931; T-135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union* [1998] ECR II-2335.

⁹¹ Case T-37/04 *Região Autónoma dos Açores v Council of the European Union* [2008] ECR II-103.

⁹² K Lenaerts, D Arts and I Maselis, *Procedural Law of the European Union*, para. 24-101.

⁹³ Case T-37/04 *Região Autónoma dos Açores v Council of the European Union* [2008] ECR II-103.

must give the parties an opportunity to submit their written or oral observations before deciding on the application to intervene.

Finally, according to Article 57 of the Statute of the Court of Justice, any person whose application to intervene has been dismissed by the GC may appeal to the CJ within two weeks from the notification of the decision dismissing the application.

2.5. Multi-party litigation at EU level

At EU level, there is no possibility as such for multi-party litigation: in other words, there is no specific action allowing a large group of litigants to vindicate their rights; thus, one of the three actions mentioned above would have to be brought.

None of those, however, would be readily successful:

An action for failure to act would most probably not be admissible because it would be impossible in such a situation to show that an EU institution, body, agency or office failed to address an act *specifically* to each of the applicants.

An action for annulment would be equally unsuccessful because it would be impossible for the applicant to pass the hurdle of "individual concern" as interpreted by the CJEU in *Plaumann*, since the very fact that a large number of litigants are affected signifies that none of them is actually affected in a way which differentiates him/her from all other persons possibly affected by a challenged measure. When individual concern could be dispensed with, i.e. in cases of "regulatory acts", there could be a possibility for multi-party litigation given the definition of regulatory act as a measure of general application not adopted with the ordinary legislative procedure. However, direct concern would still have to be shown by the applicants, and the same procedure as in "normal" actions for annulment would have to be followed.

An action for damages could in principle be admissible, if each of the applicants would claim that they have suffered damage personally as a consequence of the Union's action or omission.

2.6. The protection of public interests before the EU Courts

There is no possibility for the defence of public interests (i.e. interest(s) not imputable to a specific individual or group of individuals) before the CJEU, because of the standing requirements and their strict interpretation by the CJEU.

Similarly to what has been mentioned with regard to multi-party litigation, an action for failure to act would not be admissible, because it would be impossible in such a situation to show that an EU institution, body, agency or office failed to address an act *specifically* to the applicants.

An action for annulment would be equally unsuccessful because it would be impossible for the applicant to pass the hurdle of "individual concern" as interpreted by the CJEU in *Plaumann*, since the very nature of the claim makes it impossible for an applicant to show that he is actually affected in a way which differentiates him from all other persons possibly affected by a challenged measure, since the aim of the claim is exactly to protect goods or interests which belong to the collective in general (such as the environment). When individual concern could be dispensed with, i.e. in cases of "regulatory acts" which do not

entail implementing measures, there could be a possibility for the defence of public interests, given the definition of regulatory act as a measure of general application not adopted with the ordinary legislative procedure. However, direct concern would still have to be shown by the applicants and the same procedure as with "normal" actions for annulment would have to be followed. This point, especially with regard to the environment, will be further elaborated below under section 2.6.1.

An action for damages, finally, will not be admissible because the applicant will not be able to claim that he/she has been harmed personally by the EU action or omission.

2.7. Beyond the *Plaumann* orthodoxy: the EU Courts' practice in the application of the *Plaumann* doctrine

As discussed above,⁹⁴ the requirements of standing at first instance change according to the *type of action* brought. Apart from this differentiation, there are, formally, no further requirements applicable on the basis of the field of substantive law at hand, or the claimant's nature (within the category of "natural and legal persons"). However, it has been the *interpretation* and especially the *application* of the standing requirements that has brought about some differences in the admission of actions on the basis of the policy field at stake and the nature of the claim and the claimant. This is especially true for the requirement of "individual concern" contained in Article 263(4) TFEU, which will be further analysed below.

2.7.1. The results of the EU Courts' application of "individual concern" in the different policy fields

In certain policy fields, the CJEU has adopted a more liberal approach to the test of individual concern. In particular, in the fields of anti-dumping,⁹⁵ State aid⁹⁶ and competition investigations,⁹⁷ the CJEU has held that applicants were individually concerned as a result of their participation in the procedure leading to the adoption of the contested EU measure. The "orthodox" application of the *Plaumann* doctrine would have led, in these cases, to the dismissal of the claim because the measure affected only members of an "open" category. Also, in the same field, in *Extramet*, the CJ considered the applicant to be individually concerned because of the "adverse effects" of the challenged measure on his/her interests.⁹⁸ It should be noted, however, that this ruling was later limited only to the field of anti-dumping and, even within this area, it was considered in later cases that the ruling in *Extramet* was justified by the specific circumstances of the case.⁹⁹

At the same time, application of the requirement of the *Plaumann* interpretation of the notion of "individual concern" to the environmental field has led to the outcome that no

⁹⁴ See above section 2.2.

⁹⁵ Case C-264/82 *Timex Corporation v Council and Commission of the European Communities* [1985] ECR 849, paras. 14-15.

⁹⁶ Case C-169/84 *Société CdF Chimie azote et fertilisants SA and Société chimique de la Grande Paroisse SA v Commission of the European Communities* [1990] ECR I-3083.

⁹⁷ Case C-75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1986] ECR 3021.

⁹⁸ Case C-358/89 *Extramet Industrie SA v Council of the European Communities* [1992] I-3813.

⁹⁹ See cases T-597/97 *Euromin SA v Council of the European Union* [2000] ECR II-2419; T-598/97 *British Shoe Corporation Footwear Supplies Ltd and Others v Council of the European Union* [2002] II-1155.

claim is ever and will ever be admissible. This approach towards the issue of *locus standi* in environmental policy has been criticised by doctrine and NGOs alike.¹⁰⁰

The application of the *Plaumann* jurisprudence to the environmental field was considered for the first time in the *Stichting Greenpeace Council* case.¹⁰¹ In this case, the, then, CFI held that the *Plaumann* test “remains applicable whatever the nature, economic or otherwise, of those of the applicants’ interests which are affected”¹⁰² and did not set up an exception for environmental matters. By applying the *Plaumann* test, the CFI concluded that, since the applicant association did not “adduce any special circumstances to demonstrate the individual interest of their members as opposed to any other person residing in those areas”¹⁰³ and, therefore, “[T]he possible effect on the legal position of the members of the applicant associations cannot ... be any different from that alleged here by the applicants who are private individuals”,¹⁰⁴ standing had to be refused.

On appeal, the CJ confirmed the judgment of the CFI in applying the *Plaumann* test.¹⁰⁵ In particular, the CJ was not convinced by the appellants’ plea that:

“by applying the case-law developed by the Court of Justice in relation to economic issues and economic rights, according to which an individual must belong to a “closed class” in order to be individually concerned by a Community act, the Court of First Instance failed to take account of the nature and specific character of the environmental interests underpinning their action.”¹⁰⁶

The CFI confirmed its position in the *EEB and Stichting Natuur en Milieu* case:¹⁰⁷ it reasserted the *Plaumann* jurisprudence and considered that the European Commission’s decisions affected the applicants in the same manner as any other person in the same situation, and that the fact that their purpose was the protection of the environment and the conservation of nature did not establish that they were individually concerned by the decisions. Not entirely consistent with what was held in the economic policy fields mentioned above, it also held that the special consultative status of the EEB and SNM with

¹⁰⁰ See A Cygan, ‘Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC’, 1011; Communication to the Aarhus Convention’s Compliance Committee by Friends of the Earth, available at <http://www.unece.org/env/pp/compliance/Compliancecommittee/17TableEC.html>.

¹⁰¹ Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1995] ECR II-2205. In this case, Greenpeace International, together with local associations and residents in Gran Canaria, were seeking the annulment of a decision adopted by the European Commission to disburse to the Kingdom of Spain a certain sum by way of financial assistance provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands without first requiring or carrying out an environmental impact assessment.

¹⁰² Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1995] ECR II-2205 para. 50.

¹⁰³ Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1995] ECR II-2205 para. 60. This is the specific test relating to associational claims. See below under 2.6.2.

¹⁰⁴ Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1995] ECR II-2205 para. 60.

¹⁰⁵ Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-1651.

¹⁰⁶ Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-1651 para. 17.

¹⁰⁷ Joined cases T-236/04 and T-241/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission of the European Communities* [2005] ECR II-04945. In this case, the EEB, a federation of over 145 environmental citizens’ organisations based in the 27 EU Member States, and Stichting Natuur en Milieu (SNM) sought the annulment of certain provisions of two decisions of the European Commission which allowed the Member States to maintain in force authorisations for the use of two herbicide products with potential negative effects on the environment and human health.

the European institutions did not support the finding that they were individually concerned by the contested decisions as the Community legislation applicable to the adoption of the said decisions did not provide for any procedural guarantee for the applicants.

This line of case-law was later confirmed in the *WWF-UK* case.¹⁰⁸ As in the *EEB* case, neither the statutory aim of the applicant NGO to protect the environment, nor its special status allowing it to participate in the decision-making process of the contested regulation were criteria considered by the Court as giving the right to challenge the contested regulation.

On appeal,¹⁰⁹ the CJ confirmed the CFI's position and, in order to support its argument, made a distinction between substance and procedure, which cannot be found in the CFI's ruling. In particular, the CJ agreed on the fact that if a person is involved in the procedure leading to the adoption of a Community measure, this person is capable of distinguishing him/herself individually in relation to the measure in question if the applicable Community legislation grants him certain procedural guarantees. However, that person enjoying such a procedural right will, in the CJ's view, not have standing to bring proceedings contesting the legality of a Community act in terms of its *substantive* content.

According to the CJ, the applicant association had the right to be heard by the Commission prior to the adoption of the contested Community measure. However, there was no obligation for the Community legislature to implement the proposals made in the recommendations. From this distinction, the CJ drew the conclusion that the existence of a procedural guarantee before the Community judicature did not mean that the action was admissible, because it was based on pleas alleging the infringement of substantive rules of law.

2.7.2. "Individual concern" and claims of associations

The question of whether associations, including PIGs, could be regarded as individually concerned has frequently arisen before the CJEU. It appears from the case-law that actions brought by associations are only admissible in three cases:¹¹⁰ (a) when a legal provision grants procedural rights to these associations;¹¹¹ (b) where every single member of the association would be directly and individually concerned¹¹² or (c) where the association's interests, and especially its position as a negotiator, is affected by the measure.¹¹³

¹⁰⁸ Case T-91/07 *WWF-UK Ltd v Council of the European Union* [2008] ECR II-81. In this case, WWF-UK, an environmental NGO, sought the annulment in part of a Council regulation fixing the fishing opportunities for certain fish stocks applicable in Community waters. The CFI once again concluded that WWF-UK was not individually concerned by the contested regulation in reasserting the *Plaumann* jurisprudence and dismissed the action.

¹⁰⁹ Case C-355/08 P, *WWF-UK v Council of the European Union* [2009] ECR I-73.

¹¹⁰ Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities* [1998] ECR I-1651; T-122/96 *Federazione nazionale del commercio oleario (Federolio) v Commission of the European Communities* [1997] ECR II-1559.

¹¹¹ Case C-191/82 *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission of the European Communities* [1983] ECR 2913; T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vitell and Comité d'Etablissement de Pierval and Fédération Générale Agroalimentaire v Commission of the European Communities* [1995] ECR II-1247.

¹¹² Joined cases T-447/93, T-448/93 and T-449/93 *Associazione Italiana Tecnico Economica del Cemento and British Cement Association and Blue Circle Industries plc and Castle Cement Ltd and The Rugby Goup plc and Titan Cement Company SA v Commission of the European Communities* [1995] ECR II-1971; case T-380/94 *Association internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v Commission of the European Communities* [1996] ECR II-2169; T-

These requirements have made it almost impossible for associations to ever succeed in showing individual concern given that the cases under (a) are rare and the cases under (b) are as difficult (if not harder) to be successful as cases concerning individuals, given the strict interpretation of the *Plaumann* formula. Successful cases under (c) are also not very common since the CJEU has held that the test to be met is that the position of the association as negotiator is clearly defined and must be related to the subject matter of the contested act, and that that position must have been affected by the adoption of the contested act.¹¹⁴ The fact that an association has communicated information to an EU institution or has tried to influence the position adopted by the national authorities in the EU legislative procedure has been regarded to not suffice in itself to show that the act adopted affects an association in its position as a negotiator.¹¹⁵

2.7.3. "Individual concern" in special types of claims

In certain specific cases, the CJEU applied a more liberal interpretation of the test of "individual concern" seemingly because of the specific nature of the claim at stake.

First of all, it seems that an applicant will be individually concerned where the act at stake adversely affected his/her specific rights. However, this seems to have succeeded only in the case of *Codorniu*, where the Court held that a Spanish manufacturer of sparkling wine was individually concerned by a provision in a Council regulation what would have prevented using the term "*crémant*" in the description of its products.¹¹⁶ Other Spanish producers used that word as a designation of quality for their wines and the only factor which distinguished the applicant from all other Spanish wine producers was the fact that since 1924 it had held a trademark that included the term "*crémant*". The CJEU considered that the fact that the regulation would have prevented the applicant from using a lawfully held trademark was sufficient to distinguish it from all other wine producers. The circumstance of the special status conferred by the trademark was thus the decisive factor to allow standing. The attempt to rely on specific intellectual property rights was not successful in several other instances, although the CJEU seems to indicate that, where the applicant could show the existence of an intellectual property right, he/she would be considered individually concerned.¹¹⁷

229/02 *Osman Ocalan acting on behalf of Kurdistan Workers' Party (PKK) v Council of the European Union* [2008] ECR II-45.

¹¹³ Joined cases 67/85 R, 68/85 R and 70/85 R *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities* [1985] ECR 1315; case T-84/01 *Association contre l'horaire d'été (ACHE) v Council of the European Union and European Parliament* [2002] II-99.

¹¹⁴ Case C-106/98 P *Comité d'entreprise de la Société française de production, Syndicat national de radiodiffusion et de télévision CGT (SNRT-CGT), Syndicat unifié de radio et de télévision CFDT (SURT-CFDT), Syndicat national Force ouvrière de radiodiffusion et de télévision and Syndicat national de l'encadrement audiovisuel CFE-CGC (SNEA-CFE-CGC) v Commission of the European Communities* [2000] ECR I-3659, para. 45.

¹¹⁵ Case T-391/02 *Bundesverband der Nahrungsmittel- und Speiseresteverwertung eV and Josef Kloh v European Parliament and Council of the European Union* [2004] II-1447; T-264/03 *Jürgen Schmoldt and Others v Commission of the European Communities* [2004] II-1515.

¹¹⁶ Case C-309/89 *Codorniu SA v Commission of the European Communities* [1994] ECR I-1853.

¹¹⁷ Such as case C-391/08 P(R) *Dow Agrosciences Ltd and Others v European Commission* [2009] ECR I-219; case C-60/08 P(R) *Cheminova A/S and Others v Commission of the European Communities* [2009] ECR I-43; T-196/03 *European Federation for Cosmetic Ingredients (EFFCI) v European Parliament and Council of the European Union* [2004] ECR II-4263; T-370/02 *Alpenhain-Camembert-Werk and Others v Commission of the European Communities* [2004] ECR II-2097.

Secondly, applicants have been able to successfully show individual concern, where they have argued that, in adopting an act, the EU institutions were under a duty to take their specific circumstances into account.¹¹⁸ The fact that an applicant intervened somehow in the process of adoption of the contested measure can help in establishing individual concern where the applicable EU rules confer on that person specific procedural guarantees.¹¹⁹

Thirdly, the applicant will be individually concerned when the contested act mentions him/her by name (despite not being the addressee of the act) and a situation specific to him/her is directly governed by the act.¹²⁰

2.7.4. The importance of the claim

From the case *Les Verts*, it seems that, when higher values are at stake, the CJEU is prepared to dispense with the requirement of "individual concern" altogether. This, however, would only happen in very exceptional circumstances.

In this case, a new political party challenged two decisions of the European Parliament on the reimbursement of expenditure incurred by political parties in the 1984 elections. The decisions were considered as discriminating against new parties in favour of those already present in the European Parliament. The Court admitted that the applicants were not individually concerned, because they did not belong to a closed class, but considered that, unless they were given the opportunity to challenge the measures, a situation of profound inequality would arise in the protection afforded by the Court to the parties competing in the elections. In this case, thus, the Court simply circumvented the *Plaumann* test because the interest in having the decision reviewed prevailed over the traditional interpretation of "individual concern".

2.8. "Individual concern" as a tool for the administration of justice?

It does not appear from the case-law of the EU Courts that the rules on standing, and the hurdle of "individual concern" in particular, is used *explicitly* as a tool for the administration of justice, and for the reduction of the amount of litigation.

However, AG Jacobs tackled the case-load problem in his opinion in *UPA* and argued that it should not be overestimated and should not be an obstacle to more liberal standing rules

¹¹⁸ Case C-11/82 *SA Piraiki-Patraiki and others v Commission of the European Communities* [1985] ECR 207 paras. 17-32; C-209/94 *P Buralux SA, Satrod SA and Ourry SA v Council of the European Union* [1996] ECR I-615, paras. 30-35; C-152/88 *Sofrimport SARL v Commission of the European Communities* [1992] ECR I-153, para. 8-13; C-390/95 *P Antillean Rice Mills NV, European Rice Brokers AVV and Guyana Investments AVV v Commission of the European Communities* [1999] ECR I-769, para. 25-30. However, see also the cases C-451/98 *Antillean Rice Mills NV v Council of the European Union* [2001] ECR I-8949, para. 56-68 and case C-452/98 *Nederlandse Antillen v Council of the European Union* [2001] ECR I-8973, para. 54-77 in which the CJ stated that the requirement for the Council to take the effects of an intended safeguard measure on the address (i.e., in that cases an oversee territory) was not sufficient to individualise the territory in question.

¹¹⁹ Case T-47/00 *Rica Foods (Free Zone) NV v Commission of the European Communities* [2002] ECR II-113, para. 55; T-70/99 *Alpharma Inc. v Council of the European Union* [2002] ECR II-3495, para. 73-98; case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-3305, paras. 81-106.

¹²⁰ Joined cases 239/82 and 275/82 *Allied Corporation and others v Commission of the European Communities* [1984] ECR 1005 para. 12.

for private applicants in actions for annulment, in particular to the liberalisation of the strict requirement of individual concern. He stressed the importance of the time limit of two months provided in Article 230(5) EC (now provided in Article 263(5) TFEU) and the condition of direct concern in “prevent[ing] an insuperable increase of the case load”, and also noted that there are “procedural means to deal with a more limited increase of cases”.¹²¹

The issue of the excessive case-load for the CJEU is indeed an existing problem and has also been regarded as such by some scholars.¹²² However, it has also been noted that national courts where standing is less strict than before the European Courts do not seem to have experienced any abuse of the judicial review system.¹²³ Furthermore, as the AG Jacobs suggested, there are mechanisms in place to avoid the unpleasant consequences of more relaxed standing requirements. For example, it could be possible for the GC to dispose rapidly of manifestly unfounded claims by reasoned order.¹²⁴ Another solution that has been proposed is that of introducing a pre-hearing stage where a *prima facie* idea of the admissibility of the case could be formed, similarly to what happens before the ECtHR.¹²⁵

2.9. Influence of general principles

Articles 6 and 13 ECHR and Article 47 of the Charter have been used by the CFI and AG Jacobs in the *Jego-Quéré* and *UPA* cases in order to plead for a more liberal approach to the interpretation of the notion of individual concern.¹²⁶ In particular, the CFI considered that, in the light of these provisions, the preliminary ruling procedure was not to be regarded as an adequate substitute for an annulment action because it does not guarantee a right for an effective appeal.

The CJ did refer to Articles 6 and 13 ECHR when it held that “individuals are ... entitled to effective judicial protection for the right they derive from the Community legal order”¹²⁷ but, as discussed above, that reference did not lead the Court to re-think its approach to standing. Furthermore, the case-law referred to in this context by the CJ, namely the *Johnston*¹²⁸ and the *Commission v. Austria* cases,¹²⁹ concern the right to effective judicial protection before national courts - the Court focused on this latter issue in order to reject the CFI’s and the AG’s bold interpretations of “individual concern”.

¹²¹ Opinion of Advocate General Jacobs in case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para. 102.

¹²² Abaqueune de Parfouru, A. (2007) ‘*Locus Standi* of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?’, 364.

¹²³ A Cygan, ‘Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC’, 1001.

¹²⁴ Article 111 of the Rules of Procedure of the General Court.

¹²⁵ A Cygan, ‘Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC’, 1009.

¹²⁶ Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365 para. 47; Opinion of Advocate General Jacobs in case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677 para. 39.

¹²⁷ Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, para. 39; case C-263/02 P. *Commission of the European Communities v Jégo-Quéré & Cie SA*, para. 29.

¹²⁸ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

¹²⁹ Case C-424/99 *Commission of the European Communities v Republic of Austria* [2001] ECR I-9285.

Scholars have also noted that strikingly absent in the CJ's reasoning is the reference to Article 47 of the Charter, which both AG Jacobs and the CFI in *Jego-Quéré* had regarded as one of the main reasons to reconsider the case-law on individual concern, and which argues for the existence of a right to effective judicial protection not only before national courts but also before EU Courts.¹³⁰

The rejection of any argument based on Articles 6 and 13 of the ECHR and of Article 47 of the Charter has been repeated in several subsequent cases.¹³¹

2.10. Accession to the ECHR

A connected question to that of the influence of Articles 6 and 13 ECHR is whether the future accession of the EU to the ECHR will have any influence on the standing requirements applicable before the EU Courts.

As such, the binding effect of the ECHR in the EU legal order will not change, since the ECHR is already binding for the EU institutions. Also the current draft of the accession instrument and the current discussion on accession do not seem to add anything to the current situation of standing before the EU Courts.

However, it could be envisaged that, upon dismissal of a claim by the CJEU on the grounds of failure to fulfil the standing requirements, an individual could bring a claim to the ECtHR and argue, before that court, that his/her right to a fair trial, as provided in Article 6 ECHR, has been infringed.

In particular, the ECtHR has argued that Article 6 ECHR does not just provide a guarantee of fair conduct of the trial, but also a right of access to justice, as it would be meaningless, in the Court's view, to ensure that a fair trial takes place when individuals are prevented by national hurdles to access a court in the first place.¹³²

The question is thus whether the requirement of "individual concern" and its *Plaumann* interpretation comply with the requirements prescribed by Article 6 ECHR.

The 2005 *Bosphorus* judgment of the Grand Chamber of the ECtHR may already shed some light as to how the Strasbourg Court is likely to answer this question, if ever posed. In this judgment, the ECtHR did not directly tackle the compliance of Article 230(4) EC with Article 6 ECHR, but rather considered the overall system of remedies (available at both national and EU level) in the European legal order. Despite its observation that the applicant's right to initiate actions under Article 230 EC was restricted, it held that "the protection of fundamental rights by EC law can be considered to be "equivalent" to that of the Convention system".¹³³

¹³⁰ T Corthaut, 'Comment on *Jégo-Quéré*', 162.

¹³¹ See e.g. T-167/02 *Établissements Toulorge v European Parliament and Council of the European Union* [2003] ECR II-1111; case T-231/02 *Piero Gonnelli and Associazione Italiana Frantolani Oleari (AIFO) v Commission of the European Communities* [2004] ECR II-1051; case T-292/02 *Confederazione Nazionale dei Servizi (Confservizi) v Commission of the European Communities* [2009] ECR II-1659.

¹³² *Golder v United Kingdom* 1 EHRR 524 (1975); *Airey v Ireland* 2 EHRR 305 (1979-80).

¹³³ *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v Ireland* (Application n. 45036/98) 42 EHRR 1 (2006) paras. 162 and 165.

This suggests a positive attitude of the Strasbourg Courts towards the rules on *locus standi* applicable before the EU Courts. However, in his concurring opinion, Judge Ress, referring in particular to *Jego-Quéré* and *UPA*, stressed that the Strasbourg Court did not specifically address “the question of whether this limited access is really in accordance with Article 6(1) of the Convention”. Consequently, the Judge argued, “one should not infer from ... the judgment... that Court accepts that Article 6(1) does not call for a more extensive interpretation [of Article 230 EC]”.¹³⁴

2.11. The EU and the Aarhus Convention

A remaining question is the influence of the Aarhus Convention, an international instrument dealing with issues of standing in environmental matters, in the EU legal order.

The Aarhus Convention¹³⁵ was adopted by the European Community on 17 February 2005 by Decision 2005/370/EC¹³⁶ and it provides, in Article 9(2), that the contracting parties should ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right (where the administrative procedural law of a party requires this as a precondition), have access to a review procedure to challenge the substantive and procedural legality of decisions concerning activities subject to the public participation requirements of Article 6 of the Convention itself. Furthermore, Article 9(3) provides that parties are obliged to provide for a wide access of the members of the public to review procedures to challenge the legality of decisions affecting the environment.

To apply the provisions of the Aarhus Convention to EU institutions and bodies, the European Community adopted Regulation No 1367/2006 (the Aarhus Regulation).¹³⁷ Specifically with regard to non-governmental organisations, the Regulation allows those organisations which fulfil certain requirements¹³⁸ to institute proceedings before the EU Courts against the acts of EU institutions and the decisions of EU bodies. However, it expressly states that NGOs may do so only “in accordance with the relevant provisions of the EC Treaty” (Article 12(1)).¹³⁹

The GC and the CJ have had the opportunity, on several occasions, to comment upon the compliance of Article 263(4) TFEU (and formerly of Article 230(4) EC) with Article 9 of the Aarhus Convention, and they have invariably come to the conclusion that this international

¹³⁴ Concurrent opinion Judge Ress, para. 2.

¹³⁵ United Nations Economic Commission for Europe, ‘Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ (available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>) (last visited on 22 November 2011). The EU and all EU Member States are contracting party to the Convention.

¹³⁶ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1.

¹³⁷ Regulation 1367/2006/EC of 25 September 2006 of the European Parliament and of the Council 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] OJ L 264/13. The Regulation entered into force on 28 September 2006 and started to apply from 17 July 2007.

¹³⁸ Article 11 provides for certain criteria which must be fulfilled for NGOs to initiate an internal review procedure and action for annulment before the EU Courts.

¹³⁹ For a quite harsh criticism of this instrument, see J Jans, ‘Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies’ in R Macrory, *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (Europa Law Publishing 2006) 474.

instrument, and the transposing Aarhus Regulation, did not require any change in the *Plaumann* interpretation of the criterion of individual concern.¹⁴⁰

The EU Courts have held that Article 9 of the Aarhus Convention refers expressly to “the criteria, if any, laid down in [the] national law” of the contracting parties, and that those criteria were laid down, with regard to actions brought before the Community judicature, in Article 230 EC complemented by its *Plaumann* interpretation.¹⁴¹ Furthermore, it has been held that the special consultative status of the applicants with the European institutions did not support the finding that they were individually concerned by the contested decisions, as the then Community legislation applicable to the adoption of the said decisions did not provide for any procedural guarantee for the applicants.¹⁴²

The Courts have acknowledged that the Aarhus Regulation allows certain NGOs (i.e. those meeting the criteria set out in Article 11 of the Regulation) to bring an action for annulment before the Community judicature. However, the CJ deemed that “it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC”.¹⁴³

From the analysis of the case-law, it can be concluded that the CJEU seems to have ignored the requirements mandated by the Convention, since it has interpreted the criteria laid down in Article 230 EC so strictly as to bar all environmental organisations from challenging acts relating to the environment which are not in compliance with European law. The interpretation by the CJEU of the requirement of individual concern under Article 230 EC does not seem to comply with the requirements of Article 9(2) and (3) of the Aarhus Convention: applying the *Plaumann* test to environmental and health issues means that, in effect, no NGO is ever able to challenge an environmental measure before the CJEU.

Very recently, the GC has declared Article 10(1) of the Aarhus Regulation invalid on the grounds of its violation of Article 9(3) of the Aarhus Convention.¹⁴⁴ According to the Court, a review procedure must be available against any action of the administration falling under the scope of the Convention, including measures of a general nature, like regulations. However, Article 10 (1) limits the review procedure to measures of individual scope. This judgment truly will widen the scope and application of Article 10 of the Aarhus Regulation and, therefore, access to internal review procedures. However, it is not likely that it will widen *locus standi*, especially for NGOs before EU courts, as the GC upheld that a claimant who seeks judicial review pursuant to Article 12 against a decision taken in an internal review procedure will have to meet the criteria of individual concern, as laid down in Article 263(4) TFEU. Therefore, it seems that these recent judgments will not bring any changes with regard to the application of the *Plaumann* criteria. What can, however, be observed is that the broad interpretation given by the GC to Article 9(3) in these judgments stresses the need to rethink the doctrine of individual concern of Article 263(4) TFEU.

¹⁴⁰ Case T-91/07 *WWF-UK Ltd v Council of the European Union* [2008] ECR II-81.

¹⁴¹ Case T-37/04 *Região Autónoma dos Açores v Council of the European Union* [2008] ECR II-103.

¹⁴² Joined Cases T-236/04 and T-241/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission* [2005] ECR II-04945.

¹⁴³ Case T-37/04 *Região Autónoma dos Açores v Council of the European Union*, para 93.

¹⁴⁴ Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission* [2012] ECR nyr; case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission* [2012] ECR nyr.

The changes, discussed above, brought by the Lisbon Treaty to the wording of what is now Article 263(4) TFEU does not alter this conclusion, since many environmental measures fall outside the scope of the concept of a “regulatory act which does not entail implementing measures”:

First of all, many EU environmental measures are adopted in the form of directives. These are acts which, regardless of their legislative or non-legislative nature, by definition entail implementing measures and thus will not be included in the measures for which, according to Article 263(4) TFEU, individual concern does not need to be proven.

Secondly, even where the environmental measure is adopted by way of a decision (which was the case in the *EEB* case discussed above), the situation is not significantly improved for environmental NGOs. This is because the new wording of Article 263 TFEU, read in conjunction with Article 289(3) TFEU, precludes application to the Court against all decisions which were adopted by way of a legislative procedure. All decisions which are adopted by legislative procedure constitute “legislative acts”, and therefore cannot be challenged under the new wording in Article 263 TFEU. Furthermore, in the case of adoption by way of a non-legislative procedure, many decisions could still not be challenged in court under Article 263 TFEU, because they would either not qualify as regulatory acts because of a lack of general application, or because they need implementing measures at the EU or Member State level.

Thirdly, where a regulation is used to issue a measure which has an effect on the environment (which was the case in the *WWF-UK* and *Autonomous Region of the Azores* cases discussed above), the loosening of the standing requirements will only take place where the regulation is not adopted by legislative procedure and does not entail implementing measures. However, where regulations and decisions are used in the environmental field, they tend to entail a considerable number of implementing measures such as the designation of national competent authorities, the issuing of permits by national authorities, and the monitoring of respect for the provisions by the national authorities.¹⁴⁵ They are therefore normally not directly applicable, but require implementing provisions to be adopted by EU institutions or the Member States.

In conclusion, one could argue that the new wording of Article 263 TFEU will only affect a small number of measures and actions taken by EU institutions or bodies. As the new text only refers to provisions of regulatory acts which do not need implementation measures it is unlikely that a significant number of EU measures that affect the environment could be challenged under the new provision, hence, the violation of Article 9 Aarhus Convention remains.

2.12. Conclusion: general strictness with some exceptions

At EU level, the determination of *locus standi* depends on the type of remedy requested. The analysis carried out above has shown that, as far as actions for annulment are

¹⁴⁵ J Jans, ‘Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies’ in R Macrory, *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (Europa Law Publishing 2006), 485.

concerned,¹⁴⁶ the EU Courts, except in occasional instances, have been very strict with the control of the standing requirements. This control has essentially been exerted through the strict interpretation of the requirement of individual concern, which has not changed since the *Plaumann* case. Despite the reliance on an allegedly "complete" system of remedies and the changes brought by the Lisbon Treaty, the test is still very difficult to pass and certain situations of "complete lack of remedy" remain. Furthermore, the problems highlighted above and connected to the situation of "lack of an effective remedy" remain, with the preliminary reference procedure being unable to effectively guarantee the right of access to justice for individuals, and the system set up by the *Textilwerke Deggendorf* judgment exacerbating the problem.

As discussed above, this strictness is particularly striking and dangerous in connection with the protection of public interests, since it essentially exempts from judicial review any action taken in violation of EU environmental law. The examination of the case-law has shown that the strict application of the *Plaumann* test in the environmental field has led to PIGs always being denied individual concern. Also, this strictness stands in contrast with the relative openness of the CJEU to protect economic rights and the acceptance of a less strict interpretation of "individual concern" in specific economic policy fields. Moreover, it has been shown that not only are PIGs unable to directly challenge EU measures allegedly taken in violation of EU environmental law, but, due to the CJEU's case-law, they are also unable to intervene in an action for annulment.

The CJ, despite recalling Articles 6 and 13 ECHR and Article 47 of the Charter, has refused to change the long-standing interpretation of "individual concern" and has left it to the Member States to provide for more relaxed standing rules by way of Treaty reform. This position has been criticised by many scholars who have argued that the notion of individual concern is not expressly defined in Article 263 TFEU or in any other article of the TFEU. Nothing in Article 263 suggests that, if an applicant is to prove individual concern *vis-à-vis* a measure of general application, he/she needs to prove being differentiated from all other persons in the same way as an addressee: the *Plaumann* formula, in other words, is not contained in the Treaties, but it is the Court's interpretation of the phrase "individual concern". The phrase cannot be altered by the CJEU, but changing the interpretation given to it is not something that needs to be left to the Member States but falls within the Court's jurisdiction.¹⁴⁷

It remains to be seen whether the accession to the ECHR will bring about some changes. It surely should not be excluded that, after exhausting "domestic" (i.e. EU) remedies, an applicant will bring a claim to the ECtHR and argue that the requirement of individual concern as interpreted by the CJEU is not in line with Articles 6 and 13 ECHR.

In the meantime, the requirement of individual concern, as currently interpreted (and coupled with the lack of improvements brought by the Lisbon Treaty for environmental

¹⁴⁶ The same considerations and conclusions apply equally to actions for failure to act because of the CJ's case-law which streamlined the standing requirements for these two actions. However, the action for failure to act has played, until now, a significantly less important role in the debate surrounding locus standi before the EU Courts.

¹⁴⁷ See D Chalmers and G Monti *European Union Law*, 433; F Ragolle 'Access to justice for private applicants in the Community legal order: recent (r)evolutions', 100; T Tridimas and S Poli "'Locus Standi' of Individuals under Article 230(4): the Return of Euridice?', 81; A Albor-Llorens 'The standing of private parties to challenge community measures: has the European Court missed the boat?', 90; A Abaquense de Parfouru, 'Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?', 387.

NGOs), has been regarded by the Aarhus Compliance Committee as being too strict to meet the criteria of the Aarhus Convention.¹⁴⁸ Also, the Compliance Committee did not seem to be convinced by the “complete system of remedies” argument, and argued that the indirect challenge of EU measures before national courts “cannot be a basis for generally denying member of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies” and that the system of preliminary ruling does not compensate for the overly restrictive jurisprudence of the CJEU on standing.¹⁴⁹

As a different interpretation of “individual concern” is possible and does not require any Treaty amendment, it is submitted that the CJEU should, in order to comply with the Aarhus Convention, consider the environmental NGOs which fulfil the criteria for entitlement provided by Article 11 of the Aarhus Regulation to be individually concerned for the purposes of bringing an annulment action against EU measures affecting the environment. Whether the CJEU will in future interpret Article 263 TFEU more openly remains to be seen.

Should the CJEU not proceed to change the current interpretation of the notion of individual concern, two possible scenarios may be envisaged. The first, in principle more cumbersome, way to allow for a broader standing of environmental NGOs to challenge EU measures would be through a Treaty revision, pursuant to Article 48 TEU, by following the ordinary procedure with a Convention, or with an Intergovernmental conference, should the European Council find the Convention unnecessary.¹⁵⁰ A paragraph could also be added to Article 263 TFEU to the effect that NGOs which fulfil the requirements of Article 11 of the Aarhus Regulation do not need to prove individual concern.

Alternatively, one could envisage the creation of a specialised court for environmental matters attached to the GC pursuant to Article 257 TFEU. According to this provision, such a specialised court would have to be set up through a regulation adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, either upon a proposal of the Commission after consultation with the CJ or at the request of the CJ after consultation with the Commission (which seems to be a less likely alternative). The founding regulation would give this specialised court jurisdiction for matters falling within the scope of the Aarhus Convention, and would provide for a right of action for environmental NGOs which fulfil the requirements of Article 11 of the Aarhus Regulation.

¹⁴⁸ Findings and Recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, available at

<<http://www.unece.org/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1.edited.adv%20copy.pdf>>.

¹⁴⁹ Report of the Compliance Committee of the Aarhus Convention, para. 90.

¹⁵⁰ Pursuant to Article 48(3) TEU, if the European Council adopts by a simple majority a decision in favour of examining a Treaty amendment, the President of the European Council has to convene a Convention composed of representatives of the national Parliaments, heads of state or governments of the Member States, the European Parliament and the Commission. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States.

3. COMPARATIVE ANALYSIS OF *LOCUS STANDI* BEFORE NATIONAL CIVIL COURTS

SOME KEY FINDINGS

- A definition of a civil claim cannot be provided in most legal systems.
- *Locus standi* is a technical concept that is rarely used in civil actions.
- Entities which lack legal personality may be granted standing in civil actions in some of the jurisdictions concerned in order to avoid a failure to provide legal protection.
- The possibilities of civil litigation by a natural person, legal person or other entity representing the interests of various other parties (actions for collective interests) are limited due to the requirement that parties should have a *personal* interest in a civil action.
- Possibilities to bring an *actio popularis* before the civil courts are very limited. Such actions can often only be brought by the Attorney General or the Ombudsman.
- A real alternative for collective interest litigation in civil cases can only be found in the Netherlands.
- In two of the jurisdictions under scrutiny, the general rule is that, if a claimant claims to have a legitimate right under private law (civil right), that claimant will be deemed to have standing without any further investigation of the case.
- In the majority of the legal systems concerned, *locus standi* is not used as an instrument for national (judicial) policy.
- Only in Poland is human rights law expressly used as a basis for *locus standi*, albeit very rarely.
- In most European legal systems there is no or only a slight influence of EU law on standing in purely national cases.

3.1. Court system

Seven out of ten legal systems to be analysed know a system with four tiers of civil courts: lower first instance courts (usually small claims courts), ordinary first instance courts, courts of appeal and a Supreme Court of final appeal (England and Wales being slightly unusual in the sense that this jurisdiction only has one ordinary court of first instance, the High Court, and one Court of Appeal; there are, however, numerous county courts being the "lower first instance courts"). The three exceptions to this four-tier model are the Netherlands, Sweden and Turkey. In the Netherlands, the lowest first instance courts and the ordinary first instance courts have been integrated due to recent law reforms. Sweden also knows a three-tier system comparable to the Dutch model, whereas Turkey does not know a separate court of appeal, since both appeal and final appeal are within the jurisdiction of the Supreme Court of that country.

3.2. Specialisation

Additionally, the Netherlands (but also Italy and Poland) are different in the sense that separate specialised courts constitute an exception in this country, namely there is only a very limited number of specialised courts (various courts do, however, have specialised divisions). This is also the case in Poland: according to the Polish reporter there is considerable specialisation in this jurisdiction, but it seems that this specialisation has not given rise to separate courts. This is very different from the other legal systems under scrutiny, such as Belgium, France and Germany, where the number of separate specialised courts, next to the ordinary courts, is abundant. England and Wales has a large number of specialised tribunals. Differences may also be found with regard to appeals, where some legal systems have one general court of appeal, whereas other legal systems also know internal appeals within a single court (England and Wales) and appeals from the lower first instance courts to the ordinary first instance courts (e.g. Germany). Final appeal may be available either by way of cassation proceedings (e.g. Belgium, France, the Netherlands), review proceedings (e.g. Germany, Hungary), or by way of an ordinary final appeal (England and Wales).

Table 1: Specialisation of Courts

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Specialisation	X	X	X	X	X				X	X
Limited specialisation						X	X	X		

3.3. Definition of a civil claim

The civil courts in all legal systems concerned deal with civil claims. It is striking, however, that in none of the legal systems can a real definition of a civil claim be provided. A civil claim is usually defined in a negative way, either by stating that all claims that are not criminal in nature are civil, or that civil claims are claims that are not criminal or administrative in nature (continental legal systems). In France, civil claims can be defined as claims by private, natural or legal, persons against other private persons. In France, the distinction between civil claims and other claims is more easily made because actions by and against the State may not be brought before an ordinary civil court, but need to be litigated before the administrative courts. In most of the other legal systems under consideration, the situation is less clear, either because a distinction between civil and administrative litigation is not made (England and Wales), or because in certain matters the State may be involved in litigation before the civil courts, as claimant or as defendant (e.g. in actions for damages out of delict (tort)).

3.4. Definition, rationale and conditions of *locus standi*

The present analysis focuses on *locus standi* (also: "standing" hereafter) before the civil courts. For the purposes of this report, *locus standi* is understood as including the provisions and their jurisprudential interpretation regulating the identification of the (groups) of natural or legal persons who are allowed to bring a claim before the national civil courts. Issues concerning the lack of capacity to litigate for minors and others due to the fact that they are not deemed to be able to take care of their own interests is excluded from the discussion, as are issues concerning legal aid and other external impediments to bringing an action in court. This means that in this report we concentrated on the following

requirements that often have to be met either explicitly or at least implicitly in order to have standing before the civil courts in the legal systems under consideration: (1) the natural or legal personality of the claimant, (2) the quality of the claimant as a holder of rights under private law (civil rights) (i.e. whether the holder of rights may claim the observance of these rights before a civil court), and (3) the interest of the claimant in the action (i.e. whether the claim concerns an effective tangible or moral advantage for the claimant).

Locus standi is not a technical concept that is often used in relation to the civil courts in the legal systems under consideration (this is different from litigation before the administrative courts in civil law legal systems). The reporter on England and Wales mentions that it is not a separate requirement in English law (with one exception: the tort of conversion), whereas the French reporter mentions that it is only a separate requirement as regards specific types of cases (e.g. in family matters, such as litigation for the annulment of a marriage because of lack of consent). In Sweden, standing rules are only applied in cases where, under written provisions of private law, rights are exclusive for a certain group of persons (e.g. in family matters), or where an action needs to be brought by two or more persons in conjunction (indivisible rights). In these cases, standing is dealt with *ex officio* by the court. This is also noted by some of the other reporters, e.g. the Hungarian reporter, in actions related to personal status.

In the ten legal systems under consideration, standing, as defined above, is granted to both natural and legal persons where their claim is based on a civil right held by them, and if, by way of their claim, they can obtain an effective tangible or moral advantage from the action at the time of filing. The Belgian and French reporters (and to a certain extent also the Turkish reporter) add that this advantage should be actual, existent, legitimate and personal. A claimant, be it a natural or a legal person, who has no personal interest in the action, will have the action declared inadmissible by the court, in most cases *ex officio*.

3.5. *Locus Standi* of public authorities

Special attention should be paid to the public authorities as claimants or defendants before a civil court. Obviously, this issue is irrelevant for England and Wales, where a clear-cut distinction between civil and administrative litigation is not made, and for France, where the public authorities such as an administrative body or a local government body cannot be involved in litigation before a civil court. However, in the other legal systems, the public authorities have, under certain circumstances, standing before a civil court either as claimant or defendant. In Germany, this is the case where the State or a State organ acts in a private capacity. According to the German reporter, in order to determine whether the State or a State organ may litigate before a civil court, a combination of the *Subjektionstheorie* and the *Subjektstheorie* should be used. A matter of public law is concerned – and, therefore, litigation cannot take place before the civil court – if one of the parties is endowed with *imperium* (State power) and the dispute concerns a relationship where the party acts as a holder of such *imperium*. The civil courts are, nevertheless, competent where they have to adjudicate claims for compensation arising from acts of the State as well as claims for damages arising from wrongs committed by State officials. Civil claims in which the State or its bodies are involved are also discussed in the reports on Italy, the Netherlands, Poland, Hungary and Turkey. The Swedish reporter holds that in Sweden some public authorities may initiate civil actions before ordinary courts, but generally they may not. In this jurisdiction no special standing requirements must be met by a private actor to make a claim against a public body, except that the claim must qualify as a civil claim. The reporter also holds that, as regards claims for damages against

Parliament, Government and the Supreme Court, there is a special provision on standing in the Act on Tort Liability.

3.6. Standing of entities lacking legal personality

Some reporters mention that certain entities which lack legal personality may also be granted standing in their national legal systems in order to avoid a failure to provide legal protection. In the Netherlands this is true for e.g. the works councils, participation councils, general partnerships and trusts, whereas the Hungarian reporter mentions economic operators without legal personality. In Poland, entities without legal personality also have standing in certain situations, as is the case in Belgium.

3.7. Standing: declaratory and injunctive relief

Various reporters mention that special attention should be paid to standing and claims for declaratory and/or injunctive relief (Germany, Hungary, Sweden, Turkey).

The Swedish reporter states that in respect of claims for declaratory judgments there is a requirement corresponding to the legal interest requirement of other legal systems. Claims for judgments determining the existence of a legal relation should be allowed if that existence is uncertain and if that uncertainty is detrimental to the claimant. A claim for declaratory relief may not be brought for the determination of solely factual or solely legal questions; the claim may only be brought if both types of questions are involved. According to the Turkish reporter, the claim for declaratory relief is only admissible if such relief is sufficient to end the dispute; otherwise the claimant will not be granted standing and will have to bring an action for a more suitable type of relief.

As regards injunctive relief, it should be noted that in Germany such relief can only be requested if the conduct in question would (allegedly) harm the claimant's individual rights, with the exception of cases where injunctive relief in the public interest is explicitly provided for (e.g. in matters concerning competition and anti-trust law). Furthermore, injunctive relief requires a real danger that the defendant might commit or repeat the act in question (*Begehrungsgefahr, Wiederholungsgefahr*). The prevailing opinion in Germany is, however, that this is not a matter of standing but one of the merits of the claim.

3.8. *Locus standi* and third parties to the action

In each of the legal systems considered, third parties may intervene in legal proceedings between the original parties to the action, usually only if they meet the general standing requirements for litigants in civil actions. In most legal systems, intervention is possible at all stages of the action, usually until the closure of arguments in court. Intervention may be voluntary, i.e. at the initiative of the third party himself, or involuntary, i.e. when the third party is summoned to court by one of the original parties to the action. In case of voluntary intervention, the third party may intervene in order to support one of the original parties (this is also known as joinder of parties in certain legal systems such as the Netherlands), or he/she may pursue his/her own personal interest (in English law this would be called "joinder as co-claimant or additional defendant"). In Poland, the result of the latter type of intervention - which can be qualified as an action against both parties to the original lawsuit - results in the original lawsuit being stayed until a decision has been rendered in the lawsuit brought by the third party. In case of involuntary intervention, the third party is usually summoned because a defendant in the original lawsuit brings proceedings seeking

some contribution or indemnity from the third party in respect of the claim which the claimant has brought against the defendant. In the Netherlands, involuntary intervention is the result of a motion for indemnification proceedings. The third party is forced to become involved, however, not in the original suit, but in separate proceedings. On the basis of his/her involvement in the indemnification proceedings, the third party may decide voluntarily to join or to intervene in the original proceedings, and in specific situations he/she may take over the original proceedings from the party having made the indemnification motion.¹⁵¹

Under Belgian law, a special form of intervention is recognised, which aims at having the judgment declared binding upon the third party.

Third parties who have not intervened may often initiate third party opposition against a judgment which they consider to be detrimental to their own legal position. Again, the usual standing requirements need to be met.

Third party intervention and third party opposition cannot be prevented by the original parties to the action, unless they can show that the third party does not have an interest (i.e. should not be accorded standing), or, in some legal systems like Belgium, that intervention would substantially prolong the proceedings. Generally speaking, the matter is up to the discretion of the court.

Interpleader actions¹⁵² are not available in the civil law legal systems. In these legal systems, litigants who in common law legal systems would be entitled to bring such actions may ask the court for declaratory relief, and in some legal systems they may deposit the necessary amount of money at the court of the place where the obligations in dispute have to be executed (e.g. in Poland and Turkey; in Germany, the debtor must have been sued by one or several of the alleged creditors of the same debt in order to issue a third party notice to other alleged creditors; if these creditors consequently make an appearance in court, the debtor is able to deposit the necessary sum in court and leave the proceedings; if the other creditors do not make an appearance, the judgment between the debtor and the creditors who have initiated the suit also becomes binding for the other creditors). As a result, they do not have to fear further involvement in litigation. Other pragmatic solutions are listed in the Belgian report. For instance, an insurer could decide not to pay as long as it is not clear to whom the payment should be made and in this way force the parties to resolve their dispute. The insurer may also frame the dispute as if it was a conflict between him and one or both beneficiaries of the fund, with the techniques of party-intervention. One could also try to simulate an interpleader action by using the contractual concept of sequestration. At the request of one of the parties, the judge can order the deposit of the funds in the hands of a third person until the conflict is terminated.

3.9. *Locus standi* on appeal

On appeal there are no specific issues as regards *locus standi*. There may be bars for filing a first or a second appeal, e.g. related to money value, permission of the court *a quo* or *ad*

¹⁵¹ Van Hooijdonk & Eijssvoegel, *Litigation in the Netherlands*, 2009.

¹⁵² I.e. actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed).

quem (England and Wales, Germany), or other considerations, but these do not concern *locus standi* as such. The general rule in the legal systems under scrutiny is that the parties who have been involved in the case at first instance may file an appeal if the ruling of the first instance court has been detrimental to them. An appeal is not possible against a favourable judgment in which the party's claims have been adjudged.

3.10. Collective interest litigation and *locus standi*

The *locus standi* requirement that parties should have a *personal* interest in a civil action means that, in some of the legal systems concerned, the possibilities of litigation by a natural person, legal person or other entity representing the interests of various other parties (i.e. actions for collective interests, to be distinguished from actions for general, public or diffuse interests, discussed below under the heading of *actio popularis*)¹⁵³ are limited. Such litigation is not possible in Hungary. Limited possibilities exist in Belgium, France and Germany, whereas the other legal systems are more relaxed on this issue.

In Belgium certain organisations are allowed to pursue the personal interests of their members collectively. Examples are trade unions and employers' organisations. Apart from these examples, possibilities of collective interest litigation are limited in Belgium. The closest possibility to such actions is the filing of a case by proxy for a number of claimants.¹⁵⁴

A similar situation exists in France, where consumer associations, environmental associations and associations of investors may bring collective interests litigation. For this purpose the association must have obtained at least two written authorisations of consumers or investors involved in the matter, which may not have been solicited in any way (i.e. the consumers or investors must have given the authorisation spontaneously and not on request). Additionally, the association must have been approved for bringing an action before the court. The rule that no one may bring an action by proxy is adhered to in France and as a result, litigation by proxy may not be used as a surrogate for actions for collective interests such as in Belgium.

In France, trade unions may bring an action on behalf of their members in accordance with Article L. 2132-3 of the French Employment Code. This right is subject to two cumulative conditions. Firstly for an action for collective interests to be brought, the interests of the professional body that the union represents must have been affected. Secondly, the union must act to protect the interests of the group it represents.

The French Court of Cassation, in order to encourage actions by associations to protect collective interests, has opened the way for such litigation by associations even further (although the French reporter discusses this issue under the heading of "public interests", it appears from his report that his remarks concern collective interests and not the *actio popularis*). The Court of Cassation considers that even if an association is not authorised by

¹⁵³ The distinction between actions for collective interests and the *actio popularis* proved to be problematic in the national reports on civil litigation and locus standi. An effort has been made to make a clear distinction between the two types of actions. However, when reading the present and the subsequent sections of this report, the national reports should be consulted for further information.

¹⁵⁴ This will not be discussed here since litigation by proxy as such is not aimed at facilitating collective interest litigation.

law to protect a collective interest and if there is no express provision in its articles of association, it may still bring a matter before the courts for the protection of collective interests provided that the matter falls within the purpose for which it was created as per its articles of association. An association for the protection of the environment was therefore allowed to request the demolition of a building that did not comply with town planning requirements (*Cour de cassation*, 3rd Civil Chamber, 26 September 2007). Furthermore, an association for the protection of myopathy patients was allowed to bring proceedings against the serious problems that had arisen within an establishment for such patients (*Cour de cassation*, 1st Civil Chamber, 18 September 2008).

Germany knows the *notwendige* and *einfache Streitgenossenschaft*. The first case concerns indivisible rights and is thus especially aimed at avoiding contradictory judgments. In that sense, it is not aimed at facilitating collective interest litigation. As regards the *einfache Streitgenossenschaft*, there is a multiplicity of parties in the dispute on one side or on both sides, but again, the aim of this procedural instrument is not to facilitate collective interest litigation. Germany does not know actions for collective interests or compulsory group litigation or opt-out litigation. Test case procedures are, however, allowed as regards capital market transactions based on the *Kapitalanleger-Musterverfahrensgesetz* (KapMuG), a statute which has been enacted for a limited period of time (until the end of 2012). There are plans to replace it with a new act with largely similar content but a somewhat expanded scope of application. The main changes envisaged in the recently published Government draft (BR-Drucks. 851/11) are the establishment of a time-limit for the decision on the admissibility of the test-case procedure and rules facilitating a settlement in the test-case proceedings. Apart from the KapMuG, German civil procedural law does not contain explicit rules on test-case proceedings, but it is accepted that interested parties can enter into a contractual agreement under the *Bürgerliches Gesetzbuch* (German Civil Code) to designate one of several similar cases as a test-case.

Other legal systems know more extended possibilities for collective interest litigation. These are England and Wales, Italy, the Netherlands, Poland, Sweden and Turkey.

England and Wales knows three types of actions for collective interests: (1) the representative action where the interests of the claimants are identical (parties may opt-out), (2) group actions, where the aim is to obtain a decision which may serve as an example for settling related cases out of court (parties may opt-out), and (3) the derivative action, which is a specific type of representative action used where shareholders or other stakeholders in a company are permitted to bring an action on behalf of the company in respect of a wrong done to the company.

Italy equally knows three types of actions for collective interests (sector specific): (1) representative actions for injunctive relief which may be brought by consumer associations (originally provided for by several statutes implementing EU directives and as of now governed by the general rules of the Consumer Code), and in matters involving anti-discrimination law, immigration law, environmental law and labour law, (2) representative actions for damages suffered by consumers or users to be brought by a consumer also on behalf of others or by an accredited consumer organisation, and (3) representative actions brought by consumers or users against a public body whenever the inefficient performance of its duties has harmed the rights of a plurality of individuals. The latter type of action for collective interests needs to be brought before an administrative court and cannot, therefore, be classified as collective interest litigation in civil matters. In each case the group consists of individuals who can claim homogenous or identical rights which have adversely been affected by the unlawful conduct of the same defendant.

In the Netherlands foundations, associations with full legal personality and legal persons under public law (i.e. legal persons exercising State powers), may bring an action for the collective interests of others.¹⁵⁵ Conditions to be met are that the interests must be similar in nature and that the aim of representing these interests is expressed in the articles of association of the legal person. There must be consultations beforehand to settle out of court. No damages may be claimed. In most cases declaratory relief is being asked for, which may be used in subsequent individual actions for damages. Often, however, the individual claims are assigned to the foundation or association, which consequently becomes the "owner" of the claims and therefore may claim damages on its own behalf (after assignment of the claims, the foundation or association is acting in its own interest).

In Poland, collective interest litigation in consumer cases is regulated in a general way. Such litigation may be brought before the Regional Court, if it is based upon claims of the same kind and if it is brought by at least ten persons who found their claim on the same or similar facts. The whole group is treated as a single applicant and others may decide to opt-in. The case is handled by one joint representative, who may be one of the group's members or the District Consumer Ombudsman. Therefore, only the representative is granted standing. Claims for the protection of personality rights (rights of an individual to control the commercial use of his/her name, image, likeness or other unequivocal aspects of one's identity) are excluded.

The Swedish Act on Group Actions provides for collective interest litigation in general, while collective interest litigation in environmental matters is regulated separately. According to this Act the action may only be brought by the representative of the claimants. The individuals whose interests are represented are not party to the proceedings but they may, however, intervene autonomously if needed. Three kinds of collective interest actions may be distinguished: (1) actions brought by an individual on behalf of a group of individuals, (2) actions brought by consumer organisations on behalf of individuals, and (3) actions brought by a public authority (currently only the Consumer Ombudsman) which has been charged by the Government to bring such actions. As regards the first category of actions, the individual claimant bringing the action must have an individual claim covered by the collective interest action. In case the collective interest action is brought by an organisation (second category), the articles of association of the organisation should state that one of the objectives of the organisation is the protection of the consumer interests in disputes between consumers and businesses as regards some commodity, service or other good, which the business offers to consumers. As a general requirement, the claim needs to be based on facts which are identical or similar for the various individuals whose interests are represented, whereas for specific cases additional requirements need to be met.

In Turkey general rules on collective interest litigation have been introduced in 2011 (although a sector-specific regulation had already been introduced in the Consumer Protection Act 1995). According to this recent legislation, collective interest litigation may be initiated by associations and other legal persons to protect the interests of their members or the persons they represent; legal personality is not even needed for such organisations. Individuals may also bring collective interest litigation but only if their own interest is part of the collective interests involved. Damages cannot be claimed.

¹⁵⁵ See also M. Freudenthal et al., *Civil Procedure in EU Competition Cases*, Kluwer Law International 2009.

Table 2: Collective Interest Actions

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Collective interest actions generally regulated			X				X	X	X	X
Sector specific collective interest actions	X			X		X				
No collective interest actions		X			X					

3.11. *Actio popularis* (public interest litigation) and *locus standi*

The *actio popularis* is an action brought purely in the public interest (also referred to as general, public or diffuse interest litigation). In legal systems where the claimant must have a personal interest in the action in order to have *locus standi*, the *actio popularis* is problematic. Therefore, such actions are banned in Belgium, although there is some specific legislation allowing for certain groups the right to collectively defend the public interest (anti-discrimination, environmental issues, violence between partners). These provisions are, however, rarely used, mainly because of limited funding and the impossibility of claiming damages. Reluctance to allow public interest litigation also exists in England and Wales, France, Germany, Italy, the Netherlands, Poland, Turkey, and Hungary. In Sweden, the Consumer Ombudsman and some organisations may bring an *actio popularis*. In France and Hungary, this type of litigation, if possible at all, is the domain of the Attorney-General. In the Netherlands, the Attorney-General also has a role to play in this respect, even though the rules on collective interest litigation may under certain conditions also be applied to public interest litigation.

Table 3: *Actio popularis*

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Sector-specific <i>actio popularis</i>	X	X		X			X		X	
No <i>actio popularis</i>			X		X	X		X		X

3.12. Alternatives to collective interest litigation

A real alternative for collective interest litigation can only be found in the Netherlands. In the Netherlands a possibility is offered for natural or legal persons having caused harm and a foundation or association representing the interests of those who have suffered harm to reach an agreement which may be submitted to the Court of Appeal in Amsterdam, in order to have it approved and issued as an agreement applicable to all who have suffered harm in the context of the agreement. The decision of the Court of Appeal is binding for everyone involved in the dispute, except for those who decide to opt-out.

The Belgian Government, which took office in December 2011, has the intention to adopt legislative measures introducing a procedure for handling mass damage claims in consumer affairs. No draft bill has yet been submitted to Parliament.

Table 4: Alternatives to Collective Interest Litigation

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Specifically created alternatives to collective interest litigation							X			
No specifically created alternatives to collective interest litigation	X	X	X	X	X	X		X	X	X

3.13. Strictness in the application of *locus standi* at the national level

The following national reports qualify the approach of *locus standi* by the national civil courts as strict:

Belgium: Strictness in the application of *locus standi*, also as regards collective interest litigation and public interest litigation (*actio popularis*), appears where the Belgian Court of Cassation holds that the sole fact that a natural or legal person aims at a certain goal, even if expressed in the articles of association -where a legal person is concerned- does not create a personal interest because in that case anyone could adopt any goal and, therefore, be awarded standing (Eikendael Judgment, Belgian Court of Cassation, 19.11.1982). Furthermore, in most cases there is a strict prohibition of purely anticipatory relief (i.e. relief for something that may/will happen in the future).

France: The legislature and the *Cour de cassation* are strict on *locus standi*. Any person acting in court proceedings, for whatever reason, must have an interest (French *Cour de cassation*, 17.07.1918; idem 1st Civil chamber, 19.01.1983; idem, 27.01.1998; idem 2nd Civil Chamber, 12.11.1975). Nevertheless, as stated above, the French Court of Cassation, in order to encourage actions by associations to protect collective interests, has overcome this reluctance and opened the way for collective interest litigation by associations.

Germany: *Locus standi* is applied strictly. Collective interest litigation is regarded as an exception and not extended beyond its designated field of application and therefore standing requirements are rather strict (as opposed to actions about the claimant's own interests). Standing requirements are also strictly applied in claims for purely anticipatory relief.

Italy: The courts in Italy are strict in their application of *locus standi*.

Poland: The Polish civil courts are strict on standing (Polish Supreme Court, 28.04.2004, Docket No. V CK 472/03), unless leniency is needed to cure some obvious defects as regards the rules of substantive law governing the case (Polish Supreme Court, 04.08.2006, Docket No. III CSK 138/05).

On the other end of these strict approaches, civil courts in England and Wales, the Netherlands, Sweden and Turkey are lenient as regards standing requirements. This is also true for Hungary as regards standing at first instance.

The Swedish reporter states that in principle under Swedish law a claim will be admitted for substantive assessment even if the claim does not regard the claimant in a legally relevant way. These deficiencies will be treated as substantive deficiencies and will result in a final judgment denying the claimant's claim. The Swedish view seems to be that it is easier to solve the case on the merits than to deal with standing issues at the start of the lawsuit.

In the Netherlands and Turkey, the general rule is that, if a claimant claims to have a legitimate right under private law (civil right), that claimant will be deemed to have standing without any further investigation of the case. In Dutch law, one may say that the existence of a sufficient interest of the claimant is usually presumed.

Table 5: Strict or Lenient on Standing in Civil Matters

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Strict on standing	X	X				X				
Sometimes strict, sometimes lenient				X				X		
Lenient on standing			X		X		X		X	X

3.14. Standing as a tool for the administration of justice?

In the majority of the legal systems concerned, *locus standi* is not used as an instrument for national (judicial) policy. In Sweden, this seems to be different. The Swedish report states that the objectives which are explicit or implicit in the reasoning of Swedish court practice are protecting the defendant against unnecessary litigation, avoiding trivial cases, and follow the principle that no one should have the opportunity to have an obviously incorrect claim tried in substance. In respect of injunctions and claims for declaratory judgment, Swedish court practice exhibits a fear of flooding the courts with a large number of claims that are not serious. At the same time, the Swedish national report states that standing is not used as a tool in these cases but that it is considered easier in Sweden to solve civil cases on the merits. Thus, it seems that other -procedural or non-procedural-instruments are used to prevent flooding the courts, which are not being further elaborated.

Table 6: Judicial Policy Tool

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Standing occasionally used as a tool for national (judicial) policy									X	
Standing not used as a tool for national (judicial) policy	X	X	X	X	X	X	X	X		X

3.15. Human rights as a basis for standing

In only one of the legal systems under consideration is human rights law expressly used as a basis for *locus standi*, albeit very rarely (Poland; see Polish Supreme Court, 27.06.2008, Docket No. III CZP 25/08 (OSNC = Supr.C.Rep.Civ.Ch. 2009 issue 9, pos. 127)). The

Belgian national reporter mentions that human rights law has been invoked in vain by Belgian litigants trying to circumvent the existing strict national rules on standing. In Germany, the German Constitution is the primary legal basis for access to justice (the German Constitution reflects the wording of Article 6 ECHR). The French national reporter states that Article 6 ECHR is sometimes referred to by courts where issues of standing are at stake.

Table 7: Civil Law and Human Rights

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Human rights law influences standing				X				X		
Human rights law does not influence standing	X	X	X		X	X	X		X	X

3.16. EU law and national *locus standi* requirements

The nine EU Member States under examination have all introduced standing requirements in the specific areas that are governed by relevant European legislation (such as the various directives on unfair terms in consumer contracts and injunctions for the protection of consumers' interests).¹⁵⁶

3.17. Influence of EU law on purely national cases (no cross-border litigation)

In most legal systems under scrutiny there is no or only a slight influence of EU law on standing in cases where the cross border element required under EU legislation is missing, that is, purely national cases. There is some influence in France, Hungary, Italy and Germany (in Germany, the EU rules on standing with regard to consumer relief have been generalised). In the Netherlands, the right to effective legal protection under EU law is also used in domestic cases: entities without legal personality are accorded standing in order to avoid a failure to provide legal protection. This entitlement of an effective remedy has also appeared in Polish domestic case-law.

¹⁵⁶ Directive 93/13/EEC, Directive 98/27/EC and the new Directive 2009/22/EC.

Table 8: Civil Law and EU Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
No influence of EU law in national cases	X		X						X	X
Some influence of EU law in national cases		X		X	X	X	X	X		

3.18. Final remarks: a French particularity

In France, trade unions may bring an action to protect the individual interests of a worker, even without the worker's approval. The worker may, however, oppose the action of substitution or take over the action him or herself. This is obviously not to be classified as collective interest litigation, since the trade union may bring the action in the interest of a single worker to protect his/her interests.

4. COMPARATIVE ANALYSIS OF *LOCUS STANDI* BEFORE NATIONAL ADMINISTRATIVE COURTS

SOME KEY FINDINGS

- The enormous variety as to how judicial review of administrative action is organised in the Member States and to whom and how *locus standi* is granted makes it difficult to compare the effectiveness of the rules on *locus standi*. It is hard to say whether there is something like a level playing field in this area.
- Some national systems of *locus standi* are very complicated and complex. Obtaining access to justice in administrative matters is not always an easy matter.
- In most of the legal systems, access to administrative courts is possible for anyone who demonstrates a sufficient interest. Only Germany applies a right-based approach.
- An *actio popularis* is known only in a small number of the legal systems and only in special cases.
- Often, there seems to be a correlation between the rationale of standing (right based or interest based) and the scope of review. If the standing is interest based and broad, the scope of the review is often limited (to legality review).
- In all countries under scrutiny except Germany, PIGs have standing when they defend the public interest.
- In a small number of the legal systems the criteria for *locus standi* of PIGs seems to be used as a tool for the administration of justice.
- In certain legal systems there are doubts whether the application of the standing criteria meet the requirements of the Aarhus Convention.
- Human rights law is, except for Germany and Sweden, seldom used as an autonomous basis for standing.
- Nevertheless, it has influenced and widened the interpretation of the existing criteria at least in some legal systems.

4.1. Court systems in administrative law

There is an enormous variety of court structures in the field of administrative law of the legal systems examined. There are no two systems which could be described as quite similar. However, one common denominator is that (in the meantime),¹⁵⁷ all legal systems have “administrative courts” of one kind or the other. On the other hand, in not one single legal system are all disputes with administrative authorities dealt with by the administrative

¹⁵⁷ Until very recently, some countries (like England and Wales and Sweden) did not have any administrative courts (for very different reasons).

courts. Even in Germany, where a general clause (§ 40 Code of Administrative Court Procedure, VWGO) states very generally that “public law disputes of a non-constitutional nature may be brought before the general administrative courts”, there are some (important) exemptions, mentioned in § 40 II VWGO. Therefore, in each of the legal systems judicial review in administrative law cases is a shared task of administrative and civil courts. With respect to England and Wales, there is no such clear division between civil and administrative law, as in most continental States, and the system of appeal and review in administrative law cases is very special.

In the legal systems examined, administrative courts decide on:

Table 9: Administrative Courts

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
generally all disputes, with only a few exceptions		X	X		X			X		X
the most important categories of administrative action	X			X ¹⁵⁸		X	X		X	

The criteria for subdividing the competences of the courts in administrative law cases between civil and the administrative courts are diverse and, in some legal systems, very complicated. Whilst e.g. in Dutch law the administrative courts are competent only to judge on written decisions in concrete cases (*orders, Verwaltungsakte, besluiten van concrete strekking*), in Turkey and Germany they are competent in all administrative law disputes. It is, however, not always easy to determine whether a dispute is an administrative law dispute or a civil law dispute. In many legal systems, the distinction between the competences of administrative and civil courts has sparked a lot of debate and continues to be difficult in certain cases. The French, Turkish and the Italian systems have their own courts to decide on disputes relating to that question. This is time consuming and might constitute a violation of the right to judicial protection by courts within a reasonable time (Article 6(1) ECHR). In contrast, the German solution for that problem seems to be very pragmatic and effective. Once a court is seized of an administrative law dispute, whether it is an administrative court or a civil court, it shall first rule on whether it has competence to rule. If the court, for instance a civil court, does not consider itself competent, it will forward the suit to the other court, in this case the administrative court. The latter is bound by the decision of the forwarding court (§ 17 *Gerichtsverfassungsgesetz*). Therefore, disputes about competences are solved quickly, and a negative conflict of competence is impossible to appear.¹⁵⁹

¹⁵⁸ Important categories of administrative action are judged upon by civil courts.

¹⁵⁹ See further Ch W Backes, *Suum cuique* (Boom juridische uitgevers 2009), p. 53 ff.

4.2. Type of administrative action which may be challenged before administrative courts

The administration can act in manifold ways. Every textbook or comment on administrative law uses its own categorisation with minor or major differences. Therefore, it is necessary to define the different types of administrative action in this study to prevent misunderstandings. We subdivide administrative action (or non-action) into the following categories:

- a. individual decisions: (mostly) written decisions with an individual addressee (*Verwaltungsakt, beschikking*)
- b. general decisions: written decisions of the administration of a general nature, concerning an undefined number of addressees, like the decision to prohibit entrance to a certain area
- c. regulatory acts: decrees or other rules which may be issued by the administration on its own, without an act of an elected body like the local or regional council or the Parliament
- d. factual acts
- e. (public law) contracts, governed by public law provisions, which (in some legal systems) are distinguished from civil law contracts
- f. (decisions on the) compensation of damages
- g. omissions to act

The types of administrative action (or omission to act) which may be challenged before administrative courts differs greatly. In some legal systems, only concrete (written) decisions and omissions to give such written concrete decisions may be challenged before courts and the sole available remedy is the annulment of the decision. This is, for example, the case in the Netherlands. Then, there are legal systems, for instance Poland, where e.g. written interpretations of tax law or regulatory acts may be challenged. In other legal systems, like, e.g. France and Germany, administrative courts also rule on public law contracts between authorities and citizens. In most of the legal systems,¹⁶⁰ decisions on compensation, be it in State liability cases or cases of expropriation, are dealt with by civil courts.

A special point of interest is the fact that in several legal systems some actions of public authorities are not reviewable, neither before administrative courts, nor before civil courts. For example in France "acts of government" are not reviewable.¹⁶¹ There is no way to systematically distinguish between an administrative act and an act of government. This is done on a case-by-case basis. For example, the appointment of a member of the *Conseil constitutionnel*, the decision to recommence nuclear trials or to suspend an international treaty are qualified as "acts of government" which cannot be challenged before a court. Similar restrictions can be found in some other legal systems like Turkey, where certain decisions taken by the President and by the Supreme Military Council cannot be challenged before any court.

¹⁶⁰ However, partly not in France and not in Turkey.

¹⁶¹ Something similar counts for Italy, e.g. Cass civ. Sez. Unite, 6529/2010.

4.3. Types of remedies available before administrative courts

The question of what types of remedies are available in administrative law cases is partly linked to the aforementioned different categories of administrative action (or omission to act). If a concrete decision is challenged, the available remedy would usually lead to the annulment of the decision. If a factual act is objected the court may award an injunction. Although not specifically asked here and not really a question of *locus standi*, a brief comment on the types of remedies should be made. In some legal systems, e.g. in Germany, Sweden or England and Wales, the law allows for the administrative courts to provide various types of remedies: besides the annulment of a decision, the court may force the administration to do something (injunction) or put an obligation to compensate the claimant on the administration. These legal systems use an "open catalogue of remedies". In other systems, only the annulment of decisions is possible. In these legal systems, as a consequence, disputes which can only be resolved by recourse to other remedies are to be decided by the civil courts.

4.4. General and specialised administrative courts?

Table 10: Types of Administrative Courts

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
No specialised administrative courts			X ¹⁶²		X ¹⁶³			X		164
A few or some specialised administrative courts		X				X	X		X	
Several or many different kinds of administrative courts	X			X ¹⁶⁵						

Sometimes, the administrative courts constitute specialised independent divisions of the civil courts, such as in England and Wales, Hungary or the administrative courts of first instance in the Netherlands. However, in most of the legal systems, the administrative courts are separate from the general courts. Italy knows both kinds of courts: administrative courts which are separated from other courts and administrative law branches of civil courts. In Belgium the diversity of judicial bodies in the field of administrative law is so large that, according to the country-reporter, "it is almost impossible to get a full overview of the various existing administrative courts".

¹⁶² However, there are lots of specialised tribunals.

¹⁶³ Except Labour Courts.

¹⁶⁴ Except the High Military Administrative Court, the Council of State when it acts as a first instant court and tax courts.

¹⁶⁵ Although also general administrative courts exist, there are "a great many specialized administrative courts".

4.5. How many instances?

Table 11: Administrative Law Instances

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Only one instance	X ¹⁶⁶									
Two instances					X ¹⁶⁷	X ¹⁶⁸	X ¹⁶⁹	X		X ¹⁷⁰
Three instances		X	X	X					X ¹⁷¹	

As can be seen from this summary table, there are legal systems with one, two or three instances of administrative courts. If there are three instances, the highest court (sometimes the Council of State or the Administrative Supreme Court) in most of the legal systems rules as a *Cour de cassation*, examining only the legality of the case. In systems with two instances we find both: a second instance with full review (e.g. the Netherlands) or a second final instance which only reviews the legality of the case (respectively of the judgment at first instance, e.g. Italy). Seen from the perspective of a citizen, to have two or even three instances has advantages and disadvantages. If there are more instances, of course the chances of misinterpretations and wrongful decisions may decrease. On the other hand, going through three instances, which is often preceded by an objection procedure within the administration, means that disputes may remain unresolved for a long time. The outcome of balancing these pros and cons varies among the States examined and within each State.

Often, courts of first instance can review the legality and functionality of a decision, whilst courts of appeal are limited to a legality review. This is not the case in Italy and England and Wales. There the assessment by administrative courts, even at first instance, is limited to a legality review. The opposite is the case in Sweden. In most cases, the courts may not only review a case fully but may replace a decision of administrative authority.

4.6. The rationale of standing

In each of the legal systems certain requirements for standing have to be met when bringing a claim. An *actio popularis* is in most of the legal systems completely unknown. In some of the legal systems, an *actio popularis* is possible in special cases. This is the case in Italy, where e.g. anyone who is registered to vote may bring a judicial action against the results of the election, or in Turkey, where e.g. every citizen was allowed to object to the deployment of NATO troops in Turkey during the invasion of Kuwait.¹⁷² In Italy, France and Turkey, every taxpayer can object to administrative regulations establishing municipal

¹⁶⁶ Partly and under reform.

¹⁶⁷ In many cases there is only one instance.

¹⁶⁸ The *Corte di Cassazione* can review judgments of the second instance court (*Consiglio di Stato*) on very limited grounds and is, therefore, not assessed as a third instance here.

¹⁶⁹ Except in tax law, where there are three instances and some kind of disputes where there is only one instance.

¹⁷⁰ Sometimes, the Council of State is first and last instance court.

¹⁷¹ With exceptions like in migration law cases (where only two instances exist).

¹⁷² Council of State, Reg. n. 1990/4944, Judgm. n. 1992/3569 13 October 1992, Journal of the Council of State 1993, n. 87, 478-483.

taxes.¹⁷³ In Sweden certain municipal decisions, typically those which cannot be appealed through an ordinary administrative appeal, can be challenged in administrative courts by any of the municipality's residents.¹⁷⁴ Also in Belgium, in some areas of law, especially in environmental law and on the basis of an Act combating racism or xenophobia, there is some kind of *actio popularis*. Under Belgian environmental law, municipal authorities may act against decisions of other authorities infringing the interests of the municipality. If the mayor and aldermen do not do so, any resident can take legal action on behalf of the municipality in order to protect the environment without having to demonstrate any personal interest. This may be qualified as an *actio popularis*, open to all residents of a municipality with regard to the protection of the local environment. Although, as said, an *actio popularis* is possible in certain cases in Italy, courts very much dislike allowing an *actio popularis* in other cases, even when statutes explicitly seem to provide such a possibility. A provision holding that "everyone can challenge building licenses" was interpreted, against the wording, as "everyone with a legitimate interest".¹⁷⁵

4.6.1. Right-based or interest-based?

Table 12: Right-based or Interest-based

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Right-based		X						(X)		
Interest-based and narrow					X	(X)		(X) 176		
Interest-based and broad	X		X ¹⁷⁷	X		(X) 178	(X) 179		X ¹⁸⁰	X ¹⁸¹

Among the legal systems examined in this study, there is only one country with a clear and consistently applied right-based approach, whilst nine legal systems use an interest-based approach. The German system is not only right-based but also one in which the concept of right is narrowly interpreted. For example, procedural norms do not provide substantive

¹⁷³ Turkey: Council of State, Reg. n. 2007/6930, Judgm n. 2007/7002 25 September 2008, Journal of the Council of State 2008, n. 117, 329-332. France: CE 29 March 1901, Casanova, Rec. P. 333 and CE 13 February 1930, Rec., p. 130.

¹⁷⁴ According to the Local Government Act (1991: 900).

¹⁷⁵ CdS IV 133/2011.

¹⁷⁶ The reporter herself qualifies the approach of the Polish courts as being "rather generous". Looking at the concept of "legal interest" and material provided and comparing Poland with the other countries, we nevertheless categorize it as "interest-based and narrow", and quite close to right-based.

¹⁷⁷ E.g. Lord Justice Sedley, *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (2007). In Scotland, until very recently a quite narrow interpretation was chosen. Until a decision of October 2011, the Scottish system was essentially rights-based.

¹⁷⁸ However, in some cases, the interpretation of the standing criteria seems to be rather strict (a landowner does not necessarily have access in proceedings against a decision that has effects on his estate), whilst normally the criteria are interpreted quite broadly.

¹⁷⁹ Whether the Dutch approach is broad or narrow, is difficult to judge. There is a tendency of narrowing down the access to justice. The same counts for the question whether *recours subjectif* or *recours objectif* is the purpose of judicial review. The system is hybrid with a strong tendency to a more *recours subjectif* approach.

¹⁸⁰ Except with regard to NGOs, where the courts practice is rather restrictive.

¹⁸¹ Reporter (lenient) and reviewer (rigorous) do not agree on this point. The examples given are not unambiguous. It seems that it depends much on the area of law. In environmental law and, according to the reviewer, in "cultural cases", the approach is more lenient, in other areas stricter.

rights. Within the EU, only Austria is another country with a right-based approach. The Polish reporter qualifies the national system as interest-based. However, any claimant in Poland has to prove not only an interest, but a "legal interest". A person has a legal interest if his/her interest is protected by any legal provision. That is quite close to a right-based approach.¹⁸²

In Hungary, the basic rule is that only "clients" of the administration can ask for judicial review. The notion of "client" is generally defined by Article 15(1) of Administrative Procedure Act as a (natural or legal) person or an entity without legal personality (a) whose rights or lawful interests are affected by an administrative decision or an administrative contract with an authority, (b) the person under the control of an authority and (c) whose data are in the registers of the authority. Statutory sectoral law defines who is a client and may widen *locus standi* to certain groups of applicants who are not clients. Some sectoral statutes have limited the circle of clients who can seek legal remedies. The reporter and reviewer argue that such failures infringe the new Hungarian Fundamental Law.

Interest-based systems usually require a direct, actual and certain interest.¹⁸³ This is described in similar wording in almost all national reports.

France may be said to fall into both categories. The French legal system has two kinds of review, each with a different rationale and approach. The "abuse of power"-actions (*recours pour excès de pouvoir*) are interest-based. The claimant has to prove a direct interest. The court fully reviews the decision of the administration and may only quash it (*recours objectif*). The "subjective disputes" (*contentieux de pleine juridiction*), however, are right-based and serve to protect subjective rights. The review is limited to a possible infringement of such a subjective right (*recours subjectif*), but the possible remedies are manifold.

In some of the legal systems, the purpose of the judicial review was a *recours objectif*, but it has developed to the opposite, a *recours subjectif*, during the last years or decades. Examples of such an evolution are Poland and the Netherlands.

There seems to be a correlation between the rationale of standing (right-based or interest-based) and the scope of review. If the standing is interest-based and broad, the scope of the review is often limited (to legality review). This is the case e.g. in England and Wales. On the other hand, where there is a narrow access, the scope of the review is broad. Examples of this are Hungary or Poland. Only those who base their claim on "legal interests" are heard. But then the court examines the legality of the decision fully *ex officio*.

However, this correlation does not always exist. In Belgium, the "most important" standing requirement is to show a (justifiable) interest, which seems to be interpreted quite broadly.

¹⁸² See further the judgments mentioned in the Polish report: Main Administrative Court 12 July 2011 (II OSK 1227/11), Voivodship Administrative Court Warsaw 17 July 2009 (IV SA/Wa 718/09) and Administrative court of Gdansk 1 July 1993, SA/Gd 262/93).

¹⁸³ See e.g. for France: CE 5 May 2010, Comité de sauvegarde de la Coudoulière, n. 304059 or CE Sect., 28 May 1971, Damasio, Rec., p. 391 and CE 18 October 2002, Diraison, n. 231771. Other terms used are e.g. "personal, legitimate and actual" (TR), e.g. Council of State, Reg. n. 2006/2392, Judgm. n. 2008/5255, 14 November 2006, Journal of the Council of State 2007, n. 115, 225-227 of Council of State, Reg. n. 1991/2225, Judgm. n. 1992/525, 25 March 1992, Journal of the Council of State 1993, n. 86, 457-458.

If a claimant can prove this, the procedure is one of *recours objectif*.¹⁸⁴ The court must examine *ex officio* whether the decision rendered is in accordance with the law.

Germany, on the contrary, has, as said, a strictly right-based approach. When a claimant demonstrates that a right might have been impaired, the lawfulness of an administrative act is examined only insofar as the unlawfulness would impair the individual rights of the claimant. Not only access to court, but also the scope of the review is, therefore, limited to what is necessary to protect the individual rights of the claimant. Claimants who have standing may not claim a complete legality review of the act. However, this is not true for judicial review of by-laws and statutory orders in the field of the federal building law (mainly urban land-use plans). In cases concerning such provisions, the court exercises a (complete) control of the legality of the plan. The same is true for legal statutes ranking below the statutes of a *Land* (§ 47(2) VWGO). Another (important) exception to this rule applies if someone claims that his/her private property rights have been impaired. Then the court has to fully examine the legality of the decision (or other kind of action). Hence, the limited review of German courts is the basic rule, but there are important exceptions. German scholars emphasize that the standing and the scope both may be limited, but that the review is intensive and may be more intensive than in most other legal systems. As the intensity of review is not a topic of this study, this was not examined with respect to the other legal systems.

Most of the reporters and reviewers qualify the application of the standing criteria in practice as being "lenient" or "liberal". However, the German reporter estimates that German courts are "rather rigorous" in their control of the standing requirement. The case-law mentioned also illustrates this.¹⁸⁵ An interpretation of the standing requirements which is lenient compared with the German criteria may be quite strict when compared with e.g. the approach with regard to judicial review in England and Wales. At any rate, it seems to be safe to conclude that the interpretation of "individual concern" or "personal interest" in all legal systems with interest-based standing criteria is substantially less strict than the CJEU interpretation of the same criterion in Article 263(4) TFEU.

¹⁸⁴ A similar conclusion can be drawn with regard to Turkey.

¹⁸⁵ E.g. Bundesverwaltungsgericht, BVerwGE 27, 297 (307) or BVerwGE 111, 276 (280), specially in environmental law cases: BVerwG NVwZ 1987, 409 (409) or BVerwGE 130, 39, (41)) and specially with regard to procedural norms: BVerwGE 61, 256 (175) or BVerwG, NVwZ 1999, 876, (877).

4.6.2. Objection procedure as a prerequisite?

Table 13: Objection Procedure Required?

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Objection procedure as a prerequisite		X ¹⁸⁶					X ¹⁸⁷	X		
Sometimes objection procedure required	X		X ¹⁸⁸		X ¹⁸⁹					X
No objection procedure required				X ¹⁹⁰		X			X	

Some legal systems impose objection procedures as a prerequisite for judicial review, whereas others do not. There are various types of objection procedures with different purposes. Some are decided by the administrative authority which took the decision; some are hierarchical remedies, decided by a higher authority than the one which took the decision. There are also combinations of the two systems, such as the German *Widerspruchsverfahren*. In some legal systems there is an on-going debate about the advantages (self-control, supervision, and so on) and disadvantages (mainly delays) of objection procedures, leading to a more critical and selective use of such procedures.

Again, the peculiarity of England and Wales has to be mentioned. In England and Wales, tribunals (i.e. through an administrative appeal) often have to be addressed before a claim for judicial review may be filed. However, this only is true for the person directly affected by the administrative decision – for example, the applicant for a licence that has been refused, or a claimant for a benefit turned down. The procedure before the tribunals is not a real objection procedure (within the administration), as the tribunals are (more) independent from the administration and (often) there are tribunals in two instances. The Upper Tribunal functions more like a court (judicial review) than a body of administrative appeal. It usually consists solely of judicial members, but there is a power to include non-judicial expert members. The Administrative Appeals Chamber of the Upper Tribunal has all the powers that the High Court has. It would always be presided by a High Court judge sitting as a judge of the Upper Tribunal or a judge specifically authorized by the Lord Chief Justice to preside over Judicial Review cases. Therefore, the system of judicial protection in England and Wales may partly be qualified as a hybrid one with elements both of an objection procedure and (judicial) review.

According to our opinion a general ranking of the various systems is not possible. Objection procedures have advantages and disadvantages. They make sense if the judicial review is

¹⁸⁶ However, objection procedures become less self-evident (they are required in about 50% of the cases).

¹⁸⁷ With a growing number of exceptions.

¹⁸⁸ Objection procedures before tribunals are usually only available for those who are directly affected by a decision.

¹⁸⁹ In many cases someone, but not necessarily the one who initiates a procedure at the administrative court, has to start an objection procedure against the decision.

¹⁹⁰ CE Sect. 23 November 1962, *Association des anciens élèves des I'institut commercial de Nacny*, Rec. P. 625. However, there are some exceptions.

limited to a review of the legality of the case, especially in areas which are technically complicated, such as environmental law.

4.7. Variations in standing

Looking more precisely at the standing requirements, it can be observed that the preconditions to grant access to courts may change according to several factors, such as the question of whether it is a procedure at first instance or not, or according to the area of law or the remedy requested.

Generally, there is no differentiation in the standing requirements based on the value of the dispute. In certain legal systems, such as Poland, there is a difference between proceedings against individual decisions (to which PIGs have access) and proceedings against general measures such as plans or acts (to which individuals whose rights are concerned have access, but PIGs do not have access).

4.7.1. Differences depending on court instance

Table 14: Differences in Instances of Court

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
No differentiation with regard to instance	X		X ¹⁹¹	X			X		X	X
Stricter requirements at courts of higher instance		X						X		
Leave required		X							X	

In many legal systems, such as Hungary, Poland and Germany, only the parties to the proceedings at first instance (or the appeal proceedings) may appeal.

4.7.2. Differences depending on type of remedy?

Another question is whether the requirements of standing change according to the type of remedy requested. Usually, this is not the case. As already observed, in France it is the character of the procedure rather than the type of remedy that is decisive for the type of standing applicable. Standing requirements are stricter for subjective disputes than for actions concerning the claims of abuse of power.

Where there is a claim for compensation, no special interest or right is needed. Anyone who claims to have suffered damage as a result of an action of the administration has standing with regard to such a claim.

¹⁹¹ In England and Wales, in all cases of judicial review, leave to proceed is required. However, deciding on leave here means something different than leave in appeal cases in other countries. The courts of England and Wales first check whether the case has prospect of success. Leave is granted in about 50% of the cases.

4.7.3. Differences depending on the sector of administrative law

In some of the legal systems, each sector of administrative law knows its own variety of criteria or sub criteria for standing. In most legal systems there are special rules for standing in the area of environmental law (or nature conservation law, as is the case in Germany), often due to the influence of international law (Aarhus Convention) and EU law (Directive 2003/35/EC). To a certain extent this applies only for the admissibility of public interests groups, but in part it also concerns natural persons (more lenient sectoral criteria for admissibility). Even in legal systems where the rules on standing do not differ depending on the field of law, the uniform rules may be interpreted differently according to the area of applicable law. For example, in order to decide whether an interest is personal (and not general) in the field of environmental law, many legal systems pose the question whether the applicant lives within a certain distance or has a view over the place concerned. These are interpretive sub-criteria that would, for instance, make no sense in social security law.

In some legal systems (e.g. Italy and England and Wales), the courts try, by using a broad interpretation of the standing criteria in environmental cases, to prevent cases where no one can challenge a decision affecting the environment negatively, e.g. if the decision concerns State-owned property without any direct neighbours. In other legal systems, only PIGs (thus, not individuals) may object such decisions.

Table 15: Differing Requirements Depending On Area of Administrative Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Requirements differ only in environmental law		X ¹⁹²						X		X
Requirements depend on field of law	X			X ¹⁹³		X	X		X	
Requirements are same in all fields of law				X			X ¹⁹⁴			

4.7.4. Standing of public interest groups

In each of the legal systems, there is no differentiation in the standing requirements between natural and legal persons as long as both litigate to defend their own interests or rights. There are, however, again in each of the legal systems, special rules for PIGs.

¹⁹² E.g. Bundesverwaltungsgericht BVerwGE 61, 256 (264 ff) and BVerwGE 72, 300 (315).

¹⁹³ Important categories of administrative action are judged upon by civil courts.

¹⁹⁴ However, they are interpreted slightly differently in different fields of law (the same applies for France). There are stricter requirements as far as the Crisis and Recovery Act (which mainly concerns infrastructure projects) applies, which will be broadened and become general in the future.

Table 16: Public Interest Groups¹⁹⁵ in Administrative Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Public interest groups have standing	X		X ¹⁹⁶	X			X	¹⁹⁷	X	X
Public interest groups do not have standing		X								
Public interest groups only have standing in environmental law								X		

The requirements for such PIGs to lodge proceedings before courts differ. A common criterion is that the issue at stake must fall within the scope of the purpose of the group, as laid down in its statute. Another very common criterion is that the PIG must have been in existence or active for a minimum period of time, e.g. three years. In Belgium PIGs have to prove “lasting and effective activities”, a rather unclear criterion which is interpreted very differently throughout the time by the courts. In some legal systems such as Germany, Italy and Sweden, PIGs have to be registered or have to meet a certain minimum size in terms of membership. In Sweden only PIGs with at least 2000 members can go to court. After the CJEU ruled that this requirement hinders effective judicial protection and infringes Article 9 II of the Aarhus Convention (as transposed in EU law),¹⁹⁸ this threshold has been lowered to 100 members.

In certain legal systems, like France¹⁹⁹ and Belgium, PIGs have to define their purpose carefully. If they have a broad purpose, e.g. the protection of the environment in a large region, they will not be able to object to a decision which concerns the environment only in a small village within that region. In Belgium, this criterion was used by the courts to limit the number of claims brought by PIGs. In Germany, as a consequence of the strict right-based approach, PIGs do not have standing. However, there are (very few) exceptions in the field of nature conservation law. The *Umweltrechtsbehelfsgesetz*, which was intended to transpose Article 9 of the Aarhus Convention and Directive 2003/35/EC, granted standing to organisations only insofar as they argue that a decision infringes norms whose purpose is to protect individual rights. This restriction is not in accordance with Directive 2003/35/EC and the Aarhus Convention, as the CJEU ruled.²⁰⁰ The *Oberverswaltungsgericht Münster*, which submitted this case to the CJEU, has granted the respective PIG, based on

¹⁹⁵ As defined in Chapter 1 under « Definitions, sources and scope of the study ».

¹⁹⁶ E.G. *R v her Majesty's Inspectorate of Pollution ex p Greenpeace* (1994). However, in Scotland NGOs have standing only as far as EU environmental law requires.

¹⁹⁷ To some extent public interest groups also have standing in other than environmental cases. However, only organisations which participated in the proceedings have standing. If an NGO wants to participate, the authority decides whether it considers it useful to allow the organisation to participate. Therefore, if the authority does not agree, there is no right of an NGO, in other than environmental cases, to participate and hence there is no standing.

¹⁹⁸ Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] I-09967.

¹⁹⁹ E.g. CE 26 July 1985, *Union régionale pour la défense de l'environnement en Franche-Comité*, Rec. 251.

²⁰⁰ Case C-115/09 *Bund für Umwelt- und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV vs Bezirksregierung Arnsberg* [2011] ECR 0000, OJ C 141.

a direct application of Directive 2003/35/EC.²⁰¹ Recently, the Supreme Administrative Court (*Bundesverwaltungsgericht*) has forwarded a second case with preliminary questions to the CJEU. At the moment, it is not clear what legislative changes will be proposed as a result of this judgment.²⁰² Also in Sweden, the current law does not completely seem to meet the requirements of the Aarhus Convention, as the rules which allow standing for PIGs are not applicable to certain environmental decisions which fall out of the scope of the Swedish environmental code and are governed by the legislation on hunting and forestry.

In some of the legal systems, such as Germany, Hungary, Poland and Sweden, there are special rules concerning standing of environmental PIGs, sometimes limited to exactly what is required by the Aarhus Convention and Directive 2003/35/EC. In Poland, PIGs may only participate in court proceedings when they have participated in the administrative decision-making proceedings or when the authority decides that their participation is needed and justified from the point of view of public interest (Main Administrative Court 28 September 2009; II GZ 55/09). However, as far as Directive 2003/35/EC (and Article 9 of the Aarhus Convention) is concerned, no such decision is needed and PIGs may lodge proceedings if they meet the formal criteria. England and Wales takes a different stance. As standing in judicial review is so broad, there is no need for special rules concerning public interest groups. Proceedings initiated by public interest groups are an "accepted and greatly valued dimension of the judicial review jurisdiction", as the Court of Appeal commented already in 1998.²⁰³ In other legal systems, the rules on standing of PIGs apply also to areas different from environmental law, such as consumer law and competition law (e.g. Sweden), consumer law and anti-discrimination (Belgium) or generally to all PIGs active in all areas of administrative law. These legal systems did not modify their (general) legislation on standing of PIGs as a result of transposing the Aarhus Convention or Directive 2003/35/EC. However, in these legal systems the interpretation of the rules on standing may have been modified due to the influence of the Aarhus Convention. For example, this was the case in Belgium. Several legal systems used to have a broad access to court for PIGs even before these international and European requirements were drafted. This is amongst others the case in the Netherlands (at least at the moment). In France, special rules on standing of PIGs in environmental cases exist, but are rarely applied, because they do not differ much from the general rules.

A special form of public interest litigation exists in Belgium. Here, PIGs (as well as administrative and municipal authorities) may bring an action before the President of the Court of First Instance for cessation of acts which constitute evident infringements of environmental law or serious threats of such infringements. In Hungary, an important instrument to defend public interests consists in the possibility to turn to the Public Prosecutor services, responsible for the control of the legality of the administration and request that they bring a case in order to challenge unlawful decisions and measures before administrative courts.

It is interesting that in some of the legal systems there have been, or still remain, conflicts with the Aarhus Convention (which partly were or are also conflicts with the EU law transposing parts of the Aarhus Convention). This is obvious for the legal systems which were sentenced by the CJEU or blamed by the Aarhus Compliance Committee, such as

²⁰¹ OVG Münster 1 Dezember 2011, 8 D 58/08.AK.

²⁰² The discussion in the federal Parliament is to be found at BT-Drs. 17/7888.

²⁰³ However, that does not apply for Scotland, as was mentioned above.

Belgium, England and Wales, Germany and Sweden. There are certain country reporters who doubt whether their legal system meets the requirements of the Convention or who are certain that it does not (Germany, Belgium, Poland). A complication in that respect is the fact that the scope of Article 9 of the Aarhus Convention is not very clear in all respects.

4.7.5. Representation of collective interests

Organisations which represent the (collective) interest of a group do have standing in each of the legal systems, except for Germany and Hungary. In some countries, such organisations need to have legal personality (e.g. Italy), while in other countries (e.g. UK, France) this is not required.

Table 17: Representation of Collective Interests in Administrative Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Organisations representing group interests may have standing	X		X	X		X	X			X
Organisations representing group interests do not have standing		X ²⁰⁴						X		

4.7.6. Standing of public authorities

In most of the legal systems, public authorities have standing before administrative courts. A special case is the Netherlands, where standing of public bodies has been recently restricted. The legislator is of the opinion that filing lawsuits is not (any more) the way public authorities should communicate with each other. However, standing has only been forbidden for "lower" authorities against the decisions of higher authorities, not the other way around. Until now, this restriction only counts as far as the Crisis and Recovery Act²⁰⁵ is applicable, which is the case mainly in relation to measures relating to large infrastructure projects (such as a bridge). However, a bill is pending to extend this rule and make it generally applicable in administrative law.

²⁰⁴ With very few exceptions, mainly concerning interest groups, such as the Chambers of Industry and Commerce.

²⁰⁵ Wet van 18 maart 2010, houdende regels met betrekking tot versnelde ontwikkeling en verwezenlijking van ruimtelijke en infrastructurele projecten (Crisis- en herstelwet), Staatsblad (Official Journal) 2010, 135.

Table 18: Public Authorities in Administrative Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Public authorities have standing	X	X	X	X ²⁰⁶		X	(X)		X	X
Public authorities do not have standing					X ²⁰⁷		(X)			
Public authorities only have standing in conflicts about their competencies								X ²⁰⁸		

4.7.7. Human rights as a basis for standing

Human rights law is, except for Germany and Sweden,²⁰⁹ seldom used as an autonomous basis for standing. Nevertheless it has influenced and widened the interpretation of the existing criteria at least in certain legal systems. In Italy, human rights do not seem to widen standing as such, but have an influence on the question whether the lawsuit concerns a subjective right of a person (*diritti soggettivi*) or (only) a legitimate interest (*interessi legittimi*), which is linked to the question of which court (civil or administrative) is competent.²¹⁰ The implications are for example the time limit (longer for a civil law suit), and until recently the powers of the judge and the evidence means. In Germany, human rights, mainly as protected by the German Constitution, are important sources of “subjective public rights” and quite often play an important role in discussions about standing. Human rights in Germany firstly influence and widen the interpretation of statutory law. Secondly, if no basis in statutory law exists, they regularly serve as an autonomous basis providing a subjective public right which ensures access to court, if no basis in statutory law exists. This e.g. counts for the freedom of exercise of profession (Article 12 *Grundgesetz*).²¹¹ In Sweden, where until quite recently in many cases only administrative appeal and no judicial review existed against decisions and measures of the administration, Article 6 ECHR, especially after its incorporation into Swedish law in 1994, played a very important role to widen the area of judicial review. The same counts for the Netherlands, where Article 6 ECHR triggered a reform of the system of judicial review in the 1980s. In Belgium, the Constitutional Court relied in very few cases on Articles 10 and 11 of the Belgian Constitution in combination with Articles 6(1) and 13 ECHR.²¹²

²⁰⁶ E.g. CE 10 November 1911, Commune de Saint-Blancard, Rec. p. 1001 or for foreign local authorities (in this case Amsterdam): CE Sect., 18 April 1986, Société Les Mines de Potasse d’Alsace, n. 53934.

²⁰⁷ With very limited exceptions.

²⁰⁸ And also in some special other cases.

²⁰⁹ E.g. NJA 2009, s. 463.

²¹⁰ E.g. Cass. Sez. Unite 1957/2010 or Cass. Sez. Unite, 5290/2010.

²¹¹ E.g. Bundesverwaltungsgericht, BVerwGE 85, 167 (174) and BVerwGE 75, 109 (115).

²¹² Constitutional Court of Belgium, n. 81/2008, 27 May 2008, *vzw Vluchtelingenwerk Vlaanderen and Others* and Constitutional Court n. 8/2011, 27 January 2011, *A de Bats and Others*.

Table 19: Human Rights in Administrative Law

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Human rights law is successfully used as basis for standing	X ²¹³	X	X ²¹⁴			X	X		X	
This is not the case				X	X			X		X

4.7.8. Standing as a tool for the administration of justice?

Most reporters observe that their courts do not use standing as a tool for the administration of justice, e.g. to adapt to savings operations or cutbacks in expenditure for the judicial system. In a small number of reports, however, some examples are provided of courts interpreting the standing criteria more narrowly in reaction to a growing workload (e.g. Belgium). Many reporters mention that the courts use the standing criteria to prevent the admissibility of “busybodies, cranks and mischief makers”²¹⁵ or other abusive use of the courts without having a real and actual interest (Italy, Germany, England and Wales). German courts, for instance, have decided that property which is bought to obtain standing before the courts (because the decision to be challenged modifies property rights) does not deserve any protection.²¹⁶ Therefore, standing of the affected landowner in such a situation is denied. But we would not tend to qualify such cases as use of standing criteria for the administration of justice. The French courts solve the problem of having to deal with obviously ungrounded claims in the final court decision on the merits of the case rather than by preventing the claim. The same is true for Sweden. The issue of standing is strictly separated from the substance of the case.

However, there are also examples where (a narrow interpretation of) the standing criteria are used to limit the workload of the court and are therefore used as a tool of administration of justice. As already mentioned, the narrow interpretation of the very vague standing criteria in Belgium has been developed exactly for this reason. Since 2008, the Dutch courts require that a PIG should not only be active in administrative and court procedures, but must undertake real, factual activities in the field of its statutory goals. That prevents the admissibility of PIGs which do nothing else than object to the administration. Compared with the situation before 2008, this (more narrow) interpretation aims to limit the workload of the courts, and probably also to react on the worries caused to some politicians as a result of successful claims of PIGs, mainly against infrastructure projects. In Hungary, the workload is a prominent trigger to interpret the standing criteria and the scope of the judicial review in a restrictive way. Compared to the wording of the legal provisions, in practice judicial review is limited to the question whether the rights and legal interests of the claimant are infringed. Judges do not deal with other arguments brought forward and with infringements of the law which have no direct connection with the claimant’s own rights and lawful interests. This judicial practice has no specific legal basis, it simply is triggered by the capacity of the courts. This limitative practice is often applied

²¹³ The Constitutional Court is much more active in that respect than the Council of State.

²¹⁴ If human rights are relied on, the claimant must not only prove a legitimate interest, but a possible violation of his (human) right(s).

²¹⁵ This is a quote of an England and Wales judge, Lord Scarman in *R v Inland Revenue Commissioners* (1982).

²¹⁶ Bundesverwaltungsgerichts-Entscheidung (BVerwGE) 112, 135.

in complex cases which require vast expertise mainly in the practice of the Regional Court of Budapest. In Germany, the workload of the courts is a very prominent argument in discussions about a possible reform of the standing criteria.

4.8. Third party intervention before administrative courts

As some of the reporters mentioned, third party interventions are more a concept of civil lawsuits than of administrative law proceedings. However, also in administrative law cases in each of the systems examined, it is possible for third parties to intervene in a procedure in favour of the claimant and/or the defendant. In each of the legal systems, it is up to the court, and not the parties, to decide whether the party meets the standing requirements. The parties of course may oppose and discuss a third party intervention. However, it is ultimately the court that decides. Usually, third parties in administrative law cases have to fulfil the same standing requirements as the claimants. Therefore, they usually have to prove a direct, actual, certain²¹⁷ interest. In France, again, the kind of procedure is decisive. In subjective right disputes, only persons whose rights are likely to be affected by the decision have standing as a third party. Their rights must differ from the right of the original party to the proceedings. Elaborate written provisions on third party interventions exist in § 65 of the German VWGO, called *Beiladung* and in Poland (Article 33 Proceedings before Administrative Courts Act).

Special rules for third party interventions apply to liability proceedings. In such proceedings, often both parties can force third parties to join the defendant (forced intervention).

4.9. Multi-party litigation

In most of the legal systems examined, there are no special rules on multi-party litigation. Multi-party litigation is rather a concept of civil law proceedings and not of administrative law ones. Therefore, as far as civil courts rule on administrative law cases, e.g. concerning State liability, multi-party litigation may be brought and follow the rules of civil procedure.

However, in "classic" administrative law cases, such as objections against permits or other administrative decisions, sometimes tens, hundreds or thousands of claimants lodge an appeal to court. Most reporters do not mention special rules for handling such a situation. Thus, all claimants become party to the proceedings. Common to each of the legal systems, therefore, is that all claimants have to fulfil the standing requirements individually (save in case of abuse of power actions in France, where it is sufficient that one claimant fulfils the standing requirements, while other claimants can join such actions without having to prove an own interest).²¹⁸ If all claimants join in one claim by signing the same appeal (i.e. the file a single joint application), no special rules are needed. If several claimants lodge a number of parallel claims, the court may join the claims into one procedure. Besides that, only three legal systems covered in the study have reported special rules on multi-party litigation in (typical) administrative law cases, ruled by administrative courts. In Italy, special rules on joined proceedings in administrative law

²¹⁷ Similar terms are used in some countries.

²¹⁸ E.g. CE Sect. 30 March 1973, David, Rec. p. 265; CE 27 April 2001, M. Lubrano, n. 200659; CE Sect. 22 December 1972, Langlois et Ministre de l'équipement et du logement, Rec. p. 832.

cases were introduced in 2009.²¹⁹ They are applicable in relation to individual measures, but not in relation to regulatory measures. In Germany, § 93 VWGO authorises the court to choose one or more proceedings as model proceedings, if the same measure is the subject matter of more than twenty sets of proceedings. After the judgment in such a model case has been issued, the court may rule on the other cases by order and without an extra hearing, if it considers that they do not substantially differ from the model case. In Belgium, there is an on-going discussion about the introduction of "a consistent approach to class actions" in administrative law. However, in Belgium proceedings with a large number of claimants seem to be rather uncommon.

4.10. Influence of EU law

As has been discussed above, in most of the legal systems human rights law has or used to have significant influence on the criteria for standing. Several reporters, such as those from the Netherlands, Sweden and England and Wales, refer to decisions of the ECtHR or the CJEU on human rights cases which triggered a reform of judicial review in administrative law cases in their country or widened access to justice significantly. In Sweden, the area of judicial review has been widened during the last decades, partly due to the influence of the ECHR. In the Netherlands, to a large extent the same was true until some thirty years ago. In England and Wales, the Human Rights Act 1998 has had significant influence on the judicial review of administrative action – less on the structure of judicial review, but more on the content and intensity of such a review.

²¹⁹ This was done by D. Lgs. 198/2009. If such an action is successful, the administrative court may order the public authority to solve the problem with the resources available. Refund of damages is expressly excluded as a remedy.

4.10.1. Influence of the Aarhus Convention

Furthermore, the Aarhus Convention (and its implementation mainly via Directive 2003/35/EC) plays an important role. In the legal systems examined, the Aarhus Convention has had the following influence:

Table 20: Influence of Aarhus Convention

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
led to a change of law, even outside environmental law sector			(X) 220							
led to a change of environmental law only		X ²²¹						X	X	
only widened the interpretation of existing law	X						X			
not had any significant effect			X ²²²	X	X	X				X

Another question, which is not touched upon by the reporters, is whether the Aarhus Convention prevents governments from restricting access to justice in the future. At least in the Netherlands this clearly is the case. Proposals of some politicians to withdraw all possibilities of public interest groups to go to court have been rejected by the government, since they would clearly be in violation of the Aarhus Convention. The restrictive case-law of Belgian courts on access to justice for PIGs has been qualified by the Aarhus Compliance Committee as infringing the Aarhus Convention²²³ and has led to a conviction by the ECtHR.²²⁴ This seems to have led to a more liberal practice, at least partly.²²⁵ Bills to clarify the requirements by changing the law were, however, rejected in Parliament.

Some of the reporters doubt whether *locus standi* in their country complies with the provisions of Article 9 Aarhus Convention. Some illustrative examples are listed here.

In England and Wales discussion remains about the question whether judicial protection is not prohibitively expensive. The 2010 Jackson Review of Civil Costs (administrative law in England and Wales is treated as civil law) has looked at options for limiting costs in judicial review claims, including the possibility of a "one way cost shifting" approach. If the

²²⁰ Modifications of the Civil Procedure Rules are currently being proposed by the Ministry of Justice with regard to the criterion of the proceedings being "not prohibitively expensive". Furthermore, in Scotland specific legislation was adopted to comply with the Aarhus Convention.

²²¹ See e.g. C-115/09 *Bund für Umwelt- und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV vs Bezirksregierung Arnsberg* [2011] ECR 0000.

²²² Only with regard to Scotland.

²²³ ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW*.

²²⁴ ECtHR, 24 February 2009, *L'Erablière A.S.B.L. v Belgium*.

²²⁵ Council of State, n. 193.593, 28 May 2009, *vzw Milieufront Omer Watzet*, Council of State, n. 197.598, 3 November 2009, *vzw Stichting Omer Watzet* and Council of State n. 213.916, 16 June 2011, *vzw Natuurpunt Beheer*.

claimant is successful, then the Government is liable for both its own costs and the claimant's costs. However, if the Government successfully defends the claim, the claimant is not liable for the Government's costs but only for his own. As of yet, the Government has not proposed to take any of this forward. Similar concerns may be raised with regard to the costs and cost risks of judicial review in some other EU Member States, such as Germany and Ireland.²²⁶

Germany complies with the standing requirement of Article 9(1) Aarhus Convention. However, the German legislator did not comply with Article 9(2), as it restricted access to justice for NGOs in such a manner that in court they can only rely on norms which provide subjective rights to citizens. The legal analysis is much more complex regarding access of individuals. Whereas Article 9(2) Aarhus Convention acknowledges the right-based model of standing in principle, it also demands wide access to justice. It is questionable whether the German courts' practice with regard to access of individuals and the requirement to rely on a subjective public right satisfies this requirement.²²⁷ Furthermore, Article 9(3) Aarhus Convention contains a wide reservation for national legal criteria that may be stipulated as prerequisite for access to justice. Due to this rather vague standard of Article 9(3) Aarhus Convention, an infringement of this provision by German law cannot be established. However, within German scholarship there is a discussion about the consequences of the CJEU's judgment in Slovakian Brown Bear-case for German law.²²⁸

Polish law seems not to be compliance with the Aarhus Convention as transposed in the EIA Directive. The Commission states that access to justice shall be ensured with regard to all administrative decisions authorising the project subject to EIA (i.e. all decisions making up the "development consent" as referred to in Article 1.2 of the EIA Directive). Under Polish law there is an EIA decision and then a separate construction permit (issued under the Building Law Act). The problem is that, while access to justice is ensured in compliance with the Directive in case of the EIA decision, it is very limited at the construction permit stage. Furthermore, the Polish reporter mentioned that it is hard to evaluate whether Polish law fully complies with the Aarhus Convention, as the scope of Article 9(3) and of Article 6(1) sub b of the Convention²²⁹ is not clear. As Article 9(2) relates to Article 6(1) sub b Aarhus Convention, the scope of Article 9(2) is also unclear. The Aarhus Compliance committee has (only) recently started to discuss the meaning of Article 6(1) sub b of the Convention.

²²⁶ See further the comparative "best practices" report written for the forth Session of the Aarhus Convention Meeting of the Parties on 29 June–1 July 2011 by Yaffa Epstein, Approaches to Access, http://www.unece.org/fileadmin/DAM/env/pp/a.to.i/AnalyticalStudies/Approaches_to_Access_YE.pdf and the paper written by J Darpö, 'On costs in the environmental procedure' [2011], http://www.unece.org/fileadmin/DAM/env/pp/a.to.i/AnalyticalStudies/Approaches_to_Access_YE.pdf.

²²⁷ For a comprehensive analysis see: A Schwerdtfeger, *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention* (2010), p. 111 ff.

²²⁸ Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR 0000. In its judgment of 8 March 2011, *Lesoochranárske zoskupenie VLK* (or Slovakian brown bear case), the CJEU decided that Article 9(3) Aarhus Convention is not directly applicable. However, national law should be interpreted as much as possible in accordance with this provision to enable NGOs to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law in all cases falling within the scope of Article 9 (3) Aarhus Convention.

²²⁹ Article 6(1) sub b Aarhus Convention widens the scope of Article 6 to all proposed activities not listed in (annex I of) the Convention which may have a significant effect on the environment. It is not very clear what kind of activities « have a significant effect on the environment » and therefore fall under the scope of Article 6 Aarhus Convention. As Article 9(2) relates to Article 6 Aarhus Convention, the scope of Article 9(2) also is unclear.

Recent case law of the GC will probably give rise to new discussions and a new need to adjust the law on *locus standi* in quite some Member States. In its judgments T-338/09²³⁰ and T-396/09²³¹, the GC has declared Article 10 (1) of the Aarhus Regulation invalid on the grounds of its violation of Article 9(3) of the Aarhus Convention. According to the Court, a review procedure must be available against any action of the administration falling under the scope of the Convention, including measures of a general nature, like regulations.

4.10.2. Influence of secondary EU law

Other EU directives, such as the directives on public procurement, have changed the standing rules, or their application, in some Member States substantially. According to the French reporter, in France this caused “radical changes” in the way standing was decided for contractual litigation. Also in Sweden and Italy, EU legislation on public procurement has had a significant influence on the criteria for standing. In Italy, changes of standing requirements triggered by (general principles of) EU law, were not limited to EU law related cases, but were introduced generally and apply also in purely national cases. A first example of this concerns the standing of economic operators to challenge direct awards (without prior advertisement) of procurement contracts. Contrary to earlier case law, the Consiglio di Stato referred to the need to foster competition, a core principle in the (then) EEC Treaty.²³² A different case substantiated the granting of standing in public procurement contracts (Directive 89/665/EEC). The Directive was considered to be directly applicable, as it embodies the principles of effective judicial protection.²³³

The second example concerns decisions authorising mergers. According to the Consiglio di Stato competitors could not challenge such authorisation, even if they had taken part to the proceedings opposing the merger.²³⁴ The judgement was sharply criticised because in the end it led to a situation where no one could challenge the authorisation. This led the Consiglio di Stato to overrule its precedent. It held that the approach previously followed was inconsistent both with the principle of effective judicial protection embodied in the Italian Constitution, and with (then) EC competition law principles. The Consiglio di Stato even referred to the case law of the CJ allowing competitors to challenge merger decisions.²³⁵

In Hungary, directives on equal treatment widened the standing of public interest groups in that area.

²³⁰ Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission* [2012] ECR nyr.

²³¹ Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission* [2012] ECR nyr.

²³² Consiglio di Stato CdS V, 792/86 and CdS V, 454/95.

²³³ Consiglio di Stato CdS VI, 498/95.

²³⁴ Consiglio di Stato CdS VI, 1792/1996.

²³⁵ Consiglio di Stato (CdS 3865/2004).

4.10.3. General principles of EU law, notably the principle of effective judicial protection

What is interesting to note is that the principle of effective judicial protection, as developed by the CJEU, seems not to have had a significant influence on the courts' practice.²³⁶ The situation, however, is different in Germany where the principle is frequently used by claimants and courts to interpret the national standing rules, although the results of evoking EU law principles vary significantly.²³⁷ Also in Italy, the reporter detects an influence of the general principle of effectiveness on the interpretation of the standing criteria. In some legal systems, e.g. Belgium, the principle is regularly discussed in the courtroom, but has not found its way into judgments yet. However, Belgian law will have to be modified, in reaction to the CJEU judgment in case C-128/09²³⁸ and C-182/10.²³⁹ In England and Wales, limitation periods for judicial review have been strongly influenced by general principles of EU law, especially in reaction to the CJEU judgment of in the *Uniplex* case, where....²⁴⁰ In Sweden, the courts referred on several occasions to a general notion to "our international obligations" and used the principle of effective judicial protection as a guideline for interpretation of national standing criteria.

4.11. Final remarks

The study demonstrates an enormous variety in how judicial review of administrative action is organised in the Member States and to whom and how *locus standi* is granted. That makes it difficult to compare the effectiveness of judicial review in general and more especially of the rules on *locus standi*. It is hard to say whether there is anything like a level playing field in this area. As the German reporter has notably stressed, a certain requirement or criterion, e.g. the necessity to claim the infringement of a right as a prerequisite for standing, always has to be examined as part of a whole system. For example, access to courts may be limited by the requirement to invoke the violation of a subjective right. However, the intensity of the control of administrative decisions by the judge is, according to the German reporter, very high. Similar correlations exist e.g. in France, with regard to the differences between *recours objectif* and *recours subjectif* and in England and Wales, where the standing requirements before tribunals are rather strict and narrow, but the review is broad and intensive, whilst the standing requirements before administrative courts seem to be rather liberal, combined with a limited control of legality only. When the effectiveness of judicial protection is the overall benchmark in a discussion on *locus standi* in the Member States and within the EU, the (functioning in practice) of the whole system of judicial review should be looked at.

²³⁶ E.g. for England and Wales: *Forbes v Aberdeenshire Council & Anor* [2010], *ScotCS CSOH 1* and e.g. *R (on the application of Macrae) v County of Herefordshire District Council* [2011], EWHC 2810.

²³⁷ More rarely, Article 47 of the Charter of Fundamental Right is quoted by German courts, VGH München, VRS 120, 49-64 (2011).

²³⁸ Case C-128/09 *Antoine Boxus and Willy Roua* [2011] OJ C 153.

²³⁹ Case C-182/10 *Solvay and Others*, [2012] not yet published.

²⁴⁰ Case C-406/08 *Uniplex (UK) Ltd. vs. NHS Business Services Authority* [2010] ECR I-00817.

5. COMPARATIVE ANALYSIS OF *LOCUS STANDI* OF VICTIMS OF CRIME BEFORE CRIMINAL COURTS

SOME KEY FINDINGS

- Except for in England and Wales in all jurisdictions victims of crime have standing in criminal proceedings.
- Victims are defined essentially as natural or legal persons, including their heirs or successors, having suffered direct harm caused by a criminal offence.
- In Belgium, Italy, France and Poland PIGs have standing in specific situations defined by law.
- Except for Italy, the Netherlands and Turkey, all legal systems allow private prosecution.
- In Hungary, Germany and Poland victims may act as accessory prosecutors with procedural rights that are more or less equivalent to those of the Public Prosecutor.
- Except for Belgium and England and Wales, each legal system provides a possibility for the victim to have the decision of the prosecutor not to bring charges reviewed.
- Claims for compensation by victims can be brought within criminal proceedings in all jurisdictions except for in England and Wales and Turkey.
- Civil claims for compensation can be brought in all jurisdictions.
- Except for Sweden and Turkey all legal systems apply forms of expedited criminal proceedings that may affect the participation of victims in criminal proceedings.

5.1. Court systems in criminal law

Each of the legal systems has a three or four-tier system of criminal courts: first instance courts, courts of appeal and supreme courts. At first instance there is often a division between courts that adjudicate less serious crimes and those that deal with more serious cases. Courts of appeal in most legal systems deal both with matters of fact and law and all Supreme Courts only deal with matters of law. Sometimes appeals require leave. France has, in addition to the ordinary courts, a great variety of courts with specialised jurisdiction *ratione materiae* in fields such as organised crime, maritime affairs, drug trafficking, terrorism, economic and financial crimes, public health and offences against fundamental State interests. In Belgium and Italy the most serious cases are brought before the Assize Court that has a hybrid-jury system, France has appellate Assize courts (*cours d'assises*). All criminal cases in Sweden are usually tried by one judge and three lay judges. In Italy and Poland there are separate courts for military offences committed by armed forces. In Germany the Higher Regional Courts deal at first instance with national security cases such as terrorism, while a Federal High Court of Justice deals with appeals of law against the regional courts' decisions. Extraordinary remedies can be brought before the German Federal Constitutional Court.

5.2. Definition of victims of crime in relation to *locus standi*

For the purposes of this study, *locus standi* is understood to include the provisions (and their jurisprudential interpretation) regulating the identification of the (groups of) persons who are allowed to bring a claim before the national civil, criminal and administrative courts, as well as before the CJEU. With regard to criminal courts the questions of *locus standi* addressed concern the position of victims of crime, i.e the (natural or legal) person who has suffered harm by a criminal offence.

When addressing *locus standi* of victims before criminal courts, an insight into the content of the term "victim" in the examined legal systems is necessary. The various definitions are listed below.

5.2.1. Belgium

The Belgian legislation does not provide for a general definition of the term victim and uses the terms "civil party", "aggrieved party" or "person having a direct interest in a judicial procedure". In order to clarify their position, it is necessary to analyse the different specific rights that are provided and to detect each time which kind of victim is concerned. The definitions are not strictly applied: indirect victims, such as family members and heirs of the deceased direct victim have the same rights as regards standing. Legal entities, governmental organisations and NGOs can act as "victims" if they have suffered damage, but they cannot act as representatives of their members in order to claim damages on their behalf.

5.2.2. England and Wales

In England and Wales the victim has no formal standing before a criminal court and is supposed to be represented by the Crown Prosecution Service (CPS) that has set up a Code of Practice for Victims of Crime²⁴¹ on how victims should be treated by the various organisations²⁴² involved in providing services for victims. In this code the victim is defined as:

- "any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard";²⁴³
- the "direct victim" of the criminal conduct;²⁴⁴ in the event of death of a direct victim, the "victim" may be a family spokesperson;²⁴⁵

²⁴¹ This Code of Practice, dating from October 2005 governs the services to be provided in England and Wales by the organisations listed in section 2 of the Code to victims of criminal conduct in England and Wales. It is issued by the Home Secretary under section 32 of the Domestic Violence, Crime and Victims Act 2004. See http://www.cps.gov.uk/victims_witnesses/victims_code.pdf.

²⁴² The organisations are set out in Rule 2.11 Code of Practice for Victims of Crime: the Criminal Cases Review Commission; the Criminal Injuries Compensation Authority; the Criminal Injuries Compensation Appeals Panel; the Crown Prosecution Service; Her Majesty's Courts Service; the joint police/Crown Prosecution Service Witness Care Units; all police forces for police areas in England and Wales, the British Transport Police and the Ministry of Defence Police; the Parole Board; the Prison Service; the Probation Service and Youth Offending Teams

²⁴³ Rule 3.1 Code of Practice for Victims of Crime.

²⁴⁴ Rule 3.2 Code of Practice for Victims of Crime.

²⁴⁵ Rule 3.4 Code of Practice for Victims of Crime.

- a legal person may be considered a victim of crime; the code specifies that "businesses are entitled to receive services under the Code"²⁴⁶ (Rule 3.7).

5.2.3. France

In France the following persons and entities fall within the definition of victim or may sue for damages:

- the "injured party"²⁴⁷ which term has a broader scope than the direct victim of a criminal offence;
- the victim's heirs;²⁴⁸
- indirect victims such as relatives of the victim;²⁴⁹
- the direct victim may be both a legal or a natural person.²⁵⁰

5.2.4. Germany

In Germany "victim" is not a technical legal term in criminal procedure, although it is used in general terms in titles of acts. Remedies depend on being an "aggrieved person", a term which does not have a statutory definition but a jurisprudential one:

- an "aggrieved person" is a person who – assuming that the offence has been committed as stated by that person – has suffered direct harm in a legal interest protected by the respective criminal provision; a person who has suffered indirect harm will not qualify as aggrieved person;
- the victim's heirs²⁵¹;
- legal persons may qualify as aggrieved persons if they meet the general requirements as listed above.

5.2.5. Hungary

In the Hungarian Code of Criminal Procedure²⁵² the victim of crime is referred to as "aggrieved party":

- whose rights or lawful interest have been violated or endangered by the investigated crime;
- lineal relatives, spouses, companions or legal representatives can be considered aggrieved parties, when the aggrieved party is deceased;
- the aggrieved party may be a legal or natural person.

5.2.6. Italy

In the Italian Code of Criminal Procedure no reference to "victim" is made nor does the term "victim" constitute a technical term in criminal procedure. The general term "victim" may refer to:

²⁴⁶ Rule 3.7 Code of Practice for Victims of Crime.

²⁴⁷ *Partie lésée*, Article 2 CCP.

²⁴⁸ *Cour de cassation* Crim. 1 September, n. 09-87624.

²⁴⁹ *Cour de cassation* Crim. 29 May 2009, n. 09-80023 and *Cour de cassation* Crim. 23 September 2010, n. 09-82438 and n. 09-84108.

²⁵⁰ Article 2-1 to 2-21 CCP or other special provisions: e.g., Article L. 2132-3 of the Labour Code, pertaining to unions, or Article L. 4122-1 of the Code of Public Health, pertaining to the National Medical Order.

²⁵¹ Article 403 CCP.

²⁵² Act XIX of 1998 on the Criminal Procedure.

- the person harmed by the crime;²⁵³
- the person that suffered harm under civil law from the crime;²⁵⁴
- heirs and successors of persons harmed by the crime;
- victims may be either natural or legal persons.

5.2.7. The Netherlands

In the Netherlands Code of Criminal Procedure²⁵⁵ the victim is defined as:

- "the person who has suffered material damage or other harm as a direct cause of a criminal offence";
- the victim may be a natural person as well as a private or public legal person.

5.2.8. Poland

In Poland the Criminal Procedural Code²⁵⁶ sets out the following concerning the 'injured person':

- the injured is a natural or legal person whose legal interests (legal goods) have been directly violated or threatened by an offence;
- heirs of a deceased victim;²⁵⁷
- a State institution, a local authority or self-governing entity, a social institution may also be treated as the injured person even though it has no status of legal person;
- an insurance agency shall also be regarded as an injured person to the extent that the indemnity paid by it to the injured person as a result of the injury caused by the offence, or that which it is obligated to cover.

5.2.9. Sweden

In Sweden the victim of crime is defined as follows:

- "the aggrieved person is the person against whom the offence was committed or who was harmed by the offence";²⁵⁸
- when the criminal act has resulted in the death of a person, the deceased person's spouse, direct heir, father, mother or sibling may be regarded as aggrieved persons;²⁵⁹
- a legal person including a government or NGO may be considered a victim if the preconditions for an aggrieved person have been fulfilled.

5.2.10. Turkey

In Turkey the victim of crime refers to:

- the person who has been directly affected by a crime;
- the family of the person who has been directly affected by a crime if this person has deceased;

²⁵³ Article 90 CCP.

²⁵⁴ Article 185 CCP.

²⁵⁵ Article 51a CCP.

²⁵⁶ Article 49 CCP.

²⁵⁷ Article 52 CCP.

²⁵⁸ Article 20:8, 4 CCP.

²⁵⁹ Article 20:8, 4 CCP.

- legal persons, governmental or non-governmental, may be considered victims if the crime is of such nature that it may be committed against a legal person.

Table 21: Scope of the Term "Victim"

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Direct victim (natural person)	X	X	X	X	X	X	X	X	X	X
Legal person	X	X	X	X	X	X	X	X	X	X
Family (indirect victim)	X			X						
Heirs (in case of deceased direct victim)	X	X	X	X	X	X	X	X	X	X

5.3. Different types of standing before a criminal court

Victims may participate in criminal proceedings in many ways. For the purpose of this study we have focused on a variety of types of standing, such as the power to initiate criminal proceedings or have decisions not to prosecute reviewed and the right to claim damages and reimbursement of expenses. Included in the study is the victim's right to be heard, which may cover the provision of information or evidence and interventions, including at trial before the court. Information has also been gathered on how victims are informed on their rights, with view to enabling them to participate in proceedings or to decide whether to request a review of the decision not to prosecute or to request protection measures.

5.3.1. Private prosecution

Except for Italy and the Netherlands all other legal systems examined allow for some kind of private prosecution.

In England and Wales any private individual, including - but not limited to - victims, may undertake a private prosecution.²⁶⁰ However, the Director of Public Prosecutions can take over a private prosecution and then discontinue the prosecution.²⁶¹ For various specific offences the consent of the Director of Public Prosecutions or the Attorney-General is required.

In Belgium the victim can initiate criminal proceedings by summoning the offender directly to the court.²⁶² The victim can also oblige the authorities to investigate the case by filing a complaint with the investigating judge and simultaneously introduce a civil action.²⁶³ This does not mean however that the case will necessarily go to court. This is decided at the end of the investigation.

²⁶⁰ Section 6 (1) Prosecution of Offences Act 1985.

²⁶¹ Section 6 (2) Prosecution of Offences Act 1985.

²⁶² Article 64 para. 2 CCP; Article 145 CCP; Article 182-183 CCP.

²⁶³ Article 63 CCP.

In France, Germany, Hungary, Poland and Sweden private prosecution, albeit rare and unusual in practice, is available but mostly restricted to minor offences. In France the victim must first lodge a complaint alleging a misdemeanour or a felony to the Public Prosecutor. If the latter refuses to prosecute or does not reply within three months, the victim may file a claim for damages to the investigating judge, and in cases of misdemeanour and minor offences the victim may also summon the suspect to appear in criminal court, without needing the support of the Public Prosecutor.²⁶⁴ In Germany private prosecution is possible for a special category of listed minor offences for which, as a rule, prosecution may only be launched after the victim's request.²⁶⁵ The public prosecution service must take over if the court requests it to do so or may do so if it considers this appropriate. In some cases private prosecution may only be brought after a conciliation attempt has failed.²⁶⁶ In Hungary the aggrieved party may act as a private prosecutor in minor offences such as light bodily harm, infringement of privacy (personal or postal), defamation and libel, and thus exercise all the rights of the Public Prosecutor. The Public Prosecutor may also intervene and take over the prosecution, but if he/she drops the charges, the private prosecutor may still continue the case. In Poland the same procedure applies as in Hungary, except that here the Public Prosecutor may intervene and take over only if public interest so requires.²⁶⁷ The notion of "public interest" is not defined in the Polish CCP. However, it is generally accepted in the case-law that a Public Prosecutor shall intervene when an offence violates not only personal interests of a victim but also public order. When the Public Prosecutor intervenes, the proceedings are conducted *ex officio* and the injured person who has brought a private accusation shall be granted the rights of an auxiliary prosecutor and remain a party to the proceedings. In Poland cases brought under private prosecution (for instance, in case of defamation) are dealt with in special court proceedings.²⁶⁸ Sweden allows for private prosecution, provided the victim has reported the offence to a Public Prosecutor who subsequently declines to act, or when a public prosecution is withdrawn on the ground that there is insufficient reason to believe that the suspect is guilty.²⁶⁹ In the latter case the victim must notify the court of the launch of the private prosecution within a time limit determined by the court, after the suspect becomes aware of the discontinuance. In Turkey private prosecution before a criminal court has been abolished in the new Code of Criminal Procedure²⁷⁰ but is still possible if it concerns certain crimes (for instance crimes relating to banking and smuggling) regulated in specific legislation other than the Criminal Code.

Aggrieved parties in Hungary, Germany and Poland may also act respectively as a substitute, accessory or auxiliary/subsidiary prosecutor.

In Poland both auxiliary and subsidiary prosecutors may act in cases prosecuted *ex officio* by the Public Prosecutor. The victim in the position of an auxiliary prosecutor supports the accusation brought by the Public Prosecutor. A victim who has successfully reviewed a decision of the Public Prosecutor not to continue the prosecution obtains the position of subsidiary prosecutor and acts instead of the Public Prosecutor. These positions have to be

²⁶⁴ Article 551 CCP.

²⁶⁵ Article 374-394 CCP in particular for trespass; defamation; bodily injury; threats; (simple) stalking; criminal damage to property; several economic offences.

²⁶⁶ Article 380 para. 1 CCP.

²⁶⁷ Article 60 CCP.

²⁶⁸ Article 485-499 CCP.

²⁶⁹ Article 20:2 - 20:9 CCP.

²⁷⁰ In 2005.

distinguished from a private prosecution, which applies only in a few specific offences such as defamation, where a victim files his/her own bill of indictment to the court.

In Hungary standing as substitute prosecutor is possible if the Public Prosecutor drops the charges and the aggrieved party stands in within sixty days. In this case the substitute private prosecutor enjoys the rights of the Public Prosecutor, that is, he may submit motions even for coercive measures depriving the liberty of the defendant and may appeal against first instance court decisions.

In Germany private accessory prosecution (*Nebenklage*) is widely used and possible for listed serious offences.²⁷¹ The private accessory prosecutor must qualify as an "aggrieved person", may supplement the public prosecution and is vested with procedural rights more or less equivalent to those of the Public Prosecutor i.e. to be present at trial, make statements, challenge a judge or appeal a court decision, ask questions, apply for evidence to be taken and to appeal against the judgement independently of the public prosecution service.

5.3.2. Standing in the investigative or pre-trial stage of criminal proceedings

In Hungary,²⁷² Italy,²⁷³ Poland,²⁷⁴ and Turkey²⁷⁵ the victim already has standing in the investigative stage of the criminal proceedings. For the purposes of this study the investigative stage means the phase of crime investigation, including investigations by the police, the Public Prosecutor and judicial enquiries by investigating judges. To sum up, it covers every investigation or hearing that precedes the criminal trial by the court that adjudicates upon a summons or accusation. During this investigating stage, in each of the legal systems victims may propose for example the initiation of mediation, submit a memorandum to indicate evidentiary sources to the Public Prosecutor, may initiate investigations etc. The scope of victims' standing in the investigative stage is often connected with their capacity to stand in criminal proceedings in the trial phase, for instance as a private prosecutor or accessory prosecutor or civil claimant.

²⁷¹ Article 395 mentions rape and other sexual offences, murder and homicide, (grave) bodily injury, offences against personal freedom, (grave) stalking and unfair competition, (grave) infamations and (grave) thefts and robbery offences.

²⁷² Article 221/A (1) CCP and Act CXXIII of 2006 on Mediation Activity Applicable in Criminal Cases of 21 December 2006, in force since January 2007.

²⁷³ Article 90 and Article 101 CCP.

²⁷⁴ Article 299, para. 1 CCP.

²⁷⁵ Article 234 CCP.

Table 22: Private Prosecution

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Private prosecution possible	X	X	X	X	X			X	X	
Victim may act as private accessory prosecutor		X			X			X		
Upon condition that Prosecutor declines prosecution				X					X	
Public Prosecutor may intervene/take over		X	X		X			X	X	

5.3.3. Review of decisions not to prosecute

In Belgium a victim cannot appeal against a decision of the Public Prosecutor not to prosecute. Instead, the victim can initiate criminal proceedings in a form of private prosecution, see section 5.3.1.

In England and Wales the guiding principle for a decision to prosecute is the public interest, although the Crown Prosecution Service (CPS) should take into account the views of a victim in deciding whether to prosecute.²⁷⁶ There is no provision granting a victim the right to review or appeal a decision not to prosecute. The CPS must notify the victim in case such a decision is made.²⁷⁷ A victim may nonetheless seek judicial review by the High Court of a decision not to prosecute, as a “default” remedy because no other judicial remedy is available.²⁷⁸ These proceedings are however costly and the High Court will examine the legal aspects of the decision rather than its substance.

In France, Hungary and Sweden the victim may request review of a decision not to prosecute with the prosecution service. If the request is denied, France does not provide for a possibility to request judicial review, but like in Hungary the victim can institute a private prosecution. In Sweden a review application may be submitted to the Director of Public Prosecutions; the decision on such an application is final.

In Germany the decision to terminate a prosecution can be reviewed, but only in case private prosecution is not possible. The victim must apply for a decision by the Higher Regional Courts.²⁷⁹

In Italy the request of the prosecutor to the judge to dismiss the case may be challenged before the judge responsible for the preliminary investigations. This right is, however, limited to requesting further investigations and the victim cannot challenge the decision to dismiss the case. The victim has the right to appeal to the Supreme Court against a final decision not to prosecute, but only in case he/she has received no notification of the

²⁷⁶ Rule 4.19 Code for Crown Prosecutors 2005.

²⁷⁷ Rule 7.2 Code of Practice for Victims of Crime.

²⁷⁸ *R v DPP ex p Manning* [2001] QB 330 and *R (Guest) v DPP* [2009] 2 Cr App R 426.

²⁷⁹ Article 171 - 175 CCP.

request to dismiss a case or when the judge of the preliminary investigations had declared the objection of the victim inadmissible incorrectly.

In the Netherlands and Poland a decision not to prosecute may be appealed in court. In the Netherlands this can be against: (1) the decision of the Public Prosecutor not to prosecute; (2) the decision of the Public Prosecutor to withdraw the prosecution; (3) the decision of the Public Prosecutor to impose a penal order²⁸⁰ or when the case was dealt with by a transaction.²⁸¹ Also, the Public Prosecutor's choice concerning the qualification of an offence (for example murder or manslaughter) may be appealed.²⁸² The court will assess the decision of the Public Prosecutor not to prosecute in full and may address an order to the prosecutor as to which legal basis (sort of crime) the prosecution should be based on. All concerned parties are heard *in camera* and the victim may access the prosecution file. The court's decision cannot be appealed.

In Poland the Public Prosecutor is obliged to prosecute *ex officio* when there is sufficient evidence to support a prosecution. The victim must be notified of the institution, refusal to institute or discontinuance of a criminal investigation or inquiry²⁸³ and has the right to appeal against these decisions of the Public Prosecutor to the court.²⁸⁴ The victim has the right to inspect the case-file of the investigations. If the court upholds the decision of the Public Prosecutor, this is final and not subject to any remedy²⁸⁵. And, as is the case in France and Hungary, the victim may, in case the court has quashed a decision to discontinue the investigation but the Public Prosecutor does not find grounds to continue the investigation and issues a new decision to discontinue, the victim or injured party may by way of private prosecution summon the defendant directly to the competent court acting as a subsidiary prosecutor.²⁸⁶

²⁸⁰ *Strafbeschikking*; a penalty or corrective or preventive measure imposed on the defendant by the Public Prosecutor equal to a conviction when the penal order has become irrevocable.

²⁸¹ Article 12 - 12I CCP.

²⁸² HR 25 June 1996, *NJ* 1996, 714.

²⁸³ Article 305, para. 4 CCP.

²⁸⁴ Article 306, para. 1 CCP.

²⁸⁵ The decision may however be challenged by the way of extraordinary cassation appeal lodged at the Supreme Court by the General Public Prosecutor or the Ombudsman.

²⁸⁶ This has been found compatible by the Constitutional Court with the right of a victim of access to court as guaranteed by Article 45 of the Polish Constitution; judgment of the Constitutional Court of 2 April 2001, SK 10/00, OTK 2001, n. 3, item 52.

Table 23: Possibilities of a Victim to have a Decision not to Prosecute Reviewed

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Review possible		X		X	X	X	X	X	X	X
By prosecution service				X	X				X	
By court		X				X	X	X		
Victim able to institute private prosecution in case prosecutor drops charges	X			X	X			X		

5.3.4. Right to compensation in criminal proceedings

Except for England and Wales and Turkey, each of the legal systems provide for the possibility for the victim to bring a claim for compensation of damages arising out of the offence during the criminal proceedings. In England and Wales it is at the discretion of the court to impose *proprio motu* a compensation order. In Turkey the law provides for pre-trial victim-offender mediation and the criminal court has the discretion to postpone execution of the sentence on condition that property is returned or compensation is paid to the victim. In the other legal systems there is a great variety as to the scope of the compensation (full compensation i.e. material and immaterial damages, monetary damages, return of property, reimbursement of costs) and full judicial or prosecutorial discretion as to whether to grant compensation (only if not too complex; penal measures or orders;²⁸⁷ only in case of mediation) and procedural means (seizure of goods). An overview is provided in the following table.

²⁸⁷ A penal measure or order is a penalty or corrective or preventive measure imposed on the defendant by the Public Prosecutor.

Table 24: Right to Compensation in Criminal Proceedings

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Locus standi for compensation in criminal proceedings	X	X		X	X	X	X	X	X	
Full compensation				X	X		X	X	X	
Up to the court's discretion		X	X							X
Restricted to monetary damages				X			X			
Return of property	X	X			X	X	X	X		
Penal measure of compensatory character			X				X	X		
Reimbursement of costs	X			X	X		X	X	X	
Seizure of goods		X				X				
Only if (claim) not too complex		X			X		X			
Only if suspect has been found guilty	X				X	X	X	X	X	X
Residence permit				X						
Only in case of (pre-trial) mediation agreement between victim and offender										X

5.3.5. Division of standing between criminal and civil courts

As regards the division of standing between criminal and civil courts the study shows principally two ways of dealing with jurisdictional issues arising between criminal and civil courts in case the victim asks for compensation or other measures:²⁸⁸

1. Germany, France and Italy apply the principles of *lis pendens*, *res iudicata* and *electa una via non datur recursus ad alteram*, meaning that once a claim has been brought before a civil or criminal court, then respectively the criminal or civil court can no longer exercise its jurisdiction. Although the victim has a free choice between civil and criminal courts, once a final decision is taken by one of the courts, the other court may no longer be seized. In France and Italy, however, a criminal or civil court may refer the claim for compensation to the other court. In that situation the *res iudicata* principle applies.

²⁸⁸ Note that because in England and Wales the victim has no standing in criminal courts, the victim can only sue the suspect for damages under the law of tort in a civil court. The same applies to Turkey.

2. In Belgium, Hungary, the Netherlands, Poland, claims for damages may be brought both before criminal and civil courts, even in parallel. In theory this may result in conflicting judgments. However, in practice parties will inform the courts of any parallel action and courts will take into account the procedural complications and results of parallel judgments. The victim may also choose to bring a part of the claim before the criminal court, and the remainder before the civil court. In Belgium, Poland and Sweden the criminal court does not decide upon the civil claim in case the defendant is acquitted, which makes it possible for the victim to continue litigation on damages in civil court. In the other countries mentioned under point 1 criminal courts simply reject compensation in case of an acquittal or, as is done in France and Italy, refer the claim for compensation to the civil court. In the Netherlands *res iudicata* principle, as mentioned under point 1, applies in case the (part of) the claim that has been brought before the criminal court has been dismissed. This part cannot be brought again before the civil court. The same applies to Hungary and Poland: if there is a final and binding criminal judgment including the adjudication of a civil claim, the same claim cannot be re-examined in civil proceedings. This is only possible if the claim does not cover the entire damage. In Sweden the general courts have jurisdiction in both criminal and civil cases and may order that the action brought by the victim will be adjudicated within the criminal proceedings or will be disposed of as a separate civil action.

Table 25: Division of Standing between Criminal and Civil Courts

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Either criminal or civil court (free choice)		X		X		X				
With possibility for referral				X	X	X				
Both criminal and civil court	X				X		X	X	X	

5.3.6. Right to be heard

By the right to be heard we mean the opportunity for a victim to provide initial and further information, views or evidence during criminal proceedings.

In England and Wales the active involvement of a victim only extends to participation as a witness, but no further. Victims can provide a "victim personal statement" explaining how a crime has affected them emotionally, financially or physically that may be made available to the court and that the victim may be questioned about. In their capacity as witness they may be eligible for special protective measures and for compensatory measures after the trial, but these are left to the discretion of the court.

In each of the legal systems where the victim may bring compensation claims in criminal proceedings (Germany, France, Hungary, Italy, the Netherlands, Poland and Sweden) victims have the right to be heard by the court. In certain legal systems they may also submit requests and observations with regard to the evidence, cross-examine witnesses, put forward their own evidence, make closing arguments etc. In the legal systems where private prosecution is possible (see table n. 22) the victim in the capacity of private prosecutor often has the same rights to be heard by the court as the Public Prosecutor. In the Netherlands the position of the victims as civil party bears fewer rights with it than in the other legal systems, as they are not seen as party to the trial, they cannot examine

witnesses nor interfere in the criminal proceedings as such. They have access to the file and may only present evidence to the court with regard to the claim for compensation, which they are allowed to do orally or in writing.

Irrespective of having filed a claim for damages or acting as a private prosecutor or assistant/substitute prosecutor, in Hungary, the Netherlands and Poland the victim has the right to be heard during the court hearing.²⁸⁹ In Hungary they may have the floor before the court delivers a judgment after the prosecutor's closing, and may declare whether they want the defendant to be held liable and punished.²⁹⁰ In the Netherlands there are special provisions granting the victim a right to intervene during the trial.²⁹¹ This right is, however, limited. The victim may only make a statement about the personally felt consequences of the criminal offence ("victim impact statement"). This is not considered a witness statement, although the Supreme Court held that a written victim impact statement may be used as evidence.²⁹² In this capacity the victim may not be questioned by the defence or the prosecution in court.

Table 26: Right to be Heard in Court

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Right to be heard in capacity of civil party or private prosecution	X	X		X	X	X	X	X	X	X
Right to be heard without being a civil party or private prosecutor					X		X	X		

Table 27: Types of Standing of Victims in Criminal Proceedings

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
Private prosecution	X	X	X	X	X			X	X	X
Review decision not to prosecute		X		X	X	X	X	X	X	X
Right to compensation	X	X		X	X	X	X	X	X	
Right to be heard	X	X		X	X	X	X	X	X	X

5.4. Procedural requirements in standing rules and courts' practice

In each of the legal systems, except for England and Wales where victims do not have any formal standing in the criminal courts, the primary procedural requirement is that the victim

²⁸⁹ See for Poland Article 384 para. 2 CCP and Supreme Court 26 January 2007, I KZP 33/06.

²⁹⁰ Article 316 CCP.

²⁹¹ Article 51e and 302-303 CCP.

²⁹² HR 11 October 2011, LJN: BR2359.

satisfies the criteria of victim/aggrieved or harmed party within their jurisdiction as these have been set out in section 5.2.

Additional procedural requirements vary per jurisdiction, type of standing, the victim's nature and may sometimes be very complex and detailed. The overview below of procedural requirements is not exhaustive but offers a broad outline of the additional requirements per country, including the way courts deal with these requirements in practice.

In section 5.4.10 special attention will be given to the fact that in many legal systems procedures have been adopted in order to speed up criminal proceedings in one way or the other. This does not only affect the position of the defendant, but may also have an impact on the *locus standi* of the victim. In the analysis of the *locus standi* of victims before the criminal courts this development has been scrutinised, in order to establish whether there are regulations or practices which aim to take victims' interests into account, should the latter have had *locus standi* in case of ordinary proceedings before a criminal court.

In each of the legal systems included in the study legal persons have standing as victims in criminal proceedings when they are affected by a crime or a crime is committed against them and they have suffered damages.

In Belgium, France and Italy legal entities that qualify as PIGs (unions, NGOs, public entities, independent administrative authorities and professional organisations) may lodge claims for damages, not on behalf of (specified) victims, but on the basis of their statutory objectives. The same applies to a certain extent to Poland, where the rights of the injured persons may be exercised by State authorities, within the scope of their activities. In Poland NGOs may support victims in criminal proceedings with statements made at trial. The position of legal persons with general interests will be set out in more detail under the respective legal systems (Belgium, France, Italy and Poland) below.

5.4.1. Belgium

In Belgium a distinction is made between three different standings and the requirements for standing change according to the type of remedy requested:

1. *Victims of crime "tout court"*²⁹³ without any additional requirement:
 - are entitled to receive information;
 - have a right to receive a copy of their interrogation by the police;
 - have the right "as a person with direct interest" to request mediation in every stage of the criminal proceedings.²⁹⁴
2. *Aggrieved persons*²⁹⁵ have to file a written statement to the prosecutor to acquire this status:
 - have the right to be assisted by or represented by a lawyer;
 - can ask for any document in the judicial file;
 - will be informed of a dismissal of the case or referral of the case to an investigating judge;

²⁹³ Article 28 quinquies CCP, Article 57 CCP.

²⁹⁴ Article 553-555 CCP.

²⁹⁵ Article 5bis preliminary title of the CCP.

- will be notified of the date of the court hearings.
3. A *civil party* has to formally address a request to become a civil party either to the prosecutor or to the police, or may initiate a civil and criminal action with an investigation judge. In doing so, the civil party has the same rights as the defendant i.e.:
- can ask access during the investigation by the investigating judge for access to the file²⁹⁶;
 - can claim compensation²⁹⁷;
 - has the right to ask for additional investigating operations to be conducted by the investigating judge.

In addition, some PIGs have a special legal authorisation to act as a civil party before criminal courts (e.g. associations aiming to combat racism and discrimination,²⁹⁸ holocaust denial,²⁹⁹ human trafficking,³⁰⁰ child pornography³⁰¹ and domestic violence). In cases of racism and domestic violence, the association is only admissible if it proves that it has obtained the consent of the victim concerned, while the victim can withdraw its consent at any time during the proceedings.

5.4.2. Germany

In Germany the type of claim (monetary or immaterial damage) does not make a difference as regards the standing requirement. Legal persons do not have standing if the legal interest is of a highly personal nature. Nor does human rights law leave any marked influence on *locus standi* requirements. Other standing requirements are:

- *Review not to prosecute*: previous report of the offence to State authorities.
- *Private prosecution*: an offence among those listed in Article 374 CCP.
- *Private accessory prosecution*: an offence among those listed in Article 395 para. 1 CCP.
- *Compensation claim*: there has to be a causal link between the offence and the damage caused.³⁰²

In general, German courts are quite lenient to qualify a victim as an aggrieved person (legal term for crime victims who have suffered direct harm). The formal requirements for a review of a decision not to prosecute are, however, not easily met in practice because of the principle of procedural legality for which many review requests are inadmissible for formal reasons. This procedure is more meant to safeguard the principle of mandatory prosecution than to serve the victim's interests. Although German courts are aware that allowing civil claims in criminal proceedings may ease the workload for civil courts, many

²⁹⁶ Article 61ter CCP.

²⁹⁷ Article 3 and 4 preliminary title of the CCP and Article 66 and Article 67 CCP.

²⁹⁸ Article 31-33 Wet tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, 30 July 1981.

²⁹⁹ Article 4, Wet tot bestraffing van het ontkennen, minimaliseren, rechtvaardigen of goedkeuren van de genocide die tijdens de tweede wereldoorlog door het Duitse nationaal-socialistische regime is gepleegd, 25 March 1995.

³⁰⁰ Article 11, Wet houdende bepalingen tot bestrijding van de mensenhandel en van mensensmokkel, 13 April 1995.

³⁰¹ Article 7, Wet strekkende om het geweld tussen partners tegen te gaan, 24 November 1997.

³⁰² See Lutz Meyer-Großner, *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und erg nzende Bestimmungen* (Beck'sche Kurz-Kommentare 1995), sec 172 note 12. For instance a company that has rented premises would be able to raise a compensation claim in a criminal prosecution for arson if the offence would have caused loss of profit.

criminal judges feel that civil law questions should be dealt with by experienced civil courts. So, complexity of civil law plays a role in the decision whether to admit a civil claim in criminal proceedings.

5.4.3. France

In France requirements of standing do not change according to the type of remedy requested.

As regards the use of human rights law, Article 6 ECHR (right to fair trial) is often used by the Court of Cassation as additional basis for standing when an action for damages lodged by a legal person has been dismissed.³⁰³

In France PIGs indicated in the CCP have a special authorisation to bring claims for damages before criminal courts. This may be the case, for instance, with associations aiming to combat racism³⁰⁴ protect or assist children in danger of abuse³⁰⁵, protect animals³⁰⁶ or defend sick or handicapped persons.³⁰⁷ When the offence has been committed against an individual the association will only be admissible if it proves that it has obtained the consent of the victim concerned. These legal entities do not bring a claim on behalf of the victims but are acting as a distinct civil party. When an action is based on a special legal authorisation for PIGs, case-law is rigid when consent of the victim is required.³⁰⁸

Minors need to be represented by their parents or legal guardian, and adults under trusteeship or guardianship need to be represented by their guardians.

Since the revision of the law in June 2000³⁰⁹ the main tendency in French criminal law and procedure is an opening up towards victims. The Criminal Division of the Court of Cassation is now more lenient in admitting actions by injured parties on the basis of Article 2 CCP, where it was previously reluctant to do so and has broadened the possibility for a victim's relative to sue for damages in the field of sexual offences.³¹⁰

With regard to access to a court there is a problem in France because deposits may be requested of the claimant-victim? to prevent abuse of process.³¹¹ If the claimant does not comply with the deposit order, the action may be dismissed. The ECtHR has found a violation of Article 6 ECHR in this respect in the case of *Ait-Mouhoub v France*.³¹²

³⁰³ Most striking example: Crim. 9 November 2010, n. 09-88272 in the case of the NGO Transparency-International France in a corruption case.

³⁰⁴ Article 2-1 CCP.

³⁰⁵ Article 2-3 CCP.

³⁰⁶ Article 2-13 CCP.

³⁰⁷ Article 2-8 CCP.

³⁰⁸ Crim. 25 September 2007, n. 05-88324; Maron, A.(2007), 'Une association antiraciste mal inspirée', *Droit Pénal*, 145; Matsopoulou, H., 'La restriction jurisprudentielle apportée au droit d'une association de lutte contre le racisme de se constituer partie civile', *JCP g* 2007.II.10025.; Saas, C., 'L'action civile paralysée par le consentement impossible', *Ajpénal* 2008.83.

³⁰⁹ Law n. 2000-516 of June 2000 on enhancing the protection of the presumption of innocence and the victims' rights. In French "Loi renforçant la protection de la présomption d'innocence et les droits des victimes".

³¹⁰ Crim 29 May 2009, n.09-80023; Crim. 23 September 2010, n. 09-82438 and 09-84108.

³¹¹ Article 392-1 and 533 CCP.

³¹² EctHR 28 October 1998, n. 22924/93.

5.4.4. Hungary

In Hungary additional standing requirements apply to private prosecution (type of offence, time limits for lodging a private prosecution) and regulations where a plurality of victims of the same crime are all entitled to act as private prosecutor. Requirements of standing do not depend on the claimant's nature or variation of standing.

Human rights law as a basis for standing has not been raised in jurisprudence as a separate issue.

Because the *locus standi* requirements are set forth quite precisely in the Code of Criminal Procedure, courts generally apply a strict interpretation.

With regard to civil law claims that may be considered by a criminal court, the criminal court in many cases orders that the claim be considered by a civil court, because adjudication of the claim would significantly delay the criminal procedure.³¹³ Criminal courts only tend to deal with civil law claims when the amount of damages is clear and not challenged by the parties, and the defendant confesses the crime.

In general, courts consider the participation of aggrieved parties as a hampering element and show little consideration for the difficulties faced by aggrieved parties. Victims are merely seen as witnesses and sources of information that can advance the criminal procedure.³¹⁴

5.4.5. Italy

In Italy the person harmed by the crime may file a complaint to the police or judicial/prosecutorial authorities for which there are no admissibility requirements. Persons harmed by the crime may only become party to the criminal process i.e. file a civil claim, if they have suffered an economic or moral damage as a direct consequence of the crime for which they claim compensation or return of property. This has to be in writing and can only be exercised by those who have full legal capacity.

Legal persons and NGOs may participate in criminal proceedings as PIGs³¹⁵ mostly to support the position of the victims, when proceedings concern interests that fall within their mission (object). They may only intervene with the victim's consent. They do not have the power to introduce evidence nor can they make closing arguments. They can point out evidence to the prosecutor or to the trial judge and file memorial briefs. Courts are rather lenient in admitting NGOs as damaged parties and allow them to bring a claim for damages of their own. PIGs have to satisfy two conditions: (1) they must be officially registered³¹⁶, (2) the trial needs to concern the protection of interests that fall within their mission

³¹³ Cserei, G., 'The implementation of the aggrieved party's rights' in: Belügyi Szemle 2003/2.

³¹⁴ See the study of Róth, Erika, 'The standing of the aggrieved party in the criminal procedure', in Rózsahégyi, Zsuzsa (ed.) *Victim Support in Europe. Studies, documents prepared for the drafting of the Act on the Support of Victims of Crime and State Compensation* (2005).

³¹⁵ Article 91 CCP: for example: WWF, Legambiente, gay and lesbian organisations environmental associations, consumers associations, trade unions.

³¹⁶ Cass., Sez. 6, 3 December 2007, 5683, rv.238732.

All other standing rights (private prosecution for petty crimes, personal protective measures) are conferred to each person harmed by an offence.

Attempts to increase victims' standing rights within a criminal trial by relying on human rights law have been unsuccessful to date.³¹⁷ Italian courts are rigorous in controlling formal requirements and lenient in recognising some standing rights such as the right to reimbursement of costs related to civil claims where criminal cases have been settled with an agreement on the penalty with the prosecutor.³¹⁸ Furthermore Italian courts are lenient with victims' requests for the admission of evidence in trial,³¹⁹ or in evaluating the causal link between the crime and the damage suffered when the civil claim is coming from public authorities.³²⁰

With regard to the approach of standing a general observation would be that standing before a criminal court to claim civil damages is a traditional feature of the Italian system and may be considered as a tool in the administration of justice because the civil justice system is much more overloaded than the criminal court.

5.4.6. The Netherlands

In the Netherlands no additional standing requirements apply according to the type of remedy requested or to the type of claim.

Human rights law is considered of importance, especially Articles 2, 3, 8 and 13 ECHR.³²¹ In a case currently pending before the Amsterdam Court (sexual abuse of very young children in a day-care centre) the parents claimed the right to speak in court invoking Articles 6 and 13 ECHR, the Convention on the Rights of the Child and the EU Council Framework Decision of 15 March 2001. In addition, a request to hear the case in chambers was based on Articles 8 and 13 of the ECHR and the Lanzarote Treaty of the European Council and the Charter of Fundamental Rights of the European Union. The Amsterdam Court allowed the parents the right to speak, although this is explicitly excluded by statute.³²²

³¹⁷ Cass., Sez. 6, 9 November 2006, n. 235729; Cass., sez. 6, 28/09/1999, n. 215271 relating to negative consequences of perjury.

³¹⁸ Cass., Sez. unite, 14 July 2011, n. 40288.

³¹⁹ Cass., 14 January 2011, n. 249751.

³²⁰ Cass., 8 July 1995, n. 202736 and Cass., 22 May 2003, n. 226154.

³²¹ ECtHR 26 March 1985, *X and Y v The Netherlands*.

³²² Rechtbank Amsterdam, 15 December 2011, LJN BU8322/8313.

Other standing requirements:

- *Right to review decisions not to prosecute*: no requirements exist regarding the age or the mental status of the complainant. When a minor is younger than 12 years the legal representative has to lodge the request.
- *Right to speak*: only criminal offences sanctioned by more than 8 years imprisonment or particular sexual and violent offences (Article 361 CCP); minors of 12 years and younger children considered to be capable of appreciating their interests (Article 51e para. 4 CCP).

With regard to the general appreciation of the courts in *locus standi* issues little jurisprudence can be found, and it may be safely assumed that legal provisions concerning *locus standi* requirements are not very problematic in practice.

5.4.7. Poland

In Poland there are three types of standing the victim may apply for: the status of an auxiliary prosecutor, the status of a subsidiary prosecutor or the status of a civil party. Only the auxiliary prosecutor may submit his declaration orally. The others have to do so in writing within a time limit provided by statute and then become a party to the proceedings. The bill of indictment by a subsidiary prosecutor has to be drafted and signed by a lawyer.

Victims who do not apply for one of the aforementioned statuses may participate as a witness and, instead of lodging civil claims, they may ask the court to impose penal measures of compensatory character (for example payment of damages or return of property). The measure is a form of sentencing instead of awarding a civil claim.

Victims, regardless of being a party to the criminal proceedings, have a right to complain about the excessive length of criminal proceedings to the higher court and obtain pecuniary redress for unjustified delay.³²³ This was regulated in order to comply with the judgment of the ECtHR in the case of *Kudła v Poland*.³²⁴

The status of victims and their rights are regulated in a comprehensive manner and victims rarely rely on general provisions of human rights law. Courts are however rather strict in applying *locus standi* requirements and somewhat reluctant in granting damages for moral injury to close relatives in case of death of a witness.³²⁵ Courts are also entitled to limit the number of auxiliary prosecutors in complex cases with many victims.

A victim who testifies as a witness in court may obtain redress for damages instantly without having to fulfil any formal requirements. Here standing is used as a tool for administration of justice i.e. to avoid separate litigation for redress of damages. Due to amendments, amongst others of Article 46 of the Criminal Code introduced into the Criminal Code in 2009, the motion of a victim to order redress is binding upon the court, which may remedy the damage in whole or in part. The aim of the changes was to provide victims with the opportunity to request compensation in the course of the criminal

³²³ Article 3 of the Law of 17 June 2004 on complaints about a breach of the right to trial within a reasonable time, Official Journal 2004, n. 179, item 1843.

³²⁴ ECtHR 26 October 2000, n. 30210/96.

³²⁵ Supreme Court 6 March 2008, II KK 345/07; Supreme Court 28 April 2008, I KZP 6/08; Supreme Court 1 October 2010, IV KK 46/10.

proceedings and to avoid institution of separate civil proceedings in order to litigate on civil claims stemming from an offence.

In Poland State organs may act on behalf of victims. For instance, organs of the State Labour Office may protect employees against offences committed by employers and have next to the victim the right to appeal against a decision to discontinue an investigation or inquiry.

NGOs in the capacity of a PIG may also take part in a criminal trial, although they do not have the status of a party to the criminal proceedings, nor can they represent victims.³²⁶ They may participate in the proceedings if there is a need to defend a community's interest or the interests of an individual person, for instance in matters concerning the protection of human rights. Intervention is only possible if the matter at stake is within the scope or the statutory activities of the NGO. If an NGO is admitted to a criminal trial, its representative may make statements, submit motions and may be permitted to have access to the case file. The court can also permit the representative of the NGO to make comments at the end of the trial.³²⁷

5.4.8. Sweden

In Sweden courts are rather lenient in the control of *locus standi* requirements and the concept of an aggrieved person is seldom put to any test. Several provisions provide victims with an easy way to get a decision on compensation and there are hardly any formal requirements in place other than notification of the claim to the investigation leader or the prosecutor. At trial the aggrieved person may initiate an action for a private claim orally.

5.4.9. Turkey

In Turkey the court's practice of *locus standi* requirements for legal persons is rigorous, especially in applying the requirement of being directly affected by the crime. However there is no consistency and some claimants are favoured. For instance, the associations claiming to represent the victims of Armenian massacres were admissible³²⁸, while NGOs representing women were not granted *locus standi* in the prosecution of defendants in honour crime cases.

5.4.10. Expedited criminal proceedings

Below an overview is provided of the expedited proceedings which exist in the legal systems included in this study and whether these proceedings affect the *locus standi* of the victim.

England and Wales

Under the adversarial system of England and Wales, where victims as such have no standing, as they are not a formal party to the proceedings, the vast majority of

³²⁶ Article 90 CCP.

³²⁷ Article 406 para. 1 CCP.

³²⁸ For example in the case against Hrant Dink who was prosecuted for insulting Turkishness and was assassinated in 2007, NGOs representing the victims of Armenian massacres were granted standing. As was observed by the country reporter herself; no written source available.

defendants are dealt with through the guilty plea process. In addition there are a number of mechanisms under which a suspect who consents to the procedure may be dealt with without being taken to court (i.e. simple caution governed by Home Office Guidelines, conditional caution and fixed penalty notices, both governed by statute).

In England and Wales there is no formal requirement to seek, or obtain, the approval of the victim when the case is not taken to court, although the guidance states in the case of simple caution that the police must attempt to establish the views of the victim and in case of conditional caution the prosecutor should take the victim's views into account. Fixed penalty notices are mostly applied to minor traffic offences, public order offences including minor theft and criminal damage. In the latter there is no formal obligation to consult the victim.

Traditionally, the inquisitorial approach that is central to the other legal systems included in this study and where victims do appear to have standing to a certain degree, does not recognise the division between pleading guilty or not guilty. Many legal systems have, however, adopted procedures which either resemble the guilty plea, or which expedite criminal proceedings in another way.

Belgium

In Belgium the prosecutor can propose to the defendant to accept a transaction³²⁹ or penal mediation³³⁰. In both situations the case will not go to court.

A transaction is only possible if the defendant first compensates the (non-disputed) part of the damages caused to the victim and admits civil responsibility for what happened in writing. This leads to a non-refutable presumption of fault by the defendant in case the victim brings an additional claim (the disputed part) to a civil court.

In a penal mediation one of the conditions can be compensation or reparation (apologies, reparative work, symbolic reparation etc.) of the damages caused to the victim. If this condition is imposed, the victim will be invited to participate in order to negotiate an agreement on the compensation or the reparation. If the victim has not been involved in the penal mediation, the law provides for a non-refutable presumption of fault by the defendant in case the victim wants to obtain compensation for damages by initiating civil proceedings.

France

In France there are several expedited criminal proceedings. The first is comparable to plea bargaining;³³¹ secondly, penal orders can be imposed³³² and, thirdly, conditional suspension of the prosecution can be ordered.³³³ In each situation the standing of the injured party is protected and the prosecutor or judge may allocate damages to the injured party.³³⁴

³²⁹ Article 216bis CCP.

³³⁰ Article 216ter CCP.

³³¹ Article 495-7 to 495-16 CCP (*Comparution sur reconnaissance préalable de culpabilité*).

³³² Article 495 to 495-6 CCP (*Ordonnance pénale*).

³³³ Article 41-2 CCP (*Composition pénale*).

³³⁴ For plea bargaining see Article 495-13 para. 2; for the penal order see Article 495-2-1 and for conditional suspension of the prosecution see Article 41-2 CCP.

On the other hand, expedited proceedings do not affect the ordinary standing of a victim to summon the offender directly before the criminal court.³³⁵

Some prosecutors do not apply expedited proceedings where a victim is involved and the case-law is quite protective of the standing of victims. For example there is a recent judgment of the Supreme Court in which the victim could still summon the suspect to appear in criminal court despite the fact that the prosecutor had closed the file after an admonition of the offender.³³⁶

Germany

Also in Germany the Public Prosecutor may dispense with prosecution if the offence is considered to be of a minor nature and there is no public interest in prosecution.³³⁷ In these situations instructions may be imposed on the accused, such as payment of a fine. These decisions are in principle *ex officio* reviewed by a court and are subject to the latter's consent, while the victim cannot appeal the decision.³³⁸

Hungary

In Hungary the Public Prosecutor may request expedited hearings in which he may decide to take the defendant to court without formal indictment within thirty days after the first interrogation if the case is simple and there is sufficient evidence. There is also a possibility to waive the trial, both on initiative of the defendant and the prosecutor, when the defendant admits the commission of the crime, with the consequence that the maximum sentence that can be imposed is significantly lower than in a normal procedure. Hungary has also fast track procedures in which the defendant can be sentenced without a hearing to a suspended prison sentence or other sanction.

In case of a trial waiver or a fast track procedure the court may not refuse admittance of the claim of the aggrieved party and can either sustain the aggrieved party's civil claim or refer the civil claim to a civil court.

Italy

The Italian system provides for the possibility of a settlement between the prosecution and the defence if the penalty does not exceed five years of imprisonment. In these cases the sentence may be reduced up to one third. No role is given to the victim, who cannot object to the agreement and no compensation may be afforded by the court, because there is no trial phase and only the sentence has to be ratified by the court.

For minor offences a penal decree, by which a fine may be imposed, may be ordered by the judge upon request of the prosecutor. It is possible for the defendant to oppose the decree but in a regular trial the defendant risks a higher fine.

Another form of acceleration of criminal proceedings is the abbreviated trial, in which defendants may ask at the end of the criminal investigation that their case be decided on the file by the judge of the preliminary hearing. In return, a lesser sentence (one third of

³³⁵ Article 495-13 al. 2; Article 495-6 CCP; Article 41-2.

³³⁶ Cour de cassation, 17 January 2012, n. 10-88226.

³³⁷ Article 153-153a CCP.

³³⁸ Article 172 para.2 CCP.

the otherwise regular sentence) is imposed. The abbreviated trial does not entail any admission of guilt on the part of the defendant.

All three forms of expedited proceedings avoid a full criminal trial and only in case of a penal decree may the victim oppose the request of the prosecutor. In the other situations (settlement and abbreviated trial) victims do not have a possibility to influence the course of the process. The only possibility that remains for the victim is to file a claim before a civil court. This claim will not be affected by the outcome of the abbreviated trial or settlement.³³⁹

The Netherlands

In the Netherlands it is possible for the defendant to waive a trial by accepting a transaction from the Public Prosecutor and is consequently discharged of liability to conviction by for instance paying a fine. It is also possible for the Public Prosecutor to issue a penal order³⁴⁰ without any court hearing. When a transaction is offered the Public Prosecutor should inform the victim³⁴¹ and can impose a condition that the victim's damages should be compensated.³⁴² In case of a penal order the Public Prosecutor can order to pay compensation on behalf of the victim. The victim has to be informed that a penal order has been imposed, if he/she has applied for damages as a civil party.³⁴³ If the victim does not agree with the transaction or penal order, the victim may have the decision reviewed by complaining to the court of appeal.³⁴⁴ The court of appeal can order a normal prosecution in which the victim can execute the victim's rights.

Poland

The Polish Code of Criminal Procedure provides for three consensual proceedings. A judgment can be issued upon the consent of the accused by the prosecutor for a conviction without conducting a trial.³⁴⁵ The victim is notified and may participate in the session when the court examines the motion. At this session, the victim may support the accusation and get the status of auxiliary prosecutor. In this capacity the victim may ask the court to impose a penal measure for compensation. The court may accept the motion for a conviction without trial upon condition of reparation of the damages caused by the offence.

The second possibility is a conditional discontinuance of the criminal proceedings. The Public Prosecutor may bring such a motion to the court instead of an indictment.³⁴⁶ Again the victim has a right to participate in the session when the court is deciding on the motion and may come to an agreement with the accused on the redress of damages. Such an agreement will be taken into account by the court.³⁴⁷

The last consensual proceeding is the so-called "abbreviated trial" where a conviction is issued without evidentiary proceedings. The accused who is charged with a misdemeanour

³³⁹ Cass., 18 June 1997, Groppelli, n. 2442, in C.e.D. n. 208809.

³⁴⁰ A penal order is a penalty or corrective or preventive measure imposed on the defendant by the Public Prosecutor. The defendant may challenge the penal order and request a full trial if he does so. On the other hand if the defendant accepts the penal order this equates with a conviction by a court.

³⁴¹ Article 74 para.3 CCP.

³⁴² Article 74, para.2 e CCP.

³⁴³ Article 257d, para.5 CCP juncto Article 51g CCP.

³⁴⁴ Article 12 CCP.

³⁴⁵ Article 335 CCP.

³⁴⁶ Article 336 para.1 CCP.

³⁴⁷ Article 341 para.4 CCP.

may submit a motion for a judgment convicting him to a specified penalty or penal measure. The court may only grant such a motion if the Public Prosecutor or victim does not object. Also in this situation the victim is informed and may participate in the proceeding to reach an agreement on redressing the damage or on compensation.

Sweden and Turkey

In Sweden and Turkey no expedited or consensual procedures are adopted to avoid full trials or to reach out of court settlements.

5.5. Information provided to victims of crime

Only in Italy is there no legal provision providing that victims should be informed of their rights: if victims do not ask for legal advice they will receive no information. In Turkey victims are informed at the first hearing in court and this should be reflected in the record of the hearing.³⁴⁸ In all other legal systems covered by this study the duty to inform victims of their rights is regulated by statute. The extent to which information has to be provided is given in the following table.

³⁴⁸ Article 234 para. 3 CCP.

Table 28: Information Given to Victims

	BE	DE	E&W	FR	HU	IT	NL	PL	SE	TR
In writing		X	X				X	X		
To be provided by the police	X		X				X	X	X	
To be provided by the prosecutor	X		X				X		X	
To be provided by the court	X		X							X
Decision (not to) prosecute	X					X			X	
Procedural rights in general	X			X	X			X		X
Join public prosecution		X						X		
Assert claims for damages	X	X	X				X	X	X	
Apply for protection orders		X								
Forms of support available	X	X		X	X					
Progress of the case	X		X				X	X		
Victim organisations provide information	X		X	X			X			
Contact details institutions and organisations					X					
Terminate proceedings consensually								X		
Visit bans, legal counsel, support person		X					X		X	
Notice to appear in court						X			X	
Consultation case file	X	X				X	X	X		

In each of the legal systems victims have the right to consult the case file or ask for copies of documents in the case file.

5.6. Influence of EU law

In Germany EU law on standing rules for victims of crime is said not to have had a significant role in national legislation and that victims' rights law has been developed largely without specific reference to EU Law. Neither has transposition of secondary EU law resulted in a change in the standing of victims of crime in England and Wales, although the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings of 2001 has had a significant effect on the supportive and protective measures provided for victims. In Italy no national law has been adopted in order to implement the Framework Decision of 2001. Italy implemented instead the Directive 2004/80/EC relating

to the compensation to crime victims, which did not increase standing rights before a criminal court. In France, Hungary, the Netherlands the Framework Decision of 2001 has led to changes in criminal law or procedure. In Sweden and Poland the Framework Decision 2001 did not require changes in standing rules.

6. COMPARISONS AND RECOMMENDATIONS

In this third part of the study, the findings of the first part, i.e. the analysis of *locus standi* before EU Courts and the second part, i.e. the analysis of *locus standi* before national courts will also be compared. Furthermore, a “horizontal” comparison between the three areas of law covered in this study (i.e. civil, criminal and administrative law) is carried out. Finally, a set of recommendations will be presented as to how the situation of *locus standi* at European and national level can be improved.

6.1. Comparison EU and national level

6.1.1. Introduction

This first part of this conclusive chapter stresses congruities and differences between the legal standing criteria in the Member States, on the one hand, and before the CJEU, on the other hand.

This “comparative overview” of the national reports with EU law is principally based on the findings of the administrative law report. This is because the focus of investigation at the EU level has been that of the direct actions (because it is in these actions that issues of standing arise). These direct actions have an “administrative law” nature and thus lend themselves to a comparison with the rules on standing applicable before the administrative courts of the Member States. A notable exception to this are the actions for Union liability, which, at the Member State level, can be dealt with by administrative or ordinary courts.

The focus of the analysis is on themes that are present both at European level and at national level, on problems faced at both levels and on the solutions adopted. Special attention is devoted to the Aarhus Convention because it is an international Treaty to which both the EU and Member States are party and it raises specific problems of standing.

6.1.2. Comparison

- While at national level each of the covered legal systems has civil, administrative and criminal courts, and they all have specific rules attributing jurisdiction to the different courts, this is not the case at the European level. The GC and the CJEU deal with all types of direct actions. These are mostly “administrative” in nature; however, this is not a categorisation which is employed at EU level.
- Each of the legal systems has rules on standing and few know the idea of *actio popularis*. This is the same at EU level and here the *actio popularis* is excluded by the requirement of “individual concern”.
- At EU level there is no “right-based” or “interest-based” approach. The requirement in actions for annulment is that of “individual and direct concern”, which constitutes by far the bulk of what the European Courts deal with. While this phrase resembles an “interest-based” approach, the *Plaumann* interpretation given to it and to date maintained is even stricter than that of “right-based” legal systems.

- While at the national level there are special rules for standing (or the rules are given a special interpretation) in the area of environmental law, this is not the case in the EU, which has brought about a very restrictive attitude concerning standing in this area of law.
- With regard to associations, such as trade unions, at EU level, standing in annulment proceedings can be granted but it meets several limitations, while at national level this is not the case.
- While, in some legal systems, human rights (and especially those enshrined in Article 6 and 13 ECHR) have played a role in enlarging the scope of standing rules, this has not happened at EU level where the CJEU has held that the standing rules and their interpretation complies with these articles.
- While, in some legal systems, the rules on standing have explicitly been used as a tool for the administration of justice, this seems not to be the case at EU level.
- Both at EU and at national level, interveners have to prove an interest in the intervention, and the scope of the concept of "interest" is comparable at both levels.
- As at national level (with various exceptions, especially in civil litigation), also at EU level, there are no special rules for multi-party litigation.
- While the Aarhus Convention brought about some changes in various legal systems so as to accommodate the necessary requirement of "wide access to justice" prescribed by Article 9 of this international instrument, this did not happen at EU level. The Aarhus Regulation makes reference to the fact that standing is granted "in accordance with the relevant provisions of the EC Treaty", which has led the CJEU to apply the *Plaumann* interpretation to the requirement of "individual concern" when PIGs bring a case at EU level.

6.2. Horizontal comparison of findings in civil, criminal and administrative law

If we compare the findings of the three reports on civil, administrative and criminal law, a first conclusion could be that the problems faced in the various areas are quite different and not very much related. In criminal procedure, the position of victims in different types of procedures varies significantly between the legal systems examined. The question then is whether further harmonization is desirable. Furthermore, the discussion concentrates on the details of the proposed directive on the protection of victims³⁴⁹. In private law, a much discussed question is to what extent collective interest litigation should be allowed and in which modalities, and also whether the EU ought to harmonize national law in this regard. Lastly, in administrative law, the most topical issue seems to be the implementation and application of the Aarhus Convention. Again, the question is whether the EU should take

³⁴⁹ Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (COM (2011) 275).

action to harmonize the application of Article 9(2) and to ensure the implementation of Article 9(3) of the Aarhus Convention.

Nevertheless, the discussions in all three areas share a common topic, namely the question to what extent PIGs should have standing before the courts to represent interests that otherwise might not be represented sufficiently. It seems that an interesting common feature of the three areas is whether PIGs should be granted standing where victims or interested parties are in a vulnerable position (racism, human trafficking, gender issues, environmental protection, etc.) Apart from the discussions in the various areas of law which are related to different directives or other initiatives, this may raise the question whether a more general discussion is needed about European instruments to enhance collective redress mechanisms.

Another common topic is the fear of abuse of litigation and the need to prevent an overload of court cases. In civil and administrative law, attempts to limit the workload of the courts may easily conflict with the need to ensure access to justice for NGOs (administrative law) or to encourage collective interest litigation (civil law). An interesting finding is that, according to the national reporters, in most of the legal systems the standing criteria are not used as a tool for the administration of justice. In administrative law, only in a few legal systems courts seem to interpret the standing criteria narrowly to counter the growing workload. This occurs in four legal systems.

Surprisingly, EU law seems to have had quite a limited influence on *locus standi*. Secondary law, such as the Framework Decision on the standing of victims or Directive 2003/35/EC in administrative law led to changes in the national law in less than half of the legal systems examined. Many national reporters acknowledge that their national law already complied with the relevant EU requirements before the relevant secondary law came into force and therefore the influence of EU law was not intensive. However, the situation seems to be different in civil law, where the Member States have each introduced specific standing requirements in areas that are governed by EU secondary law, such as the directives on unfair terms in consumer contracts and injunctions for the protection of consumers' interests. While various concrete requirements in secondary EU law were transposed in national law and have had influence on *locus standi* before national courts, most of the reporters deny a substantive influence of general principles of EU law, such as the principle of effectiveness or effective judicial protection in their national laws. However, general principles have had some effect: in administrative law in Germany, England and Wales, Italy and Sweden, and in civil law in Germany, France, Hungary, Italy and the Netherlands. An example in civil law is the leniency at the national level to grant standing to entities without legal personality in case there would be an obvious failure to provide legal protection.

Human rights are seldom used as a basis for standing in both administrative and civil law. Only the Polish and French reporters in civil law and the German and Swedish reporters in administrative law stated that human rights are used expressly as a basis for standing. However, it must be added that human rights had a significant influence on the structure of the courts and the rules of judicial review in a number of legal systems.

Whether public authorities should have standing in court is a question that is only relevant in civil and administrative law, since in criminal law the Public Prosecutor is accorded standing as a public authority. In most legal systems, public authorities do have standing. Limitations which vary in nature apply. In legal systems which belong to the French civil law family, the Attorney-General has often certain powers to join or to initiate civil

litigation, whereas he may also submit his opinion (conclusion) in these cases. In Sweden, the Ombudsman has been accorded certain powers in this respect.

6.3. Recommendations

6.3.1. Recommendations at EU level

The most relevant shortcomings highlighted in the report on *locus standi* before EU Courts is the restricted standing granted to PIGs. The issue, and its link to the Aarhus Convention, will be the subject matter of the recommendations.

Article 9 of the Aarhus Convention does not differentiate between access to justice before the courts of the Member States and access to justice before EU Courts. However, due to the application and interpretation of the *Plaumann* doctrine, the EU Courts do not ensure an effective implementation of the Aarhus Convention and a wide access to justice for individuals and NGOs. Hence, the EU is in violation of Article 9(2) and 9(3) of the Aarhus Convention.

- Therefore, the EU Courts should, in order to comply with the Aarhus Convention, consider environmental NGOs which fulfil the criteria for entitlement provided by Article 11 of the Aarhus Regulation as being individually concerned for the purposes of bringing an annulment action against EU measures affecting the environment.
- Should the CJ not proceed to change the current interpretation of the notion of individual concern, a paragraph could also be added to Article 263 TFEU by way of a Treaty revision to the effect that NGOs which fulfil the requirements of Article 11 of the Aarhus Regulation do not need to prove individual concern.
- Alternatively, one could envisage the creation of a specialised court for environmental matters attached to the General Court pursuant to Article 257 TFEU. The establishing regulation would give this specialised court jurisdiction for matters falling within the scope of the Aarhus Convention, and would provide for a right of action for environmental NGOs which fulfil the requirements of Article 11 of the Aarhus Regulation.

6.3.2. Recommendations for Civil Law

When examining the results of the comparative analysis of *locus standi* before national civil courts the following issues and recommendations are highlighted.

A. General

- The only crystal-clear aspect of the present approach to standing in collective interest litigation and the *actio popularis* before the civil courts is the rejection of the American model of class actions.
- The existing national procedural frameworks as regards third party intervention, joinder of parties, interpleader etc. in civil litigation are insufficient for handling collective interest litigation. They mainly aim at preventing contradictory judgments in related cases and are not aimed at handling mass claims. Changing the rules on standing in these cases is, therefore, not a solution when the need for facilitating collective interest litigation is concerned.

- When collective interest litigation may only be used to obtain a declaratory judgment (and where necessary injunctive relief) in civil cases, this may alleviate the burden of the courts considerably, especially if such declaratory relief can be used effectively by the group members to settle their claims out of court afterwards. Where damages are recoverable, difficult questions arise as regards enforcement and the distribution of the money recovered. When damages are to be paid to the representative, this may give rise to additional litigation as regards the distribution of the money recovered.

B. Opt-in or opt-out?

- It seems that only opt-in collective interest litigation is compatible with all of the national legislations concerned. It has been claimed that an opt-out regime is incompatible with Article 6 ECHR and with the German Constitution.
- An opt-in regime poses difficult questions as regards how the group members should be informed about the action, especially taking into consideration the costs involved when the value of the individual claim is low. Obviously, group members should be informed by way of media that are consulted Europe-wide by large numbers of individuals. Facebook, Twitter and similar media are relatively inexpensive as a platform for information on collective interest litigation.

C. Identification of group members

- As regards the identification of the group members in collective interest litigation, the requirement that the interests of the group members should be similar in nature should not be applied too strictly, as is shown by the English representative action. Such strict requirements prevent collective interest litigation in cases where they may be efficient. A possible starting point for identifying the group members could be the event by which the harm has been caused or may be caused, leaving the determination of those who have suffered recoverable damage as a result of this event to the ordinary rules of substantive law in the area of tort, contract, etc. This requires judicial involvement in the determination of those who may be admitted to the group.

D. Preventing abusive litigation

- In order to prevent abusive collective interest litigation or an abusive *actio popularis*, some kind of procedure is needed as regards those who will be given standing as a representative of the group c.q. may litigate in the general interest. The easiest solution is to allow only certain approved organisations to act as a representative in collective interest litigation or to bring the *actio popularis*. Limiting the list of approved organisations too much may result in collective interest litigation and the *actio popularis* becoming ineffective instruments. However, the absence of any certification procedure will open the floodgates. If one allows standing to natural persons to act as representative of the group or to bring the *actio popularis*, such persons should have a personal interest in the action in order to prevent entrepreneurial litigation for profit. Another way to prevent abusive litigation is by giving standing to only associations aiming at protecting the interests concerned according to their articles of association or to the Attorney General, the Ombudsman or a comparable official.

- Apart from using standing as a tool, abusive litigation may also be prevented by (1) a strong system of high fixed costs that the claimant must pay at the outset of a case; (2) the "loser pays" rule; (3) a preliminary deposit for costs; (4) a power conferred to the court to impose additional high penalties (even *ex officio*) on the losing party if the court finds that the lawsuit is frivolous; (5) an action for abuse of process or for abuse of the right to bring a court action (claim inadmissible if malicious intent can be proven). It should, however, be noticed that, for example, high fixed costs at the outset of the lawsuit may also prevent meritorious actions from being brought to court (over-deterrence).

E. Alternatives for collective interest litigation

- An alternative for collective interest litigation can be found in the Netherlands. In the Netherlands, a possibility is offered for natural or legal persons having caused harm and a foundation or association representing the interests of those who have suffered harm to reach an agreement which may be submitted to the Court of Appeal in Amsterdam in order to have it sanctioned as an agreement applicable to all who have suffered harm in the context of the agreement. The decision is binding for everyone involved in the dispute, except for those who decide to opt-out. This approach may alleviate the burden on the courts.
- The active involvement of the court is necessary in such cases, in order to safeguard the legitimate interests of all parties to the dispute. It is particularly important that the court be involved actively in reviewing the terms of a settlement negotiated between the representative claimant (or their counsel) and the defendant.

F. Role of the EU

- Whether EU rules on standing in collective interest litigation or the *actio popularis* should also encompass purely national cases (in addition to cross-border cases) is a political issue. Currently, in issues of civil procedure, the EU is only considered to be competent in cross-border cases (see e.g. the European Small Claims Procedure). Some hold that this leads to unnecessary discrimination of litigants in purely national cases and an unnecessary fragmentation of the internal market.
- EU rules on standing in collective interest litigation and the *actio popularis* should be general and not sector-specific, in order to make this litigation visible at the European level. Fragmentation may lead to differences in the legal protection between the various sectors and to a highly complex ensemble of rules and regulations.

6.3.3. Recommendations for Administrative Law

The analysis of *locus standi* before national administrative courts has brought about the following outstanding issues.

A. Variety and complexity of the national systems of judicial review

The study demonstrates an enormous variety in how judicial review of administrative action is organised in the Member States and to whom and how *locus standi* is granted. That makes it difficult to compare the effectiveness of judicial review in general and more

particularly of the rules on *locus standi*. It is hard to say whether there is anything like a level playing field in this area.

- A certain requirement or criterion, e.g. the necessity to claim the infringement of a right as a prerequisite for standing, may never be discussed and evaluated on its own, but it always has to be examined as part of a whole system.

When the effectiveness of judicial protection is the overall benchmark in a discussion about *locus standi* in the Member States and within the EU, (the functioning in practice of) the whole system of judicial review should be looked upon, in addition to a comparison of single elements or rules.

- Being aware that a comparison of something like “a whole system” is difficult to perform on the basis of abstract descriptions, it would be a worthwhile venture to compare, in addition to the review here, how a number of concrete and fictional cases would be handled by the courts in the different legal orders.

As a general remark, several reporters and reviewers indicated that their national system of judicial review in administrative law cases is very complicated and complex. Obtaining access to justice in administrative matters is not always an easy job for citizens. As the procedural law before national courts is not an EU competence and the Member States in principle are autonomous in this area, the variety of solutions found as such is not problematic. To a certain extent, this implies that it is neither an obligation nor a desirable aim to guarantee a level playing field in *locus standi*.

- European action to harmonise national law and practice of *locus standi* is required and, as far as can be seen, desirable only as far as obstacles of access to justice are concerned, and more specifically hurdles in *locus standi* that circumvent an effective judicial protection. Complexity of some national systems of judicial protection may be detrimental for effective judicial protection. However, this does not seem to give sufficient grounds for legislative measures that aim to harmonise the systems of judicial protection in each of the Member States. The Commission might consider taking action against any Member State, if there is evidence that the complexity of the rules is concerning judicial protection hinders the reliance by citizens on their rights before a national court.

B. Compliance with the Aarhus Convention

Some of the reporters (e.g. England and Wales, Poland, Germany) doubt whether *locus standi* in their country complies with the provisions of Article 9 Aarhus Convention. Not all of the problems with respect to compliance with the Aarhus Convention indicate the desirability of new European legislation. For example, there is no need for new legislative measures to force Germany to grant *locus standi* to NGOs. Germany simply has to comply with Directive 2003/35/EC and with the judgment of the CJ in case C-115/09 (*Trianel*). If that country takes too long to adjust its procedural law to these requirements, the Commission can request the CJ to impose a fine on the basis of Article 263 (4) TFEU.

An important requirement of the Aarhus Convention and of EU law is that any infringement of environmental law by public authorities should be challengeable before a court by someone. As the study shows, most of the Member States which were examined comply with this requirement, albeit in variable ways. In some legal systems the courts try, by using a broad interpretation of the standing criteria in environmental cases, to prevent

cases where no-one can challenge decisions which have negative effects on the environment. In other legal systems, PIGs may object such decisions. The only country which does not comply with this requirement seems to be Germany. Hence, there is no need to harmonise the approaches to *locus standi* in the Member States. It seems be sufficient to enforce existing principles of EU law as considered in the case-law of the CJ.³⁵⁰

- Legislative activism may be desirable or needed where poor compliance, at least partly, is due to the lack of clarity of the legal consequences of the Aarhus Convention. That is true with regard to the scope of Article 9(2) in combination with Article 6(1)(b) and the scope of Article 9(3) of the Aarhus Convention. As far as the latter provision is concerned, the fact that it does not have direct effect (CJ C-240/09) may hamper its enforcement. That could be an extra argument for legislative action by the EU. However, the parties to the Aarhus Convention deliberately drafted Article 9(3) in such a way to provide for discretion. The question is whether the EU Member States now want to go further and limit this discretion. Although the proposal of a directive on access to justice in environmental measures from 2003, which aimed at transposing Article 9(3) Aarhus Convention was rejected by a number of Member States, the situation may now be different. As recent case-law and the report show, there remain shortcomings in the application of the Aarhus Convention, which may (now) require European legislative initiatives.

C. Other recommendations

Next to the aforementioned, it should be noted that:

- In some legal systems, *locus standi* is not the foremost tool ensuring an effective judicial protection. Instead, decisive seem to be other questions such as cost and cost-risks (e.g. England and Wales), the duration of the procedures and workload (e.g. Belgium and Hungary), limited expertise and corruption risks (Hungary) or uncertainty, caused by manifold and rapid changes of procedural and material law (Hungary). Therefore, new EU legislation may not be the most urgent reaction to face the shortcomings of access to court in the Member States.

6.3.4. Recommendations for Criminal Law

On the basis of the results of the analysis of *locus standi* before national criminal law courts, the following issues and recommendations should be highlighted:

- A. The requirements of the Framework Decision on the standing of victims in criminal proceedings of 15 March 2001 (2001/220/JHA) and the proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime (COM (2011) 275).

³⁵⁰ E.g. Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405.

Each of the legal systems in the study comply with the standing requirements of the Framework Decision on the standing of victims in criminal proceedings of 15 March 2001 (2001/220/JHA) due to the fact that this Framework Decision allows, as a result of rather vague and broad terms, considerable leeway in the implementation of standing rights in the strict sense as we have defined in our study.³⁵¹ This is even the case in England and Wales where victims have no standing in criminal proceedings. According to Article 1(d) Framework Decision 2001: "the term 'proceedings' shall be broadly construed to include, in addition to criminal proceedings, all contacts of victims as such with any authority, public service or victim support organisation in connection with their case, before, during, or after criminal process". Article 3 Framework Decision 2001, providing the right to be heard, refers to the general term "proceedings" in Article 1(d). So a victim may also be heard before or after the criminal proceedings by an authority or victim support organisation. A consequence is that there is no firm requirement that the victim should be heard and granted *locus standi* in criminal proceedings. The reimbursement of expenses regulated in Article 7 Framework Decision 2001 refers to victims who have the status of parties or witnesses, and does not imply the obligation to grant victims this status of party in criminal proceedings. Article 9 Framework Decision 2001 covers the right to compensation in the course of criminal proceedings, which allows national law to award compensation in another manner than through criminal proceedings. If victims have *locus standi* in civil proceedings, the provision is complied with.

The question is whether the proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime (COM (2011) 275) aims to alter the question of *locus standi* before criminal courts. This draft directive puts more emphasis on the rights and facilities that inform, support and protect victims, - absolutely important - but it does not provide concrete standing requirements, or only very limited ones:

- To the definition of victim in the proposed Article 2(a)(ii), the following is added: "family members of a person whose death has been caused by a criminal offence should fall under the definition of 'victim'." As this study highlights, this is already standard practice in the covered legal systems.
- The right to be heard is formulated in Article 9: "Member States shall ensure that victims may be heard during criminal proceedings and may supply evidence", but does not give victims a straightforward right of *locus standi* in criminal proceedings.
- The right to review a decision not to prosecute is new compared with the Framework Decision 2001 and already complies with in the legal systems covered in the study, except for England and Wales. The right to a decision on compensation from the offender in the course of criminal proceedings in Article 15 still leaves a significant margin for implementation according to national standards.

All other provisions in the draft Directive that address procedural issues do not deal with *locus standi* in criminal proceedings in the strict sense.

³⁵¹ See for the same conclusion the Report Victims in Europe, Implementation of the EU framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union, 2009.

It is a political issue, falling outside the scope of this study, whether more EU harmonization or legislation is necessary, considering that the legal systems covered in this study all have – except for England and Wales – legislation that regulates *locus standi* of victims in criminal proceedings (in England and Wales this issue is also regulated, but outside the criminal trial).

B. Expedited criminal proceedings

- In order to protect the victim's *locus standi* in case of expedited criminal proceedings or mediation, there could be a provision added to Article 10 (Rights in the event of a decision not to prosecute) of the proposed Directive specifically addressing the situation when expedited criminal proceedings or mediation are applied.
- In our opinion, the most sophisticated way of taking into account the victims interests seems the Belgian one, where a transaction is only possible if the defendant first compensates the (non-disputed) part of the damages caused to the victim and admits civil responsibility for what happened in writing, leading to a non-refutable presumption of fault by the defendant in case the victim brings an additional claim (the disputed part) to a civil court. A similar solution can be applied in cases of criminal mediation, where the victim would be invited to participate in order to negotiate an agreement on the compensation or the reparation. Although the victim does not need to participate in criminal proceedings, Belgian law provides for a non-refutable presumption of fault by the defendant in case the victim wants to obtain compensation for damages by initiating civil proceedings. This construction could be applied in all forms of expedited criminal proceedings.

REFERENCES

- Abaquense de Parfouru, A (2007), 'Locus Standi of Private Applicants under the Article 230 EC Action for Annulment: Any Lessons to be Learnt from France?' 14 MJ Eur Comp Law 361.
- Albor-Llorens, A. (2003), 'The standing of private parties to challenge community measures: has the European Court missed the boat?', 62 Cambridge LJ 87.
- Arnall, A. (1995), 'Private applicants and the action for annulment under Article 173 of the EC Treaty' 32 CML Rev 7.
- Arnall, A. (2001), 'Private Applicants and the Action for Annulment since Codorniu' 38 CML Rev 7.
- Arnall, A. (2005), 'A constitutional court for Europe?' 11 Cambridge Yearbook Eur Leg Studies 29.
- Martin Cortés, JM. (2004), 'Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' 11 MJ Eur Comp Law 233.
- Backes, Ch.W., *Suum cuique*, (Boom juridische uitgevers 2009).
- Balthasar, S. (2010), 'Locus standi rules for challenges to regulatory acts by private applicants: the new art.263(4) TFEU' 35 E.L. Rev. 542.
- Barents, R. (2004), 'The Court of Justice in the Draft Constitution' 11 Maastricht Journal of European and Comparative Law 130.
- Brown, C. and Morijn, J. (2004), 'Comment on *Jégo-Quéré*' 41 CML Rev 1654.
- Cserei, G. (2003), 'The implementation of the aggrieved party's rights' in: Belügyi Szemle 2003/2
- Chalmers, D and Monti, G. (2006), *European Union Law* (4th Ed.) Cambridge University Press.
- Cortés Martin, JM. (2004), 'Ubi ius, Ibi Remedium? – Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads' 11 MJ Eur Comp Law 242.
- Corthaut, T.(2002/2003), 'Comment on *Jégo-Quéré*' 9 Columbia Journal of European Law 143.
- Cygan, A. (2003), 'Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC' 52 Int Comp Law Quarterly 995.
- Dashwood, A. and Johnston, A. (2004), 'The institutions of the enlarged EU under the regime of the Constitutional Treaty' 41 CML Rev 1509.

- European Commission (2003), *Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters*, COM(2003) 624 final, Brussels.
- European Commission (2011), *Commission staff working document public consultation: Towards a Coherent European Approach to Collective Redress*, SEC(2011)173 final, Brussels.
- European Commission (2008), *Green paper on Consumer Collective Redress*, COM(2008) 794 final, Brussels.
- European Commission (2011), *Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime*, COM(2011) 275 final, Brussels.
- European Parliament (2009), *European Parliament resolution of 26 November 2009 on the elimination of violence against women*, P7_TA(2009)0098, Strasbourg.
- Granger, M. (2003), 'Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Jégo-Quéré et Cie SA v Commission and Unión de Pequeños Agricultores v Council'. 66 ML Rev 133.
- Hodges, Ch. *et al* (2009), 'Costs and Funding of Civil Litigation, A Comparative Study', Legal Research Paper Series, Paper No. 55/2009, December 2009.
- Jans, J. (2006), 'Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' in R Macrory, *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (Europa Law Publishing 2006).
- Koch, C. (2005), 'Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy' E.L. Rev. 2005, 30(4), 511.
- Koch, C. (2004), 'European Community – Challenge of Community Fisheries Regulation – Admissibility of Individual Applications under Article 230(4)' 98 American J Int Law 819.
- Lenaerts, K. (2006), Arts, D. and Maselis, I., *Procedural Law of the European Union* (Sweet & Maxwell) (2nd Ed).
- Lewis, X. (2006/2007), 'Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?' 30 Fordham Int LJ 1496.
- Maron, A.(2007), 'Une association antiracist mal inspirée', Droit Pénal 145.
- Matsopoulou, H. (2007), 'La restriction jurisprudentielle apportée au droit d'une association de lutte contre le racisme de se constituer partie civile', JCP g 2007.II.10025.
- Meyer-Großner, L. (1995) *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen* (Beck'sche Kurz-Kommentare 1995)

- Oliver, P. (1997), 'Joint liability of the Community and the Member States' in T Heukels and A McDonnell, *The Action for Damages in Community law* (Kluwer 1997).
- Ragolle, F. (2003), 'Access to justice for private applicants in the Community legal order: recent (r)evolutions' 28 E.L. Rev. 90.
- Saas, C. (2008), 'L'action civile paralysée par le consentement impossible', AJP, n° 2/2008.
- Schwerdtfeger, A. (2010), *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention*, (Mohr Siebeck GmbH & Co. K 2010).
- Tridimas, T and Poli, S. (2008), "'Locus Standi" of Individuals under Article 230(4): the Return of Euridice?' in: T Tridimas and S Poli, *Making community law: the legacy of Advocate General Francis Jacobs at the European Court of Justice* (Edward Elgar Publishing) 79.
- Usher, J. (2005), 'Direct and Individual Concern – An Effective Remedy or a Conventional Solution' 28 EL Rev 599.
- Ward, A. (2001), 'Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post-Jégo-Quééré' 4 Cambridge Yearbook of Eur Leg Studies 424.
- Ward, A. (2003), 'Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity' 22 Yearbook Eur Law 45.
- Ward, A. (2001), 'Amsterdam and Amendment to Article 230: An Opportunity Lost or Simply Deferred?' in A Dashwood and A Johnston, *The Future of the Judicial System of the European Union* (Hart Publishing) 37.

ANNEX I – QUESTIONNAIRE FOR COUNTRY REPORTERS ON CIVIL LAW

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

1. The Court System

- 1.1 Give a short overview of the court system in civil law cases in your legal system in no more than half a page.
- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?
- 1.3 Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?
- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?
- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?
- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?
- 3.4 Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?
- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

- 3.6 Are there any other variations in the standing rules (e.g. according to the value of the dispute)?
- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?
- 4.5. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.
- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?
- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?
- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

6. General interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?
- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?
- 7.2. Are there significant variations in the courts' approach based on:
 - 7.2.1. the type of remedy requested?
 - 7.2.1. the field of substantive law at hand?
 - 7.2.2. the nature of the claimant?
 - 7.2.3. the nature of the claim?
- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?
- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?
- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?
- 8.3. Did the courts use:
 - 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);
 - 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or
 - 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case-law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

ANNEX II – QUESTIONNAIRE FOR COUNTRY REPORTERS ON ADMINISTRATIVE LAW

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

1. The Court System

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.
- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?
- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?
- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?
- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?
- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?
- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?
- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?
- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?
- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?
- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?
- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.
- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?
- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?
- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

6. General interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?
- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?
- 7.2. Are there significant variations in the courts' approach based on:
 - 7.2.1. the type of remedy requested?

- 7.2.2. the field of substantive law at hand?
- 7.2.3. the nature of the claimant?
- 7.2.4. the nature of the claim?
- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?
- 7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?
- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?
- 8.3. Did the courts use:
 - 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);
 - 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;
 - 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case-law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

ANNEX III – QUESTIONNAIRE FOR COUNTRY REPORTERS ON CRIMINAL LAW

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

1. The Court System

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.
- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?
 - 1.2.1. Is there a possibility of private prosecution?
 - 1.2.2. Can a victim request review of a decision not to prosecute?
 - 1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?
 - 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?
- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?
- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.
- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?
- 3.3. Are there specific standing rules applicable to certain types of claims?
- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?
- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?
- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?
- 4.2. Are there significant variations in the courts' approach based on:
 - 4.2.1. the type of remedy requested?
 - 4.2.2. the nature of the claimant?
 - 4.2.3. the nature of the claim?
- 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?
- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?
- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?
- 5.3. Did the courts use:
 - 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);
 - 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or
 - 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case-law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

6. Other

Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

ANNEX IV – GUIDANCE DOCUMENT FOR COUNTRY REPORTERS

1. Purpose of the country reports

- 1.1 The country reports will provide the basis for a comparative research into *locus standi* before the civil, administrative and criminal courts in respect of the ten national legal systems and the EU on which the research team will base its analysis and comparative conclusions. When drafting your country report, take into account the fact that the report should readily be understood by readers from other jurisdictions.

2. The need to be analytical and critical

- 2.1. It is important that the country reports are both analytical and critical. There are normally significant differences between what the law states and what actually happens in practice, and, as far as possible, the report should provide an account what those differences are and how important they are.
- 2.2. There may be a lack of data and empirical research on *locus standi*. Lack of data is, in itself, an important finding and should be reported. Lack of empirical research should not prevent you from using the best available evidence in order to analyse, and draw conclusions about, the aspects of *locus standi* and processes in which this research project is interested.

3. Word limit

- 3.1. While there is no word limit we would nevertheless strongly encourage you to remain concise in your answers. If the answer requires a lengthy answer, then you should not spare any space. However, there is no need to cite scholarly articles or copy-paste entire sections from the statutory law. Clear and concise answers are preferred.

4. Writing guidelines

- 4.1. In order to ensure that all country reports are consistently structured, you received the questionnaire in a .pdf format which you cannot alter, but works much like a form you can fill out. Please stick to the allotted room for each question. Do not copy and paste the questionnaire in a separate document.

ANNEX V – GUIDANCE DOCUMENT FOR COUNTRY REVIEWERS

1. Purpose of the country reports

- 1.1. The country reports will provide the basis for a comparative research into *locus standi* before the national courts in respect of the ten legal systems on which the research team will base its analysis and comparative conclusions. When drafting your review, take into account the fact that the report should readily be understood by readers from other jurisdictions.

2. Purpose of the country reviews

- 2.1. In order to ensure the accuracy of the country reports, you are asked to review the country report. In particular you are asked to take note of the following:
 - a. check whether answers to the questionnaire are correct;
 - b. correct any factual errors;
 - c. make appropriate suggestions regarding the clarity of the report;
 - d. take into account the requirement that it be readily understood by readers from other jurisdictions;
 - e. consider the validity of any conclusions drawn from the available evidence and make any appropriate suggestions;
 - f. critically assess the data produced by the reporter; and
 - g. suggest any amendments.

3. The need to be analytical and critical

- 3.1. It is important that the country reports are both analytical and critical. There are normally significant differences between what the law states and what actually happens in practice, and, as far as possible, the report should provide an account what those differences are and how important they are.
- 3.2. There may a lack of data and empirical research on *locus standi*. Lack of data is, in itself, an important finding and should be reported. Lack of empirical research should not prevent you from using the best available evidence in order to analyse, and draw conclusions about, the aspects of *locus standi* and processes in which this research project is interested.

4. Word limit

- 4.1. While there is no word limit we would nevertheless strongly encourage you to remain concise in your answers. We expect that the total number of pages for your report will not need to (hopefully) exceed 2 pages. If the review requires a lengthy explanation, then you should not spare any space. However, there is no need to cite scholarly articles or copy-paste entire sections from the statutory law. Clear and concise comments are preferred.

5. Writing guidelines

- 5.1. Please send us your review in a word document (.doc or .docx) and not a .pdf file.

ANNEX VI – COUNTRY REPORTS³⁵²

³⁵² This annex can be obtained upon request from the Department C: Citizens Rights and Constitutional Affairs of the European Parliament (poldep-citizens@europarl.europa.eu)

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C** CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

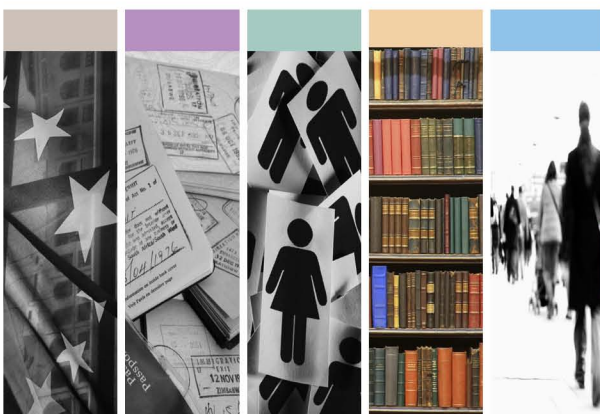
Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu>

PHOTO CREDIT: iStock International Inc.



ISBN