Building Collective Redress in Europe: Seeking Solutions for the Environment and Climate

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Building Collective Redress in Europe: Seeking Solutions for the Environment and Climate

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Abstract

Collective redress mechanisms have been part of EU law for several decades. They focus on strengthening the position of the "weaker party" in litigation, especially in the consumer and competition fields. More recently, the EU has also tried to introduce collective redress mechanisms to the environmental protection sector, where they are known under the term "access to justice in environmental matters". However, neither the legislative nor the interpretative attempts have so far proved successful. This article aims to uncover possible reasons for this failure, and to examine whether and on what conditions environmental law and emerging climate law are fitting sectors for collective redress mechanisms. To that end, the article analyses the main functions and objectives of environmental and climate harm cases, from the perspective of collective redress patterns. As a result, it suggests that when environmental collective redress is addressed, a distinction should be drawn between harms to persons and harms to the environment.

Introduction

Does the wider use of collective redress mechanisms improve the enforcement of public interests such as environmental protection? This idea has been both supported and rejected by legal scholars in Europe.[1] The proponents of environmental collective redress usually highlight advantages such as filling the gaps in the public enforcement of environmental law, enhancing public interest goals, deterring perpetrators more effectively, dealing with compensation when it comes to environmental harm suffered by individuals, and providing civil society with "watchdog" instruments against ineffectual public authorities. On the other hand, implanting private collective instruments in an area that is traditionally publicly enforced is, for this very reason, barely able to solve the problem of poor public enforcement. Collective redress mechanisms that allow several identical or similar claims to be joined procedurally into one court action are part of private law enforcement and, in the form of "class actions", have a long tradition in the US. The EU first started to legislate on collective redress actions in the 1980s in the consumer and competition areas. The efforts to extend the application of collective redress instruments to EU environmental protection, where public enforcement methods clearly dominate, appeared two decades later. Since then, several legislative and interpretative paths have been devised to introduce environmental collective redress in

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[1] Compare, e.g. L. Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice — Improving Citizen Involvement" (2014) 44 *Environmental Policy and Law* 247; A. Uzelac, "Why No Class Actions in Europe? A View from the Side of Dysfunctional Justice Systems" in V. Harsági and R. Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Cambridge: Intersentia, 2014), p.53.

Europe, but so far they have produced few positive results. This article first seeks to explore why the initiatives in EU environmental collective redress have not lived up to expectations. Second, it will reflect on whether environmental protection and the new climate protection field are suitable areas for the application of collective redress mechanisms.

The article keeps its main focus within the field of environmental law, the traditions of which support the analysis with many examples. Additionally, it presents climate law as a new discipline, one that is built to a large extent on environmental law methods but is as yet not so strongly embedded in EU law and jurisprudence. Here, one can expect similar problems related to the model of collective redress. The scope of this analysis is confined at the EU level, as including national law perspectives would greatly complicate and lengthen it. The analysis is based on scholarly writings that describe the collective redress mechanisms in consumer and competition areas in Europe, on the relevant case law of the Court of Justice of the European Union (CJEU) and the Aarhus Convention Compliance Committee (ACCC),[2] and on other studies that examine the application of collective redress in environmental protection. Regarding the last point, it should be mentioned that the term "collective redress" is somewhat alien to the environmental law area. The instruments with the relevant content mostly use the term "access to justice in environmental matters" that is linked to the Aarhus Convention, and they predominantly address the privileged status of environmental non-governmental organisations (NGOs) in various environment-related procedures; such NGOs are deemed to "have an interest" in the relevant decision-making procedure and thus to fulfil one of the conditions for standing. That is why the literature on environmental law in Europe rarely deals explicitly with "collective redress",[3] while contributions addressing "access to justice in environmental matters", especially those related to the implementation of art.9 of the Aarhus Convention, are abundant.[4]

The article first summarises the main characteristics of collective redress mechanisms and their legislative development in EU law. Next, it explains why EU bodies have attempted to include environmental protection in their collective redress policies and legislative efforts. The sectoral and horizontal legislative efforts to introduce an environmental collective redress regime are then presented. This section explains why neither these efforts nor the interpretative path at the CJEU, supported by numerous environmental law scholars, have succeeded. In its core, the article examines the extent to which environmental and climate protection issues, which differ greatly from the consumer and other issues to which collective redress has traditionally been applied, are suitable for enforcement using private and collective methods. The article ultimately concludes that, in the environmental and climate sectors, it is crucial to differentiate between two lines of redress on the basis of what has been harmed. Collective redress methods are only conceivable where harms occur to persons or their property as a result of damage to the environment or climate. On the other hand, when purely environmental values or climate stability are at stake, collective

[2] The Aarhus Convention Compliance Committee was entrusted with the control mechanisms under the Aarhus Convention and the implementing Decision I/7 of the Meeting of the Parties; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998 [2005] OJ L124/4. The EU, as well as all EU Member States, is a party to this Convention.

[3] M. Eliantonio, "Collective Redress in Environmental Matters in the EU: A Role Model or a 'Problem Child'?" (2014) 41 *Legal Issues of Economic Integration* 257.

[4] E.g. C. Poncelet, "Access to Justice in Environmental Matters—Does the European Union Comply with its Obligations?" (2012) 24 *Journal of Environmental Law* 287; J. Darpö, Effective Justice? Synthesis Report of the Study on the Implementation of arts 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union (2013) Final Report, *https://environment.ec.europa.eu/law-and-governance/aarhus_en*; H. Schoukens, "Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?" (2015) 31 *Utrecht Journal of International and European Law* 46; B. Pirker, "Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?" (2016) 25 *Review of European, Comparative & International Environmental Law* 81.

redress mechanisms can only be introduced with great difficulty, and, in this area, calls for strengthening private enforcement may appear as something of a substitute for effective public enforcement.

Collective redress and the environmental sector in EU law

Developing the collective redress concept

According to the European Commission definition,

> "collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action."[5]

Collective redress procedures can be described as civil disputes between two private parties, one of which is a collective party, for instance, a group of claimants.[6] The main functions of collective redress in the consumer and competition areas are twofold: first, to facilitate access to justice in cases where the individual damage is not great enough for potential claimants to think it worth pursuing an individual claim; and second, to allow legal systems to accommodate mass litigation without being overwhelmed.[7] Usually, in a particular collective redress procedure, one or both of two basic objectives are sought: cessation of an unlawful practice (an injunctive relief form of collective redress), or compensation for damage suffered (compensatory relief form). There are two models for how the group of claimants in collective redress proceedings is created: opt-in and opt-out. In the opt-in model, any harmed person who wishes to join the group as a claimant has to take a positive step to assert their rights and formally join a coordinated procedure; by contrast, in the opt-out system, all victims are automatically assumed to be members of the class and any member is entitled to opt out of the class, having the opportunity either not to assert their claim or to bring it individually.[8] In standard collective redress proceedings, a typical situation may cover a group of consumers who suffered the same or similar harm from a specific unlawful practice by a company, whether state-owned or in private hands. The interest at stake is usually the private interest of individual persons, whose direct personal harm gives them legal standing.

The EU's efforts in collective redress started with sector-specific regulations in the consumer and competition areas in the 1980s. After having presented the idea of a consumer class action at the EU level for the first time in a Memorandum in 1984, the Commission included a collective mechanism as one of the required provisions in several Community measures, empowering consumer organisations to take certain enforcement steps.[9] The drafting of the instruments that followed after 2000 initiated a heated debate on the pros and cons of collective litigation and private enforcement in Europe, in the light of the EU's cautious approach and fear of American-style class actions.[10] This was a substantial impediment to

[5] "Towards a European Horizontal Framework for Collective Redress" COM(2013) 401 final.

[6] "Towards a European Horizontal Framework for Collective Redress" COM(2013) 401 final.

[7] "Towards a European Horizontal Framework for Collective Redress" COM(2013) 401 final; D. Fairgrieve and G. Howels, "Collective Redress Procedures—European Debates" (2009) 58 *International & Comparative Law Quarterly* 379.

[8] C. Hodges, *The Reform of Class and Representative Actions in European Legal System. A New Framework for Collective Redress in Europe* (Oxford: Hart Publishing, 2008), pp.118–119.

[9] E.g. Directive 84/450 on Misleading Advertising [1984] OJ L250/17; Directive 93/13 on Unfair Contract Terms [1993] OJ L95/29; Directive 98/27 on Injunctions for the Protection of Consumers' Interests [1998] OJ L166/51.

[10] Hodges, *The Reform of Class and Representative Actions in European Legal System. A New Framework for Collective Redress in Europe* (2008), pp.131–154; V. Harsági and R. Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Cambridge: Intersentia, 2014), pp.xix-xxv.

smooth legislative progress[11]; although it slowly led to new legal provisions,[12] these new provisions were ultimately regarded as not ambitious enough or even as a backward step.[13]

The environmental law debates broached the subject of private enforcement, and this was not just inspired by other domains in which individuals are the "weaker party" in their relations with corporations or operators. The following section will outline what motivated the efforts to embrace environmental protection within collective redress approaches, what were the main legislative and interpretative attempts that appeared and whether the expectations connected with introducing environmental collective redress have been fulfilled.

Objectives

The EU bodies had two main objectives behind their attempts to include environmental protection in collective redress debates and legislative efforts: to implement art.9 of the Aarhus Convention establishing access to justice in environmental matters for private actors, and to fill serious gaps identified in the public enforcement of EU environmental law.

First, introducing environmental collective redress in an appropriate form would ensure the implementation of art.9(3) and (4) of the Aarhus Convention: art.9(3) requires members of the public to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities that contravene provisions of national law relating to the environment, under criteria laid down by national law. Article 9(4) demands that those procedures must provide adequate and effective remedies, including injunctive relief as appropriate. These entitlements of members of the public sound highly progressive and are unparalleled in any other international environmental law instrument. If connected with those provisions in the Convention that grant a preferential position to environmental NGOs, allowing them to represent groups or collectives of persons in various procedural situations,[14] these entitlements can reasonably be considered as a basis for private enforcement and injunctive collective redress in the environmental area.

On the other hand, the form and extent of this Aarhus-required environmental collective redress are not clear enough. Commentators remark, for instance, that art.9(3) does not mean that members of the public are automatically granted standing to enforce environmental law in court directly. The obligation can also be met by, for example, ensuring that members of the public have the right to initiate administrative or criminal procedures.[15] In addition, the ACCC expected the State Parties to be rather flexible in their implementation of art.9; it admitted that para.3 certainly requires more than a right to address an administrative authority about illegal activity[16] but less than an *actio popularis* whereby anyone can

[11] B. Hess, "European Perspective on Collective Redress" in V. Harsági and R. Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Cambridge: Intersentia, 2014), p.3.

[12] Directive 2014/104 on the Compensation of Cartel Damages [2014] OJ L349/1.

[13] Hess, "European Perspective on Collective Redress" in Harsági and Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (2014), p.4.

[14] Especially art.2(5), under which environmental NGOs are by definition deemed to "have an interest" in the relevant environmental decision-making and thus to be entitled to enjoy the rights conferred on the public concerned, in relation to art.9(2). At the same time, it must be noted that, from a textual point of view, the wording of art.2(5) does not apply to art.9(3), although some national courts, as well as the CJEU, have found such an application to be appropriate. This may indicate a trend towards broadening the access to justice of environmental NGOs. See A. Danthinne, M. Eliantonio and M. Peeters, "Justifying a Presumed Standing for Environmental NGOs: A Legal Assessment of art.9(3) of the Aarhus Convention" (2022) *Review of European, Comparative & International Environmental Law* 1, 6.

[15] J. Ebbesson et al., *Aarhus Convention Implementation Guide*, 2nd edn (Geneva: United Nations, 2014), p.198.

[16] ACCC Decision III/6 General Issues of Compliance (Denmark) para.28 (United Nations) *https://unece.org/fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_8_e_GenCompliance.pdf*.

challenge any decision, act or omission relating to the environment.[17] Nevertheless, it is evident from the wording of the provision that the contracting parties are obliged to facilitate access to justice and to introduce systems sympathetic to providing access to justice for a wide range of claimants.[18]

Second, establishing a functioning environmental collective redress system could help to fill the serious gaps that have repeatedly been reported in the public enforcement of environmental law at both EU and national level. In the European Union, environmental law and emerging climate law are considered typical public law domains, and enforcement in these domains has predominantly relied on two principal stakeholders—the European Commission and the environmental authorities of the Member States. This differentiates the EU from the US, where approaches to law enforcement, including environmental and climate protection, rely considerably on private initiatives.[19]

The environmental law field has traditionally played a prominent role in Commission-initiated enforcement. The first case ever brought before the CJEU within an infringement procedure was an environmental one,[20] and the environmental sector has for years accounted for the largest number of infringement cases in any one EU policy sector managed by the Commission.[21] Despite this, the EU's centralised system of enforcing environmental law has repeatedly been described as weak and suffering from severe shortcomings, namely the limited ability of the Commission to detect all non-compliance with EU legislation, the Commission's selective infringement policy, leading to the prosecution of only some of the non-compliance cases discovered, and the excessive length of infringement proceedings, with a risk of environmental damage becoming irreparable.[22] What is more, the Commission has been criticised for its gradual withdrawal from its central enforcement authority role in the environmental sector over the past few years. The number of procedures initiated due to violations, or non-implementation, of environmental laws by Member States has fallen significantly.[23]

Legal scholars agree that greater involvement by private actors is beneficial for law enforcement in general, but it cannot replace the role of public authorities. General support for environmental collective redress can bring several advantages: it can enhance public interest goals, while also enabling those with private interests to take effective action against environmental pollution, it can help those who have

[17] ACCC Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Belgium) para.35 (United Nations) *https://unece.org/DAM/env/pp/compliance/C2005-11/ece.mp.pp.c.1.2006.4.add.2.e.pdf*.

[18] M. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges*, 2nd edn (Abingdon: Routledge, 2015), p.373.

[19] Hodges, *The Reform of Class and Representative Actions in European Legal System. A New Framework for Collective Redress in Europe* (2008), pp.196–197.

[20] M. Eliantonio, "Enforcing EU Environmental Policy Effectively: International Influences, Current Barriers and Possible Solutions" in S. Drake and M. Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Cheltenham: Edward Elgar Publishing, 2016), p.178.

[21] Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), p.227.

[22] E.g. Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice—Improving Citizen Involvement" (2014) 44 *Environmental Policy and Law* 247; A. Hofmann, "Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union" (2019) 28 *Environmental Politics* 342; M. Hinteregger, "Reconciling Multilayer Interests in Environmental Law: Access to Justice in Environmental Matters in the European Union and the United States" in S. Wrbka, S. Van Uytsel and M. Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge: Cambridge University Press, 2012), p.143; C. Schall, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?" (2008) 20 *Journal of Environmental Law* 417, 444; Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), p.196; Eliantonio, "Enforcing EU Environmental Policy Effectively: International Influences, Current Barriers and Possible Solutions" in Drake and Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (2016).

[23] A. Hofmann, "Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union" (2018) 40 *Journal of European Integration* 737.

suffered loss resulting from a breach of the law to gain compensation, and it can act as a deterrent for future perpetrators, too. Moreover, private actions are probably more effective at producing injunctions than the Commission's infringement procedures, which take a long time. Finally, civil society needs mechanisms for the times when public authorities, for one reason or another, do not protect the environment properly.[24] On the other hand, the environmental and climate law branches do not appear to be best suited to host collective redress instruments, and increasing the number of procedures initiated by private persons is still unlikely to solve the problem of poor public enforcement.[25]

Efforts and results

The steps taken to introduce environmental collective redress, or the elements of environmental collective redress, in the EU have been aimed at both sectoral and horizontal legislation. Besides this, a line of argumentation has been resonating that some level of implementation of collective redress could be created through changing the interpretation of the conditions for private actors to have standing before the CJEU. These three aspects will now be explored.

Sectoral legislation

Within the sectoral legislation in force, the only example of obligatory environmental collective redress (albeit with a limited impact) comes in the Environmental Liability Directive of 2004.[26] This Directive imposes obligations of a preventive and remedial character on operators performing the industrial activities listed in the Annex to the Directive. Article 12 entitles specified natural and legal persons, including environmental NGOs, to submit observations relating to instances of environmental damage or the imminent threat thereof to the competent authorities, which are then obliged to act. In this way, private entities may initiate proceedings in cases of environmental damage. However, there are two weak points in this legal regulation that so badly undermine the idea that it cannot be considered to be full environmental collective redress: first, the scope of the Directive is quite narrow—it is limited to damage to protected species and natural habitats, and to water and soil,[27] and second, the Directive does not endow the requesting persons with any participatory rights in the procedures instigated as a result of their submissions, or any rights to force the environmental protection authorities to utilise their inspection powers.[28] The only entitlement of

[24] Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice—Improving Citizen Involvement" (2014) 44 *Environmental Policy and Law* 247; Hofmann, "Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union" (2019) 28 *Environmental Politics* 342; Hinteregger, "Reconciling Multilayer Interests in Environmental Law: Access to Justice in Environmental Matters in the European Union and the United States" in Wrbka, Van Uytsel and Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (2012); S. Drake, "More Effective Private Enforcement of EU Law Post-Lisbon: Aligning Regulatory Goals and Constitutional Values" in S. Drake and M. Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Cheltenham: Edward Elgar Publishing, 2016), p.15.

[25] Hofmann, "Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union" (2019) 28 *Environmental Politics* 357.

[26] Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56. In this article, I am treating the categories of sectoral (vertical) and horizontal legislation from the collective redress point of view, i.e. sectoral legislation as dealing with collective redress in one sector only, and horizontal legislation as regulating collective redress in several areas. That is why I subsume the Environmental Liability Directive within sectoral legislation. This differs from the environmental law perspective, where the same Directive belongs in horizontal environmental legislation.

[27] Directive 2004/35 art.2(1).

[28] Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), p.263.

the requesting persons is to be informed of the decision taken by the competent authority.[29] This means that these provisions do not in fact grant any formal enforcement role to private persons or organisations, with the role being left in the exclusive competence of public authorities. The regime established in this form by the Directive has even been described as a public regulation regime with private enforcement elements, where the public authority is the actual enforcer and private parties can only influence the authority ex post.[30]

After the EU's accession to the Aarhus Convention in 2005, the Commission planned to implement the full requirements of art.9 in two pieces of sectoral legislation, a Directive and a Regulation, but only the Regulation was ultimately adopted. The Proposal for a Directive on Access to Justice in Environmental Matters of 2003[31] was expected to establish a general framework for access to justice in environmental matters in relation to acts or omissions by public authorities. It intended to grant standing to certain members of the public, including environmental NGOs, for whom proving sufficient interest in the proceedings would not be required.[32] However, the proposed Directive was never approved: after more than 10 years of unsuccessful negotiations within the EU's legislative bodies, it was withdrawn as obsolete.[33]

The Aarhus Regulation, adopted in September 2006,[34] introduced a specific procedure for the internal review of acts adopted by the EU organs: under art.10 of the original wording, an environmental NGO fulfilling the set criteria could bring an application for an internal review of administrative acts to the Commission and, under art.12, could appeal to the Court of Justice against the written response of the Commission resulting from the internal review procedure. However, the procedure implemented art.9(3) of the Aarhus Convention at first glance only: the internal review was available to NGOs, but concerned individuals were not even mentioned in the Regulation, which was not in compliance with the Aarhus Convention. Moreover, the internal review could be a review of "administrative acts" only, a concept that is traditionally interpreted narrowly to mean measures of individual scope under environmental law.[35] Finally, based on art.12, the Court always dealt solely with the written response of the respective EU body, and the annulment of the written response did not entail the cancellation of the act or omission at issue. This has applied even in the recent, otherwise promising, landmark case law, which demonstrates the limited capacity of the administrative review procedure under the Aarhus Regulation.[36]

[29] Directive 2004/35 art.12(4).

[30] J.A.W. Van Zeben, "The Untapped Potential of Horizontal Private Enforcement within European Environmental Law" (2010) 22 *Georgetown International Environmental Law Review* 241, 265.

[31] See "Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters" COM(2003) 624 final.

[32] See arts 4 and 5 of the proposed Directive.

[33] See Withdrawal of Obsolete Commission Proposals [2014] OJ C153/3.

[34] Regulation 1367/2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L264/13.

[35] See Aarhus Regulation art.2(1)(g). For more details, see J. Jans, "Did Baron von Munchausen 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 (ed), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (Paris: Europa Law Publishing, 2005); J. Jans and G. Harryvan, "Internal Review of EU Environmental Measures. It's True: Baron van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation" (2010) 3 *Review of European Administrative Law* 53; V. Vomáčka, "To the Bitter End: The Limits to the CJEU's Interpretation of Locus Standi in Environmental Matters" in R. Simon and H. Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (Praha: Institute of State and Law of the Czech Academy of Sciences, 2019), p.146.

[36] See Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, *EIB v ClientEarth* (C-212/21 P) EU:T:2021:42, currently under appeal. Although the Court interpreted the concept of "act adopted in accordance with environmental law" in its judgment in a very broad sense and annulled the decision of the European Investment Bank rejecting as inadmissible the request for an internal review of its resolution approving

Because of these flaws, the Aarhus Convention Compliance Committee concluded in March 2017 that the EU had failed to comply with art.9(3) and (4) of the Aarhus Convention,[37] which moved the Commission to revise the Aarhus Regulation to introduce a broader scope for the review mechanism. No matter how disappointing and insufficient the Commission's original proposal was,[38] months of intense negotiations initiated by the European Parliament led in October 2021 to a reform that can be described as a big step towards compliance with the Aarhus Convention.[39] The amendment brings three main changes. First, it provides a new definition of "administrative act", replacing its meaning of individual acts only with non-legislative acts, which entails a significant widening of the categories of decisions that are subject to the review mechanism. Second, it extends the scope of acts that may be challenged beyond those in the field of environmental law to those that contravene environmental law, regardless of the policy area in question, and also to omissions to adopt such an act, where such a failure may contravene environmental law. Third, the Regulation now opens the ability to apply for an internal review to individuals as well, albeit under quite restrictive conditions: they must demonstrate that they are either directly affected and that their rights have been impaired, or that they defend a sufficient public interest and have at least 4,000 supporters from at least five EU Member States. For both options, the individuals are required to be represented according to special rules. The rule that the Court's review under art.12 is limited to the written response of the respective EU body only (not to the act or omission at issue) remains unchanged.

Interestingly, the conditions set by the new version of the Regulation for the representation of individuals in these two variants of internal review lead us back to the collective redress design. Members of the public must be represented either by an NGO that meets the same criteria as those prescribed for NGOs wishing to make their own request for an internal review, or by a lawyer authorised to practise before a court of a Member State. This approach is, in fact, reminiscent of the notion of a "class" as a group of individuals similarly affected by the same unlawful act, and the representation of that class that may be required by EU or national procedural regulations on collective redress. It could be possible to consider this new arrangement of access to justice as indicating certain features of "environmental collective redress", albeit under a procedure very far from a civil one, limited to acts and omissions to adopt acts and to Union institutions only, and limited to redress that does not necessarily even include rectifying the act or omission at issue and produces no remedy or compensation. It is also still to be seen how the revised provisions will be interpreted in the courts. As such, it is not yet certain how much collective redress the revised Aarhus Regulation brings.

the financing of a biomass power generation plant, this judgment cannot anticipate the EIB's new way of dealing with the request in the future.

[37] ACCC Findings and recommendations of the Compliance Committee with regard to communication concerning compliance by the European Union (EU) Part II, para.123, *https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf*.

[38] "Proposal for a Regulation of the European Parliament and of the Council on Amending Regulation 1367/2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies" COM(2020) 642 final. For critical comments, see e.g. G.C. Leonelli, "Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending" (2021) 40 *Yearbook of European Law* 230. See also Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3 2021 *https://unece.org/sites/default/files/2021-02/M3_EU_advice_12.02.2021.pdf*.

[39] Regulation 2021/1767 amending Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L356/1. Assessed by, e.g. A. Hough, *Final Report: Analysis of the Revised Proposal to Amend the Aarhus Regulation Agreed 12 July 2021* (Environmental Justice Network Ireland, September 2021), *https://ejni.net/wp-content/uploads/2021/09/AJO-Final-Report.pdf* at 7.

To conclude, the implementation of the Aarhus commitments to environmental collective redress through sectoral legislation has been partly ameliorated and displays certain collective redress features, but it is still far from perfect.

Horizontal legislation

Horizontal efforts to treat environmental harms together with other types of harm in a common piece of legislation seem to have moved from hopes to an impasse. The first legislative outcome reflecting the horizontal approach and including the environment was the Commission Recommendation on Common Principles for Injunctive and Compensatory Redress Mechanisms,[40] which was presented as the establishment of a common framework for horizontal collective redress in the EU. For the areas covered,[41] the Recommendation introduced a basic structure and the main rules to be established by the Member States, including injunctive and compensatory collective redress, representative actions, and the rules on legal standing therein. For the environmental area, the Recommendation became the platform on which the Commission decided to move the collective redress agenda when it abandoned the preparation of the Proposal for a Directive on Access to Justice in Environmental Matters.[42]

The Recommendation, if implemented, would have brought at least some kind of private enforcement to the environmental sector. However, the assessment of the Recommendation has been rather critical, its provisions being described as so cautious that they would most probably not produce any positive effect,[43] and its drafters as being too reluctant to promote effective collective redress mechanisms.[44] Moreover, the soft law nature of the Recommendation has certainly undermined its power. The results of the implementation of the Recommendation in the Member States were reported in 2018 to remain "somewhat limited": nine Member States still had no compensatory collective redress mechanism in place; and only seven Member States had enacted reforms of their laws on collective redress based on the Recommendation, while the majority of the new or proposed legislation was restricted to consumer matters only.[45] Member States have clearly chosen not to replace the sectoral approach with a horizontal one.[46]

The most recent developments in the EU collective redress legislation have shown that the environmental hopes originally connected with its horizontal aspect were vain. The new Directive on representative actions for the protection of the collective interests of consumers[47] indicates that it can only result in very limited environmental collective redress. Although the proposed Directive was originally planned to "cover a variety of areas such as data protection, financial services, travel and tourism, energy, telecommunications

[40] Recommendation 2013/396 on Common Principles for Injunctive and Compensatory Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law [2013] OJ L201/60.

[41] The areas are consumer protection, competition, environmental protection, protection of personal data, financial services legislation and investor protection.

[42] See especially Resolution of the European Parliament Towards a Coherent European Approach to Collective Redress (2011/2089(INI)) (2012), which explicitly calls the Commission to extend the instruments of injunctive relief to the environmental sector (para.12), and the Commission Towards a European Horizontal Framework for Collective Redress.

[43] Harsági and Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (2014), p.xxxv.

[44] Hess, "European Perspective on Collective Redress" in Harsági and Van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (2014), p.7.

[45] Commission Report on the implementation of the Commission Recommendation of 11 June 2013 (2013/396/EU) at 2–3.

[46] A. Stadler, "Optimal Instruments for Collective Redress Mechanisms in Europe—What Should the National Legislator Take into Account?" in R. Simon and H. Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (Praha: Institute of State and Law of the Czech Academy of Sciences, 2019), p.21.

[47] Directive 2020/1828 on Representative Actions for the Protection of the Collective Interests of Consumers and Repealing Directive 2009/22 [2020] OJ L409/1.

and environment",[48] the final wording of the Directive leaves the environment out of this list.[49] Environmental harms by private or public entities ("traders") can only be challenged by representative actions if they infringe any of the pieces of EU law referred to in Annex I of the Directive and if they "harm or may harm the collective interests of consumers".

This means that the scope of the legislative acts listed in the Annex is key for any collective redress, including in the environmental arena. The list of legislation in the Annex includes, among many consumer-only laws, a few Directives and Regulations relating indirectly to the environment, such as those on general product safety, food law, cosmetics, misleading advertising, ecolabelling, energy labelling, energy efficiency, eco-design or classification, and the labelling and packaging of substances and mixtures. However, it does not currently cover any laws with direct implications for the environment such as those on industrial pollution, air quality, or the status of water resources. If it were to do so, such "environmental collective redress" could benefit the environment, in my opinion. It would fulfil, at least for NGOs as "qualified entities" and at least for those types of environmental harm with an impact on persons (as consumers), some of the criteria set out in art.9(3) of the Aarhus Convention.

The developments described in the EU horizontal collective redress legislation in any event show that the Commission is no longer adhering to its horizontal approach, but has brought the scope back to consumer law.[50] Moreover, it demonstrates that there has been a significant move in how environmental interests are seen within the horizontal collective redress perspective, narrowing them down to a derisory part of consumer protection. All in all, even the previous horizontal legislative efforts have not led to the fulfilment of the expectations for environmental collective redress.

Finally, looking out for what the future may bring, a new legislative endeavour with potential impacts on environmental collective redress has appeared at the EU level and has raised expectations. In February 2022, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence.[51] Partly following on from the OECD Due Diligence Guidance for Responsible Business Conduct,[52] the proposed Directive aims to improve corporate governance practice in the fields of human rights and environmental impacts, to increase corporate accountability for adverse impacts, to create legal certainty for stakeholders, and to facilitate access to remedies for those affected by practices adverse to human rights and by the environmental impacts of corporate behaviour. The proposal plans to introduce due diligence duties for large companies (first of all, for EU companies with more than 500 employees on average and a worldwide net turnover exceeding EUR 150 million a year). The scope of the duties in the environmental area will be set by the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II.[53] The Annex determines those environmental

[48] "Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22" COM(2018) 0184 final—2018/089 (COD), recital 6.

[49] Directive 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22 [2020] OJ L409/1, recital 13.

[50] Stadler, "Optimal Instruments for Collective Redress Mechanisms in Europe—What Should the National Legislator Take into Account?" in Simon and Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (2019), p.21. And, as Fairgrieve and Salim point out, whilst the new Directive is a positive development in European collective redress, it still has shortcomings which limit its potentially transformative impact for consumers. See D. Fairgrieve and R. Salim, "Collective Redress in Europe: Moving Forward or Treading Water?" (2022) 71 *International and Comparative Law Quarterly* 465, 465–466.

[51] "Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive 2019/1937" COM(2022) 71 final.

[52] Available at *https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf*.

[53] "Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive 2019/1937" COM(2022) 71 final art.3(b), and the Annex.

conventions covered and their provisions, the violation of which (and only the violation of which) shall be considered a violation of the proposed Directive. However, the list of these conventions and their provisions seems to be rather narrow; it contains the conventions on biodiversity and CITES, mercury and mercury waste, chemicals, substances depleting the ozone layer, and hazardous waste, but no other environmental conventions or climate conventions.

From the environmental collective redress point of view, the proposed Directive requires, in art.9, that persons affected or potentially affected and civil society organisations may submit complaints to a company when they have legitimate concerns regarding the actual or potential adverse environmental impacts of the company's operations or the operations of its subsidiaries or its value chain. Complainants will be entitled to request appropriate follow-up of the complaint from the company, and to discuss the adverse impacts with the company's representatives at an appropriate level. Companies will have to establish a procedure for dealing with complaints and, in the event of justified complaints, will be obliged to take appropriate measures under art.9 to bring the adverse impacts to an end or to minimise their extent, and to take further appropriate action, such as paying damages to the affected persons or financial compensation to the affected communities, implementing a corrective action plan, or suspending or terminating business relationships with the partner causing the adverse impact. Nevertheless, the proposed art.9 does not treat environmental redress as a specific category, and there are no special forms of redress assumed for environmental harms, which may weaken the effects of this legal regulation from the environmental point of view.

Judicial interpretation

The results of the academic debate on whether and how the change in judicial interpretation at the CJEU level could improve access to justice in the environmental field are rather unclear. This debate concerns two interconnected issues—the conditions under which private parties have standing before the CJEU in environmental cases based on art.263 TFEU, and the scope of the Aarhus Convention provisions that have a self-executing effect. Environmental law researchers have continually tended to criticise the way in which the Court has interpreted the locus standi criteria under art.263 TFEU (previously art.230 of the EC), which is rooted in the Plaumann test of the 1960s. According to several such studies,[54] the Plaumann rules for defining "individual concern" are too restrictive and do not correspond to the new situation after the EU acceded to the Aarhus Convention; as a result, it is very difficult for environmental illegalities challenged by private actors to be heard by the Court.[55] These authors usually support the view that the Court not only has the power to change this interpretative pattern but also should do so. However, as other studies indicate, this attitude of the Court may emerge from constitutional elements limiting its interpretative

[54] E.g. M. Eliantonio, "Towards an Ever Dirtier Europe? The Restrictive Standing of Environmental NGOs before the European Courts and the Aarhus Convention" (2011) *Croatian Yearbook of European Law and Policy* 69; J. Ciantar, "Mission Accomplished? The Evolution of the Action for Annulment and Access to Justice in the European Union after the Treaty of Lisbon" (2012) 22 *Id-Dritt* 1; Poncelet, "Access to Justice in Environmental Matters—Does the European Union Comply with its Obligations?" (2012) 24 *Journal of Environmental Law* 287; Schoukens, "Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?" (2015) 31 *Utrecht Journal of International and European Law* 46; Krämer, "EU Enforcement of Environmental Laws: From Great Principles to Daily Practice—Improving Citizen Involvement" (2014) 44 *Environmental Policy and Law* 252–253.

[55] Compare, e.g. Order of the Court of First Instance (First Chamber) of 9 August 1995, *Greenpeace v Commission* (T-585/93) EU:T:1995:147; Judgment of the General Court (Fourth Chamber, Extended Composition) of 25 October 2011, *Microban International Ltd v European Commission* (T-262/10) EU:T:2011:623; Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami v European Parliament* (C-583/11 P) EU:C:2013:625; [2014] 1 C.M.L.R. 54.

space rather than from its conservatism or any unfriendliness toward environmental issues, and the Court explicitly does not see itself having the interpretative freedom to widen the scope of the standing criteria.[56]

The inability of applicants to gain access due to the standing restrictions based on the TFEU led them to try to rely directly on the provisions of the Aarhus Convention on the right to access to justice and to justify their standing with the Convention's self-executing effect. Even that approach has not brought much success: the Court denied the direct applicability in EU law of the Aarhus Convention provisions in two decisions in 2015.[57] As a result, the main route to the judicial protection of the environment seems to be indirect, beginning before the national courts,[58] and giving them the option to activate the preliminary question procedure, which allows a request for the CJEU to review EU law.[59] The effectiveness of this mechanism in the environmental field has, however, been found to be limited.[60] The resulting stalemate is not likely to be resolved soon; instead, it seems that the system remains in place under which access to the CJEU is only possible for those who meet the Plaumann criteria and others defending environmental interests are left with national procedures and with hopes that the Member States, as masters of the Treaty, will enact a change at some point.[61]

In the climate area, the admissibility of annulment actions has already been tested twice; both cases were rejected as the applicants failed to satisfy the CJEU's stringent standing requirements, on similar grounds as in environmental law cases. In the *Carvalho* case,[62] in which the applicants claimed that EU law does not limit greenhouse gas emissions as strictly as is required by EU human rights and international law, the Court showed by its final dismissal that it will apply the Plaumann criteria in climate-related harms cases in the same way as it does in environmental cases. The *Sabo*[63] applicants sought the annulment of EU law provisions that consider burning forest biomass to be a source of renewable energy because, they claimed, burning wood releases more carbon dioxide into the atmosphere than burning coal. Here, the decision repeated the same pattern: the merits of the case were not considered, as the applicants were unable to persuade the CJEU that they had the standing to present their case.

From the collective redress perspective, in both the *Carvalho* and the *Sabo* cases the applicants were groups of individuals or organisations from several countries. For instance, in *Carvalho*, they were families

[56] Especially M. Van Wolferen, "The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework" (2016) 12 *Journal of Contemporary European Research* 914, 916 and 921.

[57] *Council of the European Union v Vereniging Milieudefensie* (C-401/12 P to C-403/12 P) EU:C:2015:4; [2015] 2 C.M.L.R. 32; *Council of the European Union v Stichting Natuur en Milieu* (C-404/12 P and C-405/12 P) EU:C:2015:5; [2015] 2 C.M.L.R. 31.

[58] M. Van Wolferen and M. Eliantonio, "Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention" in M. Peeters and M. Eliantonio (eds), *Research Handbook on EU Environmental Law* (Cheltenham: Edward Elgar Publishing, 2020), p.148.

[59] Van Wolferen and Eliantonio, "Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention" in Peeters and Eliantonio (eds), *Research Handbook on EU Environmental Law* (2020), p.148.

[60] Milieu Consulting Sprl, *Study on EU Implementation of the Aarhus Convention in the Area of Access to Justice in Environmental Matters: Final Report* (September 2019); Vomáčka, "To the Bitter End: The Limits to the CJEU's Interpretation of Locus Standi in Environmental Matters" in Simon and Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (2019), pp.160 and 166.

[61] Van Wolferen and Eliantonio, "Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention" in Peeters and Eliantonio (eds), *Research Handbook on EU Environmental Law* (2020); Vomáčka, "To the Bitter End: The Limits to the CJEU's Interpretation of Locus Standi in Environmental Matters" in Simon and Müllerová (eds), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* (2019), p.157.

[62] Judgment of the Court (Sixth Chamber) of 25 March 2021, *Carvalho v Parliament and Council (supported by European Commission)* (C-565/19 P) EU:C:2021:252; [2022] 2 C.M.L.R. 8.

[63] Order of the Court (Eighth Chamber) of 14 January 2021, *Peter Sabo v European Parliament and Council (supported by European Commission)* (C-297/20 P) EU:C:2021:24.

working in the agricultural or tourism sectors. They asked for pecuniary damages under art.340 TFEU for their alleged individual losses as well as compensation in the form of an injunction. Specifically, they requested that measures were adopted to reduce greenhouse gas emissions, by 2030, by at least 50% to 60% compared to 1990 levels.

Attempting to overcome the Plaumann test, the litigants in both cases argued that the "individual concern" requirement should be interpreted in view of the reality of the global climate crisis and that, in cases alleging human rights violations, direct access to the CJEU must be ensured. However, the Court replied in its reasoning that,

> "the claim that an act infringes fundamental rights is not sufficient in itself for it to be established that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of art.263 TFEU meaningless".[64]

The Court did not exclude the conclusion that climate change has an effect on human rights, but refused to take this argument as a reason for changing the rules on standing.

This whole judicial fiasco logically revives the question of whether collective redress in the environmental and climate change areas, even in times of global environmental and climate crisis and in the context of alleged breaches of fundamental rights, is a worthwhile pursuit, given the existing legal order. The Court has apparently refused to revisit the Plaumann test to include climate change, and individuals are kept away from challenging EU law measures of general application, even when fundamental rights are at stake.[65]

Dismantling environmental redress

We can conclude from the previous sections that environmental collective redress, regardless of the abundant rhetoric about it, has mostly been a paper remedy. There are several reasons for this disappointing state of affairs, one of which may lie in the EU and its Member States being very willing to use the "improving the access to justice" catchphrase in policy documents but not actually wishing to strengthen the role of private prosecutors in environmental misconduct cases:

> "Access to justice is often used as a political slogan. It is quoted in policy papers, but is arguably not a real driver to the changes."[66]

It seems that neither the Commission nor the Member States are currently willing to allow there to be a truly independent private enforcement mechanism within EU environmental law.[67] Moreover, there might be strong opposition to private environmental enforcement from those leaders who tend to promote economic growth over environmental concerns, or from the entities that might find themselves accused under environmental collective redress proceedings (big polluters, for instance). Yet another reason may lie in people ignoring the fact that the broad concept of environmental collective redress encompasses two very different branches whose eligibility to be subject to collective redress instruments is not the same. The latter reason will be examined in more detail in the next sub-section of this article.

[64] *Carvalho v Parliament and Council (supported by European Commission)* (C-565/19 P) EU:C:2021:252 at [48]; *Peter Sabo v European Parliament and Council (supported by European Commission)* (C-297/20 P) EU:C:2021:24 at [29].

[65] J. Hartmann and M. Willers, "Protecting Rights through Climate Change Litigation before European Courts" (2022) 13 *Journal of Human Rights and the Environment* 90.

[66] Hodges, *The Reform of Class and Representative Actions in European Legal System. A New Framework for Collective Redress in Europe* (2008), p.190.

[67] Van Zeben, "The Untapped Potential of Horizontal Private Enforcement within European Environmental Law" (2010) 22 *Georgetown International Environmental Law Review* 267.

In environmental harm and climate-related cases, the environment as such (air, water, nature, species, stability of the climate, etc.) is usually directly harmed, while harm to persons may appear instead as a consequence of the degradation to the environment or as the effect of climate change on their health or property. Nevertheless, the current policies and legislative efforts have tended to treat both types of harm together, as requiring one "environmental collective redress", or, more precisely, one "access to justice in environmental matters", regime. My argument is that the two branches are not sufficiently compatible to be treated within one common instrument, and that, if they are put together, we risk obtaining, instead of the "something" that could be earned from a functioning part, a "nothing", as the malfunction of the one part affects the instrument as a whole. The two parts of the necessary redress must therefore be distinguished, even if they result from the same illegal behaviour. These two parts are the remediation of the harmed environment and its elements, and redress to the persons who have suffered harm as a consequence of environmental degradation or climate change.

It may legitimately be conceded that the distinction between harm to the environment as such and harm to persons as a result of a damaged environment is rather a functional or schematic one in this text. A closer look at this distinction from the recent scientific knowledge perspective[68] shows that it is not justified, as human life and health form an indivisible complexity with the environment, ecosystems and biodiversity, linked in various ways and at various scales. From this point of view, there may not exist anything like pure environmental harm that would be fully distinguishable from harm to persons. Nevertheless, since the distinction serves us well in terms of analysing EU law in its own terms, I will examine these two branches separately in the following section as regards the ability to enforce claims in respect of such harms through collective redress methods.

Harms to persons

Let us start with the line that is closer to the consumer sector and thus more easily addressed using the collective redress approach—harms caused to persons by a degraded environment or climate change. For instance, excessive or toxic air pollution may cause respiratory diseases, or an industrial accident may contaminate plots or destroy crops. Similarly, negative impacts of climate change, such as floods, droughts, extreme temperatures or extraordinary weather events may damage human life, health or property. In cases of damage inflicted on the environment that causes harm to life, health or property, collective redress is readily conceivable, targeted at both the monetary compensation of the victims (comprising material, immaterial, and physical damage to the person),[69] and injunctive relief (asking for cessation of the environmentally harmful illegal activity). In particular, catastrophic events with an environmental impact, such as the Fukushima nuclear disaster, have already shown that, in environmental (and climate) cases, collective redress is needed to resolve mass harm where victims suffer similar losses or injuries, and, as plaintiffs, may facilitate their situation by acting collectively.[70] Here, collective litigation may solve both the incapacity of the victims to sue and the potential overburdening of competent courts.

[68] See e.g. World Health Organization and Convention on Biological Diversity, *Connecting Global Priorities: Biodiversity and Human Health. A State of Knowledge Review* (2015), *https://www.cbd.int/health/SOK-biodiversity-en.pdf*; P.A. Sandifer, A.E. Sutton-Grier and B.P. Ward, "Exploring Connections among Nature, Biodiversity, *Ecosystem Services*, and Human Health and Well-being: Opportunities to enhance Health and Biodiversity Conservation" (2015) 12 Ecosystem Services 1.

[69] M.J. Azar-Baud, "L'action de groupe, une valeur ajoutée pour l'environnement?" (2015) 22 *Vertigo — la revue électronique en sciences de l´environnement* 1, 6.

[70] Hinteregger, " Reconciling Multilayer Interests in Environmental Law: Access to Justice in Environmental Matters in the European Union and the United States" in Wrbka, Van Uytsel and Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (2012), p.166.

However, there are also serious barriers that hinder the use of standard collective redress mechanisms for environment-related harms to persons or property. In consumer cases, those harmed usually know who the perpetrator is, and the damage is normally easier to identify and quantify. In environmental cases, the identification of an originator and a causal link between their activity and the harm caused to persons is much more complicated and is sometimes almost impossible to identify and prove, especially where there are several polluting businesses in the same region. Additionally, it can be hard for private plaintiffs to ascertain the unlawfulness of the relevant activity and to quantify the damage. Unlike environmental authorities, private actors have no right to investigate or inspect sites or premises where suspected violations of EU environmental law may have occurred. Other barriers may be financial, linked to the costs of litigation.[71]

In climate change harms, the barriers impeding the application of collective redress may be even stronger. The chain of causes and impacts contains more elements: cumulative emissions of greenhouse gases by a high number of actors throughout the planet cause anthropogenic climate change, and the effects of this, such as increased temperatures, rising sea levels and extreme weather events, cause damage to human health and property. For this reason, it may be even more complicated to identify the main perpetrators, to attribute the damage to climate change, and to prove the causal link. Here, science and law need to be developed further. Recent studies in climate attribution science have shown some initial positive results,[72] suggesting that it may be possible at some point to apply collective redress in cases of climate change harms to groups of people.

Harms to the environment

Applying collective redress to harms to the environment as such, namely to polluted water, to air, plant or animal species becoming extinct, to destroyed animal habitats or to depleted soil, presents special challenges when compared to "standard" collective redress.

In cases where environmental values as such are at stake, we first face the problem of legal standing, or, more precisely, the problem of representing the harmed parts of the environment before the courts. The environment is usually protected as a public interest or common good, and only some elements of the environment may be privately owned and thus protected through property rights. Acceptance of standing for parts of nature, based on an idea of the "rights of nature"[73] and recognising certain parts of nature as subjects, has been worked on more theoretically than in practice, and this idea is in fact non-existent in the European geographical and legal environment.[74] Unless a violation of EU environmental

[71] Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), pp.197 and 262.

[72] M. Burger, J. Wentz and R. Horton, "The Law and Science of Climate Change Attribution" (2020) 45 *Columbia Journal of Environmental Law* 57; M. Fermeglia, "Climate Science Before the Courts: Turning the Tide in Climate Change Litigation" in L. Westra, K. Bosselmann and M. Fermeglia (eds), *Ecological Integrity in Science and Law* (Cham: Springer, 2020), p.23; S. Marjanac and L. Patton, "Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?" (2018) 36 *Journal of Energy and Natural Resources Law* 265.

[73] The initial theoretical foundation of the rights of nature in law was laid in the work of C. D. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment*, 3rd edn (New York: Oxford University Press, 2010) originally published in 1972, and has since been widely developed and elaborated, e.g. in the works of D.R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017), D.P. Corrigan and M. Oksanen (eds), *Rights of Nature: A Re-examination* (New York: Routledge, 2021), or C.M. Kaufmann, "Rights of Nature: Institutions, Law, and Policy for Sustainable Development" in J. Sowers, S. D. VanDeveer and E. Weinthal (eds), *The Oxford Handbook of Comparative Environmental Politics* (Oxford: Oxford University Press, 2021).

[74] However, in other parts of the world particular cases have appeared where protection of specific parts of the environment, such as rivers or lakes, has been based on a "personality" having been granted to them by a judicial decision or an act. See, e.g. Constitutional Court of Colombia, *Atrato River Case* (T-622/16); or Te Awa Tupua

law adversely affects a person's immediate rights, it is usually unlikely that they will be in a position to take legal action. It is hard for environmental law norms to vest citizens with explicit individual rights that they can activate in the courts, and privately enforceable legal norms protecting climate stability are not yet in place. Furthermore, EU environmental law is criticised for not being clear enough on the exact extent of the rights of private litigants, based on individual pieces of legislation, and it is thus reliant upon the often ambiguous and open-ended state of the CJEU's case law.[75] This uncertainty probably also hinders any initiatives by private plaintiffs in environmental law enforcement. As a result, in certain cases of environmental violation, there may be nobody within the standard model of private redress (whether individual or collective) who would have standing to sue before a court, because nobody can prove an infringement of their own rights or interests.

Second, the objectives of redress for environmental or climate harms may diverge so much from those of standard collective redress that we may ask whether these fields have any substantive common points. Private actions in a standard collective redress model are often driven primarily by compensation motives. On the other hand, in environmental or climate cases, monetary objectives do not necessarily have to be present at all. An award of monetary compensation for harm to the environment to a private plaintiff alone would anyway miss the key environmental goal of restoring a damaged site to the condition in which it was before the occurrence of damage.[76] Injunctive relief and restitutio in integrum, and ultimately damages to ameliorate the environment if restitution is no longer possible, instead of compensation for plaintiffs, would be the most welcome objectives of environmental and climate collective redress.[77]

Third, the key procedural elements present in standard collective redress processes make little sense when the aim is to redress harms to the environment or climate. Here, the harms and the needs for redress are so specific that we may hesitate to consider civil law litigation, typical of standard collective redress, as a suitable procedure at all. Moreover, the representation here of relatively homogenous public interests means that there is no need to join or leave the class, and thus the question of whether it is better to have the *opt-in* or *opt-out* procedure seems irrelevant. Finally, rather than individual persons or their groups, environmental NGOs tend to play the role of primary instigators in environmental harm cases. This indeed corresponds to their typical mission to be "watchdogs", keeping their eyes on operators' practices on the one side and authorities' decisions on the other.

Implications

Based on the examination so far, it appears that the standard model of collective redress can be adopted for one aspect only of environmental or climate harms: to compensate personal victims. It is hardly practical to seek redress for environmental values or climate stability on their own, when there is no direct relationship to harm to persons. These harms are potentially ineligible for the collective redress mechanisms that we know from their original fields. If both harms, to persons and to the environment, are treated together as

(Whanganui River Claims Settlement) Act 2017 of New Zealand. Elaborating on and defending the idea of the rights of nature has been an increasing area of work among environmental philosophers as well as law scholars, and could help to protect the environment against human activities that cause it to deteriorate. See, e.g. M. Tanasescu, *Environment, Political Representation and the Challenge of Rights: Speaking for Nature* (London: Palgrave Macmillan, 2016).

[75] Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), p.263. One of few examples in which the CJEU concluded that there existed an "EU substantive right" in the field of air quality is the *Janecek* case (Judgment of the Court (Second Chamber) of 25 July 2008, *Janecek v Freistaat Bayern* (C-237/07) EU:C:2008:447).

[76] Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2015), p.628.

[77] Azar-Baud, "L'action de groupe, une valeur ajoutée pour l'environnement?" (2015) 22 *Vertigo — la revue électronique en sciences de l'environnement* 10.

requiring one "environmental collective redress", we risk, because one category cannot be subject to this type of remedy, the other category going empty-handed despite the arguments in favour of it.

It therefore seems to be key to differentiate strictly between the two branches of remedy in the environmental field when speaking about collective redress. So far as relates to harm to persons, it makes absolute sense to strengthen the role of private actors and to support the introduction of collective redress mechanisms here. I personally see a prospective future enlargement of the scope of the Directive on representative actions, through adding to the Annex important pieces of environmental legislation, to be more promising than other efforts. Building upon an existing general framework while gradually subsuming new environmental elements to it may have more chance of success than making new legislation, such as a new proposal for a Directive on access to justice in environmental matters, where similar previous efforts have failed. We may also hope that the new legislation that has been prepared on corporate due diligence and corporate accountability brings out some useful elements that make it easier for individuals and NGOs to enforce environmental and climate law norms privately.

On the other hand, the role of private enforcement mechanisms in the line of environmental redress that addresses harms to the environment itself should not be overestimated. Here, the ultimate objectives of redress are, in short, stopping illegal practices, repairing the damaged environment, punishing offenders and deterring potential perpetrators. The goals just enumerated are, at least in the traditional European legal environment, absolutely of a public enforcement nature. Even if far-reaching modifications to standard collective redress mechanisms were available, enabling them to be applied to environmental harms, it is still debatable whether environmental NGOs or other private entities would and should coerce environmental perpetrators privately and on their own into stopping illegal activities and repairing the environment.

In my opinion, in cases of pure environmental harm caused by private actors, insisting on full and effective implementation of the Environmental Liability Directive and its enforcement in all relevant cases is the first recommendation.[78] Second, in areas not covered by the Directive, the environment could benefit from a combination of private initiative and public enforcement, in which competent authorities are obliged to act once a suspected or discovered violation of environmental law is announced to them. Competent authorities would be obliged, inter alia, to open the relevant administrative, delict, criminal or other proceedings, with the claimant having certain limited participatory rights, such as the right to bring evidence. To prevent abuse, qualified categories of private complainants, such as environmental NGOs meeting given criteria, should have an entitlement to initiate such procedures. It seems that we will have to wait for the other type of claims of environmental illegality, complaints by private actors against public authorities' breaches of environmental law, represented by the internal review, to reveal its new effects after the revision of the Aarhus Regulation. The effectiveness of remedial instruments in national law in the field of judicial reviews of administrative acts also remains an open question. Finally, the prospective line of developing, in the future, the concept of personality and standing for parts of nature, which could help to solve the representation problem in pure environmental harm cases, needs much more research. At the moment, such legal constructions seem alien to the European law tradition, but this does not mean that they cannot serve the environment in the future.

For the present, I believe that enriching the public enforcement regime for pure environmental and climate harm cases with certain private enforcement elements, especially in its initial phases, would make

[78] The Commission's REFIT Evaluation of the Environmental Liability Directive of 2016 found that the ability of the Directive in achieving a high level of environmental protection and in preventing and remedying environmental damage in the EU is hampered by a significant lack of clarity and uniform application of key concepts, and by underdeveloped capacities and expertise. Also, eleven Member States notified that the Directive has never been applied in those states since its entry into force in 2007. "Commission Staff Working Document REFIT Evaluation of the Environmental Liability Directive" SDW(2016) 121 final at 60. A new evaluation of the Directive has recently been launched, including an open public consultation, available on *https://environment.ec.europa.eu/news/making-polluter-pay-commission-seeks-views-eu-environmental-liability-laws-2022-05-12_en*.

more sense for preserving environmental values than further attempts to bring in collective redress as we understand it in its traditional areas. Such a solution would probably also fulfil art.9 of the Aarhus Convention. However, the problem is that such procedural rules would need to be established at the national level of Member States, who now enjoy wide procedural autonomy,[79] which limits any efforts here. The Gordian Knot of environmental collective redress therefore does not yet seem to be cut through.

Conclusion

Turning the rhetorically supported but never really functioning environmental collective redress system into a living instrument in Europe is by no means an easy task. This article aspired not to produce straightforward solutions but rather to help to disentangle the bundle around the blurry concept of environmental collective redress.

The review of the efforts to introduce environmental collective redress in the EU started with explaining the expectations of the EU bodies of support for private initiatives in taking legal action against breaches of environmental law norms. It was revealed that neither the expectations related to implementing the Aarhus Convention nor those related to filling the gaps in the weak public enforcement have been fulfilled, although several lines of effort—sectoral and horizontal legislation and changes in judicial interpretation—have been put forward. Based on these poor results, attention was drawn to the deeper questions underlying the problem, and especially to whether the environmental and climate areas are even suitable fields for performing collective redress.

Here, the study of the values that may be at stake in environment- and climate-related cases showed that, conceptually and with a view to a more illustrative legal analysis, it is worth splitting them into two categories of redress, one being the solution of personal harms and the other being redress for harms to the environment itself, even if both are caused by the same illegal activity. A further examination of the needs, in terms of functions and objectives, of these two categories of redress through the lens of "standard" collective redress mechanisms proved that the only first category—harms to persons—seems to be adaptable to collective redress rules similar to those of the consumer field, for example. On the other hand, harms to the environment or climate do not appear to fit within the forms of collective redress, as the functions, pursued objectives, and patterns of such claims tend not to match those in consumer or other related sectors and, at the moment, they are definitely better suited to public enforcement; in the future, there may also potentially be some new concepts of standing for parts of nature.

This article argued that treating both environment- and climate-related harms to persons and harms to the environment or climate within one complex phenomenon of environmental collective redress can be a disservice, blurring the whole concept with a guise of inapplicability. I would therefore suggest reserving the term "environmental collective redress" for the category of environmental or climate change harms to persons only. In this field, collective redress instruments may and should be strengthened to enable better enforcement. A prospective way for this seems to be to extend the scope of the Directive on representative actions to cover substantive environmental legislation.

As regards harms to the environment itself, on the other hand, private initiatives cannot substitute for public authorities. The public enforcement of laws against environmental and climate harm seems to remain indispensable for now, and even for the near future, at both the EU and the national levels. The right way ahead requires re-emphasising the role of public enforcement, strengthening the Environmental Liability Directive and the revised Aarhus Regulation and, in areas not covered by these two norms, building enforcement on a balanced combination of private initiatives and public enforcement. As these lines of law enforcement require effective action at a national level too, further research would be required

[79] Hofmann, "Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union" (2019) 28 *Environmental Politics* 352.

on how to harmonise the procedural rules in this area. The role of private actors, such as environmental NGOs, should be supported as much as possible in the harms-to-environment line of remedies, but not in a position of "law enforcers"; rather, they should act as "watchdogs" who help public authorities to uncover environmental law violations and violations aggravating the climate crisis. In the latter case, we can expect that, in the future, harms will become even more frequent and more serious, so further research aimed specifically at climate harm redress is also very much needed.

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