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## STANDING BEFORE FRENCH ADMINISTRATIVE COURTS AND ENVIRONMENTAL PROTECTION: NOT SPECIFIC ENOUGH FOR AN EFFECTIVE ACCESS TO JUSTICE?

### ABSTRACT

In environmental matters, under the influence of Aarhus Convention, access to court is now a core pillar for the effectiveness of environmental legislation. In the French system, the standing conditions for a claim for judicial review before the French administrative courts are usually regarded as being easily fulfilled, since the French administrative case law adopts an interest-based approach to standing. This notion is interpreted in a rather extensive manner and in such way that the requirement has been deemed as satisfied as soon as there is a link between the challenged act and the personal situation of the applicant. But, applied in environmental matters, the enforcement of those standing requirements is restrictive, since it may be rather complex to prove the existence of an individual interest to challenge an act which impacts species or biodiversity. Indeed, due to the collective dimension of environmental protection, access to judicial review for individuals might be widely impaired. Doing so, the French conception of *intérêt à agir* does not seem to be in compliance with high standards applicable to access to justice to review administrative action. However, despite the development of International and European standards, it is rather unlikely that the French conception may change in order to take into account the specificity of the question of access to justice in environmental matters.

KEYWORDS: access to justice, judicial review, standing, environment, Aarhus convention.

INDICE: 1. The inadequacy of the *intérêt à agir* requirements in environmental matters. –2. An unlikely adaptation of standing requirements of judicial review in environmental matters.

The judge has become a core pillar for the protection of environment. Its intervention happens most often in a conflictual context, potentially reflecting the existence of violations of environmental protection standards. The judge is then increasingly seen as the indispensable and ultimate guarantor of environmental Rule of Law, promoting its effectiveness in the domestic legal order<sup>1</sup>. In the French system, ordinary judges, meaning civil, criminal and ad-

<sup>1</sup> J. EBBESSON, *L'accès à la justice en matière d'environnement en droit international: pourquoi et comment?*, in J. BÉTAILLE (dir.), *Le droit d'accès à la justice en matière d'environnement*, Toulouse, Presses de l'Université Toulouse 1 Capitole, 2016, p. 64, spéc. p. 65-66: «*Quelles sont les justifications plaçant en faveur de participation du public au processus décisionnel et de l'accès à la justice ? (...) Garantir les droits à la participation et à l'accès à l'information et les autres droits existants en matière*

ministrative judges are competent to adjudicate on environmental matters, according to their respective jurisdiction, ensuring the complementarity available legal remedies<sup>2</sup>. In this respect, the administrative judge belongs in a special place. While it is involved in disputes between individuals and administrative authorities, administrative judge's role is first of all to guarantee Rule of law and the compliance of public activities with legal standards, which is obviously an essential condition for the effectiveness of environmental legislation. Making use of dynamic interpretation, the French administrative judge has also contributed to the deepening of environmental requirements<sup>3</sup>, especially under the influence of European standards, but also following the movement of fundamentalization of environmental law by promoting constitutional standards in the field, grounding especially on the Charter for the Environment<sup>4</sup>.

However, the enforcement of the protective mission of the administrative judge is conditioned by the fact that the judge is called upon to rule on the legality of an act, i.e. in concrete terms that an action is brought before it, which is an essential preliminary requirement. Beyond thoughts related to the use of courts by individuals, from a legal point of view, the intervention of the judge in judicial review (*recours en excès de pouvoir*) depends in particular on the conditions of admissibility of the action, and especially on the definition of standing requirements, and particularly the interest to act (*intérêt à agir*). These are determined by each legal system, following different national legal traditions. In this perspective, based on an objective conception, the conditions of access to the French administrative courts are generally considered to be favorable, even very favorable, to individuals<sup>5</sup>. Indeed, the standing requirement is interpreted extensively, especially in comparison with the German conception based on right-violation<sup>6</sup>. This notion is not stated in a legal statute, but has been set in case law and has, over time, been interpreted on a case-by-case basis, as meaning that a personal interest, material or moral, is required. The administrative case law has interpreted this notion in a rather extensive manner and in such way that the requirement has been deemed as satisfied as soon as

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*d'environnement ; Faire respecter les règles de protection de l'environnement et améliorer l'efficacité et l'application des lois environnementales ; Améliorer la qualité du processus décisionnel en renforçant le contrôle de l'administration publique ; Promouvoir et adapter l'acquis des droits de l'homme ; Promouvoir la légitimité, l'équité et la justice dans la prise de décision et ainsi promouvoir la confiance envers le gouvernement ; Faire de même dans des contextes transfrontaliers».*

<sup>2</sup> C. HERMON, *Le droit à un recours effectif. Du bon usage de l'office distinct des juges administratif et civil*, in J. BÉTAILLE (dir.), *Le droit d'accès à la justice en matière d'environnement*, op. cit., p. 145.

<sup>3</sup> Le juge administratif et le droit de l'environnement, Dossiers thématiques du Conseil d'Etat, 2015, available at <https://www.conseil-etat.fr/content/download/145800/document/droit%20de%20l%20environnement.pdf>.

<sup>4</sup> CE, 3 October 2010, *Commune d'Annecy*, n° 297931. Charter for Environment available at <https://www.conseil-constitutionnel.fr/en/charter-for-the-environment>

<sup>5</sup> O. RENAUDIE (dir.), *L'intérêt à agir devant le juge administratif*, Boulogne-Billancourt, Berger-Levrault, 2016.

<sup>6</sup> See C. BACKES, *Access to court*, in C. BACKES, M. ELIANTONIO (eds.), *Cases, Materials and Text on Judicial Review of Administrative Action*, London, Hart Publishing, 2019, p. 191.

there is a link between the challenged act and the personal situation of the applicant<sup>7</sup>. The *intérêt à agir* is, in this sense, assessed objectively and not subjectively.

However, in environmental matters, the apparent liberalism of the conditions of the interest to act is not so evident, since to some extent, they could be obstacles hindering access to courts. Indeed, the assessment of standing requirement may reduce or even exclude for some applicants from access to courts. This is not only the case, in a fairly traditional manner for associations or other legal persons<sup>8</sup>, but also for individual applicants. Insofar as the defence of the environmental interest is primarily a collective interest, it is difficult for individuals to assert an individual and personal interest in the annulment of a general administrative act. Then, assessment of standing requirements impacts the enforcement of environmental Rule of law. Such conception is now potentially in contradiction with international<sup>9</sup> and European requirements. Indeed, those requirements, which are grounded on classical case law, shall be assessed in a renewed legal context. The obligation to ensure effective access to courts in environmental matters is first of all based on the Aarhus Convention<sup>10</sup>, which enshrines the role of the judge as a pillar of environmental democracy. Access to the courts is not only conceived as a guarantee for the effectiveness of the right of access to information and participation<sup>11</sup>, but also and above all, through the third pillar of the Convention, as an autonomous guarantee of environmental Rule of Law. Article 9 (3) of the Convention states that «(...) each Party shall ensure that members of the public who meet the criteria, if any, laid down in its national law have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment». Based on a rather flexible approach to the assessment of the criteria for admissibility of judicial review in environmental cases, its decisive contribution is to stress the immediate connection between effective access to justice and environmental matters<sup>12</sup>.

<sup>7</sup> R. CHAPUS, *Droit du contentieux administratif*, Paris, Montchrestien, 2008.

<sup>8</sup> Legal persons have standing to challenge acts related to their existence, organisation, functioning, competences or their activity, see CE, 28 December 1906, *Syndicat des Patrons-Coiffeurs de Limoges*, n° 25521.

<sup>9</sup> See Rio Declaration on environment and development, principle 10; Report on UN Conference on Environment and Development (3-14 June 1982), UN Doc. A/CCONF.151/26, Vol II, Annex I.

<sup>10</sup> Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998, ratified by France by Law n. 2002-285 of 28 February 2002 authorizing approval of the Convention and Decree n. 2002-1187 of 12 September 2002 on publication of the Convention, Official Journal of the French Republic, 21 September, p. 15 563; and by the EU, by 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.

<sup>11</sup> See Convention, article 9 (1) and (2).

<sup>12</sup> See e.g. on Article 9 of the Aarhus Convention, J. JENDROSKA, *Accès à la justice: remarque sur le statut juridique et le champ des obligations de la convention d'Aarhus dans le contexte de*

The conditions of admissibility judicial review shall therefore be assessed in the light of these requirements in order to assess the effectiveness of the judicial review as a way to contribute to environmental protection. However, their implementation shows, to a certain extent, the limits of judicial review to promote environmental Rule of Law. Indeed, the broad conception of *intérêt à agir* is in environmental matters rather strict, especially because of the lack of consideration of environmental specificity (§1). Furthermore, despite of the development of international and European standards on access to justice, specific for environmental matters, the approach adopted by the French administrative judge does not tend to be changed, at least in the short term (§2).

### **1. The inadequacy of the *intérêt à agir* requirements in environmental matters.**

Taluno Whereas judicial review is generally considered as a remedy widely accessible for individuals, such a statement deserves to be put into perspective when environmental matters are at stake. Indeed, the assessment of standing requirements proves to be more restrictive in this context because of the predominant collective dimension of environmental protection issue (A). Even if the French system has some peculiarity, regarding the favored status of some environmental NGOs to access to court, this cannot compensate for an overly restrictive conception of access to courts for individuals (B).

#### *A. Individuals removed from the administrative judge's courtroom in environmental matters*

In the context of environmental disputes, the assessment of standing for individuals is no different from that applicable to any dispute which falls within the jurisdiction of the administrative court in judicial review. However, it proves to be restrictive, or even exclusive, for individuals involved in the defence of environmental interests.

According to long-established case law, the applicant must show that he has a personal, direct and certain interest in the annulment of the challenged act for its action to be admissible. This requirement is deemed to be satisfied if the applicant demonstrates that there is a link between the contested measure and his personal situation. The interest in bringing action is therefore subject to a broad interpretation. Nevertheless, when applied to environmental litigation, these requirements look particularly restrictive. Indeed, by its very nature, the promotion of the environmental interest is first and foremost that of a collective interest. When initiating judicial review, the individuals do not aim at defending an individual interest, but the protection of a species or other environmental interests, which may be impacted by an administrative act. Obviously, the defence of the environmental interest may be satisfied while defending an individual interest, and then the action would be admissible, the individual

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*l'Union Européenne*, in *Revue Juridique de l'Environnement*, 31, Special Issue, 2009.

situation (and not only the environment or a component of it) is affected by the challenged act, because of geographical proximity or by a neighborhood link<sup>13</sup>. In practice, it is true that such interpretation of individual interest does not prevent the administrative judge from ruling on cases having environmental impact. The success of the movement "Not In My Back Yard" (or NIMBY) feeds the environmental litigation thanks to the requests brought by individuals, the alibi of environmental protection being then put forward to legitimize the judicial action, whereas, paradoxically, it is indeed the existing individual interest that makes it admissible. But the mere defense of environmental interests is never sufficient to declare an individual action admissible.

This restrictive conception and the limits it creates in terms of access to the administrative judge were confirmed by the Janin decision of the Council of State, held in 2015<sup>14</sup>. The appeal had been lodged by an academic, specialized in public and environmental law and active member in several NGOs. He challenged a ministerial order (*arrêté ministériel*) adopted on 30 June 2015 and which provided for the list, methods and periods of destruction of harmful species. In a rather laconic fashion, with is not atypical in French rulings, the French supreme administrative judge dismissed the claim, considering it inadmissible, due to the lack of standing on the side of the applicant. What is worth noticing is that the applicant had originally not raised any arguments concerning standing, but did so only after the *Conseil d'Etat* raised *ex officio* a question concerning the admissibility of the case. At that point, the applicant, in order to prove standing, invoked both a constitutional source, i.e. Article 7 of the Charter of Environment, and an international source, i.e. Article 9 of the Aarhus Convention. However, the *Conseil d'Etat* considered that neither of these provisions could grant any standing to the applicant, being "only" a member of the public, even if he is interested above average in environmental issues<sup>15</sup>. Thus, environmental claims should not profit from a different approach towards standing, despite the constitutionalisation of the Charter of the Environment. Indeed, the *Conseil d'Etat* ruled that Article 2 of the Charter of the Environment, according to which «*Everyone is under a duty to participate in preserving and enhancing the environments*», did not ground a general access to court<sup>16</sup>. Such a solution was to be expected, since the provisions of the Charter are generally

<sup>13</sup> CE, 15 April 2005, *Association des citoyens et contribuables de la communauté de communes Saane-et-Vienne et autres*, n°273398; CE, 3 June 2009, *Canary*, n° 305131.

<sup>14</sup> CE, 23 October 2015, *Janin*, n° 392550.

<sup>15</sup> CE, 23 October 2015, *Janin* : «*Considérant que pour justifier son intérêt pour agir, M. A...se prévaut, en premier lieu, de l'intérêt qu'il porte à la faune sauvage et à sa préservation, qui s'est traduit par la publication de nombreux articles dans des revues spécialisées, de son engagement, depuis plusieurs années, comme membre fondateur ou administrateur d'associations de protection de l'environnement, et de ce qu'il a pris part à la procédure de participation du public mise en œuvre, en application de l'article L. 120-1 du code de l'environnement, sur le projet d'arrêté attaqué ; que toutefois, ces circonstances ne sauraient par elles-mêmes être regardées comme lui conférant un intérêt personnel direct et certain à l'annulation de l'arrêté attaqué ; (...)*». See E. CHEVALIER, M. ELIANTONIO, *Standing before French Administrative Courts: too restrictive to effectively enforce environmental rights?*, in *Montesquieu Law Review*, Issue n°5, 2017, available online.

<sup>16</sup> CE, 3 August 2011, *Mme Buguet*, n° 330566.

denied of direct effect<sup>17</sup>.

The conditions of admissibility, as assessed, therefore make it difficult, or even reduce to a bare minimum, the possibilities for an individual to challenge an administrative act impacting the environment or the state of nature. These inadequacies have been partially remedied by the legislative recognition of a presumption of interest to act on behalf of certain associations, which cannot, however, compensate for this restrictive conception as far as individual actions are concerned.

*B. The recognition of a privileged category of applicants, an insufficient compensation*

Generally speaking, access to justice for associations to challenge the illegality of an administrative act is problematic, either because of a lack of individual interest or a lack of violation of a subjective right. It is precisely one of the achievements of Aarhus convention to impose the contracting states to provide for adequate regime to ensure an effective access to NGOs. The French system differs from the majority of European States since it has for long provided for a specific regime of access to justice for some environmental NGOs. However, this system of presumption does not completely remedy the shortcomings resulting from the limited access to the courts for individuals.

The specific role awarded to NGOs in the environmental field is not a French peculiarity. Their activism, vigilance and particular expertise have legitimized their greater involvement in the public arena<sup>18</sup>. Concerning particularly access to justice, the recognition of their capacity to go before court is often considered as a means to represent the interest of Nature. Indeed, «*the environment has no voice*»<sup>19</sup>, and Nature does not have, most often, legal personality<sup>20</sup>, which constitutes an obstacle to grant direct access to justice<sup>21</sup>. Consequently, legal systems have developed mechanisms of representation<sup>22</sup>. NGOs have emerged as legal representatives or legitimate agents of Nature's interests<sup>23</sup>. In

<sup>17</sup> B. MATHIEU, *Observations sur la portée normative de la Charte de l'environnement*, in *Cahiers du Conseil Constitutionnel*, n° 15, p. 146 ; M. PRIEUR, *La charte de l'environnement : droit dur ou gadget politique ?*, in *Pouvoirs*, 4 (n° 127), 2008, p. 49.

<sup>18</sup> J.A. FUENTES VÉLIZ, *L'évolution du rôle des organisations non gouvernementales dans le droit de l'environnement*, in *REDE*, 4, 2007, p. 401.

<sup>19</sup> L. KRAMER, *Débats*, in M. Boutelet, J.-C. Fritz (dir.), *L'ordre public écologique*, Bruxelles, Bruylant, 2005, p. 342. The author adds that «*Les universitaires devraient donner une voix à l'environnement silencieux*»!

<sup>20</sup> D. SHELTON, *Nature as a legal person*, in M.-P. CAMPROUX DUFFRÈNE, J. SOHNLE (dir.), *La représentation de la nature devant le juge : approches comparative et prospective*, in *Vertigo - la revue électronique en sciences de l'environnement* [En ligne], Hors-série 22, septembre 2015, mis en ligne le 10 septembre 2015, URL: <http://vertigo.revues.org/16188>.

<sup>21</sup> See the famous article of C.D. STONE, *Should trees have standing? Towards legal rights for natural objects*, in 45 *South California Law Review*, 450, 1972.

<sup>22</sup> See for example E. FERNANDEZ FERNANDEZ, *Les controverses autour de l'intérêt à agir pour l'accès au juge constitutionnel : de la défense du droit à l'environnement (Costa Rica) à la défense des droits de la nature (Équateur)*, in M.-P. CAMPROUX DUFFRÈNE, J. SOHNLE (dir.), *La représentation de la nature devant le juge*, *op. cit.*

<sup>23</sup> See F. OST, *La nature hors la loi – l'écologie à l'épreuve du droit*, 1995, rééd., Poche, La Découverte, 2003, p. 204: «*Plutôt, (...), que d'affubler la nature des oripeaux du sujet de droit et de lui confier un rôle d'emprunt sur la scène judiciaire (...), ne convient-il pas plutôt d'accorder enfin un réel droit d'action en*



the French system, in a rather pioneer manner, these profits indeed from more relaxed standing rules than individuals and they do not need to pass the “interest to act” threshold discussed above. Indeed, according to the Law of 10 July 1976, approved NGOs profit from a presumption of standing when bringing a claim for judicial review<sup>24</sup>, which is interpreted widely<sup>25</sup>. The NGOs concerned are those which are approved by a ministerial or prefectoral decision depending on the geographical scope of its competence. Such a legislation-based presumption illustrates the will of the legislative power to limit the margin of discretion of the judge in regulating access to court. It has been considered as the express recognition of the importance of NGOs in the promotion of environmental democracy<sup>26</sup>, and of their legitimacy to take part in public debate at various stages and thus opens a privileged path to access to court, and especially to the administrative courts.

However, this system does not compensate fully the limited access for individuals. The scope of such a mechanism, and then its contribution to the enforcement of environmental Rule of Law, is limited first of all by the conditions of approval. The latter has a symbolic scope in that it must reflect the association's ability to contribute to the general interest, through the defence of a collective interest, which aims precisely at distinguishing them from associations constituted first for the defence of individual interests<sup>27</sup>. In order to be eligible for approval, it is required to demonstrate that for a period of three years from the date of its declaration, its statutory purpose and its activities have actually been concerned with environmental protection, that it is sufficiently representative from the point of view of its members and that its activity is non-profit-making<sup>28</sup>. Previously of indefinite duration, approval is now granted for a five-year time. From 2012, the number of approved associations has been drastically reduced to around ten, whereas they used to be more than a hundred. The administrative authority justifies this narrower approach by the desire to limit the grant of approval for the most representative and active associations. So, the approval system is not a panacea and cannot replace individual appeals. Even if environmental NGOs are relatively active in litigation, anchoring judicial review in environmental matters in an associational approach does not seem to grant sufficient possibility to enforce judicial review. First, in the case NGO would fail to bring a claim against a certain environmental violation, essentially no recourse would be open to individuals in those cases in which no individual would be able to demonstrate a personal interest, as it was exemplified above. Second, the limited number of approved NGOs

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*justice aux associations qui la défendent ?».*

<sup>24</sup> Article L 142-1 of the Code of environment.

<sup>25</sup> CE, 17 March 2014, *Association des consommateurs de la Fontaulière*, n°354596.

<sup>26</sup> F. OST, *Droit et intérêt*, Facultés universitaires de Saint-Louis, Vol. 2, 1990.

<sup>27</sup> R. LÉOST, *L'agrément des associations de protection de l'environnement*, in *Revue Juridique de l'Environnement*, 2, 1995, p. 265.

<sup>28</sup> See article R. 141-2 of the Code of environment.

reduces concretely the opportunities of litigation. From a political point of view, the approval system may also be considered as a way to “select” *a priori* who can go to court to defend environmental interests. This selection implies, firstly, that not all NGOs fall within the scope of application of the more favorable standing conditions, and, secondly, that not any individual can go to court. In this sense, the legislation could be interpreted as an implicit refusal to recognize an equally broad access for individuals in environmental matters. At the same time, it legitimates the restrictive approach to standing for individuals promoted by the French case law, since the administrative courts have discretion to define the standing requirements in the absence of any legislative requirement.

The presumption of standing awarded to the approved NGOs is undeniably an interesting palliative to the limits of the application of the basic criteria to assess standing in environmental cases, offering a way of defending the environmental interest. However, its scope should not be overestimated. This presumption may even have an reverse effect on the situation of individual applicants: considering that action in judicial review may be lodged by privileged applicants, it may justify that on the other side to exclude the majority of individuals. Such a conception seems questionable in the light of European and international requirements, which on the contrary support the promotion the widest access to justice as possible in environmental matters. However, it is not certain that these developments will lead to an adaptation of standing requirements in the field of environment.

## **2. An unlikely adaptation of standing requirements of judicial review in environmental matters.**

Despite the increasing promotion of access to court in environmental matters, the French interpretation of standing requirements in judicial review has for consequence to neutralize the range of those obligations (A), since French administrative judge intends to keep under control access to its courtroom (B).

### *A. The limitation of the scope of international and European standards*

The right to judicial review has been recognized specifically by international conventions and European norms related to environmental protection. However, the effects of those provisions remain limited in the domestic legal order.

First of all, the effective enforcement of Article 9 of Aarhus Convention before the judge is conditioned by its invocability and direct effect. Generally speaking, the *Conseil d'Etat* has adopted a restrictive conception of direct effect of the provisions of Aarhus Convention, leading to the selectivity of the provisions which individuals may use<sup>29</sup>. Indeed, having a classical conception of di-

<sup>29</sup> J. BÉTAILLE, *The direct effect of the Aarhus Convention as seen by the French 'Conseil d'Etat'*, in *Environmental Law Network International*, 2, 2009, pp.63.



rect effect, the *Conseil d'Etat* relies exclusively on the terms of the provision, in order both to identify the will of the parties to the Convention and to determine whether it can be applicable in the litigation. This position has been criticized by some members of the Council of State themselves<sup>30</sup>. Thus, direct effect has been denied to Article 9 (3) of the Aarhus Convention, as was confirmed in the Janin judgment<sup>31</sup>. This approach seems to be shared by courts and especially by the Court of Justice of the European Union itself. Contrary to the other pillars of the Aarhus Convention, the third pillar related to access to justice has not been implemented into Union law through secondary law, particularly because of the Member States' reluctance to see the Union interfering in these matters, since the Union is sometimes considered as too intrusive in national judicial systems<sup>32</sup>. In the absence of harmonization process giving effect to Article 9(3), the Court of Justice has nevertheless sought to ensure that the third pillar is effective in the Union legal order, especially at Member States level<sup>33</sup>. Thus, it held that even if Article 9(3) of the Convention did not have direct effect, since its effectiveness remained conditional on implementing

<sup>30</sup> See Conclusions of Public Rapporteur Yann Aguila on CE, 6 June 2007, *Commune de Groslay*, n° 292942. See also Y. AGUILA, *L'étendue du contrôle du juge dans les Etats membres*, in RJE, special issue, 2009: «On peut se demander si le moment n'est pas venu, à la lumière des développements du droit international aujourd'hui, de revoir cette jurisprudence sur l'effet direct des traités internationaux».

<sup>31</sup> CE, 5 April 2006, *Mme Dupont et al*, n° 275742.

<sup>32</sup> In 2003, the Commission presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters which would give effect to Article 9(3) of the Convention (Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final). The Directive has not been adopted to date on the ground that 'Member States remained unconvinced that legislative action at EU level was needed to implement Article 9(3)' and that the proposal was overly intrusive into the national judicial systems of the Member States (European Commission, 'Explanatory Consultation Document', at <http://ec.europa.eu/environment/consultations/pdf/access.pdf>, p. 2.)

<sup>33</sup> The EU Court of justice has been much more reluctant to ensure the effectiveness of Article 9(3) in its own courtroom in case of action for annulment. The Aarhus Compliance Committee stated that EU infringed Aarhus requirements (J. BÉTAILLE, *Accès à la justice de l'Union européenne, le Comité d'examen du respect des dispositions de la Convention d'Aarhus s'immisce dans le dialogue des juges européens : à propos de la décision n° ACCC/C/2008/32 du 14 avril 2011*, in *Revue juridique de l'environnement*, 2011, pp. 547-562. See more recently, Findings and recommendations of the Compliance committee with regard to communication ACC/C/2008/32 (Part II) concerning compliance by the European Union, 17 mars 2017); J.-F. DELILLE, *La protection juridictionnelle dans la matière environnementale en droit de l'Union européenne : la victoire de l'incohérence*, in J. BÉTAILLE (dir.), *Le droit d'accès à la justice en matière d'environnement*, op. cit., p. 91, spéc. p. 93-94: «En définitive, le constat est celui de l'existence d'un double discours dans la jurisprudence de la Cour de justice. D'un côté, elle encadre étroitement les droits procéduraux des états membres, en favorisant la protection du droit de l'environnement devant leurs juridictions. De l'autre côté, la Cour permet aux institutions de l'Union de contrevenir aux normes environnementales de l'Union européenne, en subordonnant l'accès à son prétoire à des conditions restrictives directement contraires à la Convention d'Aarhus. De sorte les actes des autorités publiques causant des nuisances environnementales sont inégalement exposés à la sanction juridictionnelle selon qu'ils soient édictés au niveau des institutions de l'Union ou à celui de ses états membres»; E. CHEVALIER, *Le rôle politique de la Cour de justice en matière environnementale*, in L. CLÉMENT-WILZ (dir.), *Le rôle politique de la Cour de justice*, Bruxelles, Bruylant, 2019, p. 357.

measures, the national courts had a duty to interpret national law in a manner consistent with the Convention, as far as possible to give full effect to the Convention<sup>34</sup>. Effective access to justice is deemed essential to ensure effectiveness of EU environmental law. The national courts are then required to interpret the national rules on admissibility of the appeal in the light of the requirements of the Convention, paying peculiar attention to allow an effective access to the courts for NGOs. However, the *Conseil d'Etat* seems to be hermetic to such developments, ignoring EU law requirements even when the case brought before it involves the implementation of Union law<sup>35</sup>.

However, the restrictive interpretation given by the French system of the scope of the right of appeal appears to be in line with that adopted by the Aarhus Convention Compliance Committee (ACCC). The Aarhus Committee has developed a set of case law outlining the scope of obligations grounded on Article 9 (3) of the Convention<sup>36</sup>. The question of how the assessment of standing requirements as defined in French administrative law with the requirements of Aarhus Convention is no longer purely hypothetical, since following the rejection of his appeal, Mr. Janin decided to refer the matter to the Aarhus Compliance Committee. He argued that, by denying him any interest in bringing proceedings, the national judge breached the Convention<sup>37</sup>. Unsurprisingly, the Compliance Committee, which delivered its findings a few weeks ago, considered that France «has not failed to comply with article 9(2) or (3) of the Convention in the circumstances of this case»<sup>38</sup>. One decisive element is the idea that other applicants could have potentially standing to challenge the decision<sup>39</sup>. Indeed, the inadmissibility of individual appeals in environmental matters does not mean that there is no judicial protection of environmental Rule of Law in the French system, and, as the Committee stated, that «article 9(3) does not grant a right to every member of the public to challenge every act or omission which may con-

<sup>34</sup> CJUE, 8 mars 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Brown Bear case), C-240/09 Rec. p. I-1255. M. Eliantonio, 'Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*', Judgment of the Court of Justice (Grand Chamber) of 8 March 2011' (2012) CMLRev, p. 767.

<sup>35</sup> See Janin case.

<sup>36</sup> J. EBBESSON, *L'accès à la justice en matière d'environnement*, op. cit.

<sup>37</sup> Communication to the Aarhus Convention Compliance Committee ACCC/C/2015/135, available at [http://www.unece.org/fileadmin/DAM/env/pp/compliance/Communications/PRE-ACCC-C-2015-135-France/Communication\\_Eng\\_France\\_Janin\\_04.11.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/Communications/PRE-ACCC-C-2015-135-France/Communication_Eng_France_Janin_04.11.pdf).

<sup>38</sup> E. CHEVALIER, *L'accès au juge administratif et la protection de l'environnement*, *Le juge et la protection de l'environnement*, Colloque, Université de Sfax 2017, SOGIC, 2018, p. 67.

<sup>39</sup> Findings and recommendations with regard to communication ACCC/C/2015/135 concerning compliance by France Adopted by the Compliance Committee on 10 March 2020: «69. In that regard, the communicant does not claim that environmental associations would not have had standing to challenge the 2015 Order. Rather, he seems to acknowledge that they would have (see para. 35 above). 70. Nor does the communicant provide any evidence to demonstrate that other natural persons, for example those who live or work in or recreationally use the areas covered by the 2015 Order, would be denied standing. His sole claim is that he personally was denied standing and that this amounts to a breach of the Convention», available at [https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015-135\\_France/Draft\\_findings/C135\\_France\\_findings\\_advance\\_unedited.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015-135_France/Draft_findings/C135_France_findings_advance_unedited.pdf).

travene national law relating to the environment»<sup>40</sup>, nor does it require an *actio popularis*<sup>41</sup>. Because of the privileged system enjoyed by nature protection associations, some members of the "public" are guaranteed effective access to the administrative courts. In view of the Review Committee's case law, a systemic assessment seems to prevail. Above all, the French system is deemed as much more favorable than most other national legal systems. Indeed, traditionally, it is the question of access to justice for NGOs that is problematic, and on this point the adoption of Aarhus Convention has had a significant impact in the majority of cases<sup>42</sup>. On the contrary, in the French case, it was noted that the ratification and the entry into force of the Convention was not expected to bring about significant changes in French administrative litigation rules<sup>43</sup>.

Whereas the standing requirements before the French administrative judge follow Aarhus requirements, one could still question its compliance to EU law. As mentioned, in Janin case, the action challenged an administrative act adopted to implement Regulation n. 1143/2014<sup>44</sup>. Then, the judge was bound by the ECJ case-law on standing in environmental cases, case-law promoting a wide access to justice. But, here, the solution may not be straightforward. The fact that the *Conseil d'Etat* denied any direct effect to Article 9(3), on the basis of a literal interpretation of the provision, is in line with the European case law, and noticeably the Brown Bear case. However, on the basis of mentioned case, the *Conseil d'Etat* was under an obligation not only to take it into consideration, but also to interpret French law, and especially the applicable standing requirements, in line with the objectives and principles of the Aarhus Convention. But, then, if the Aarhus Committee stated that the French interpretation is in line, even if the *Conseil d'Etat* considered that Article 9(3) was irrelevant in the case, shall we conclude that the solution complies with EU law? First, EU, as a contracting-party of the Convention, may always provide for higher level of protection than the Convention itself, still in compliance with it. Second, the obligation to comply with Aarhus requirements through the channel of EU legal order, on the ground of the mixed agreement concluded by the EU and the Member States, has for consequence to bind the Member States also with EU requirements. On this basis, the interpretation of standing requirements by the *Conseil d'Etat* may be in breach with the fundamental EU

<sup>40</sup> Findings and recommendations of the Committee, *op. cit.*, point 67.

<sup>41</sup> This was made clear in a decision from the Compliance Committee in a case concerning Belgium (C/2005/11 Belgium, para 35).

<sup>42</sup> M. ELIANTONIO, C.W. BACKES, C.H. VAN RHEE, T.N.B.M. SPRONKEN, A. BERLEE, *Standing Up for Your Right(s) in Europe - A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, at

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL\\_JURI\\_ET\(2012\)462478\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL_JURI_ET(2012)462478_EN.pdf), p. 83.

<sup>43</sup> J. MAKOWIAK, *French report*, at [http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm), p. 16.

<sup>44</sup> Regulation 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species [2014] OJ L 317/35.

principle of effective judicial protection. Indeed, as mentioned above, it can legitimately be doubted whether a legal system which *de facto* immunizing decisions from judicial review in lack of a challenge by an approved NGO, complies with this objective. Nevertheless, once assessed globally, access to judicial review in environmental matters in France may be fully satisfying with EU requirements, because, here again, of the privileged access guaranteed for some environmental NGOs<sup>45</sup>.

While the classical interpretation of *intérêt à agir* in judicial review in the Janin case might suggest that it was not compatible with the requirements of the Aarhus Convention, a systemic interpretation might be more favorable to the French system. However, such an interpretation should not mask the ever-increasing obstacles to promote an effective access to the administrative court when environmental Rule of Law is at stake.

*B. An impossible adaptation of French judicial review to the environmental protection challenges?*

The increasing promotion of environmental standards shows the inadequacy of the judicial review, as conceived in France, to defend a component of the general interest, which is environmental protection. Admittedly, in the French conception, the *recours en excès de pouvoir* shall not be assimilated to an *actio popularis*, even if admissibility is based on an objective conception. An excessively broad, if not unlimited, access to the courts would mean that any individual could challenge any administrative act regarded as unlawful, with the risk of jeopardizing legal certainty and the continuity of administrative action. According to French doctrine, such an approach would run counter to the presumption of legality attached to administrative acts. Thus, the *recours en excès de pouvoir*, perhaps paradoxically to some extent, is not open to anyone wishing to promote legality, even it is very purpose. The defence of the general interest is not a ground for access to the courts in the context of an action for excess of power, whereas it is the finality of judicial review in the French conception. Here, a distinction shall be drawn between the conditions of admissibility and the merits of appeal. Classically, the action for excess of power, as an objective remedy, is considered to protect first and foremost the general interest, which will be the basis for the merits of the action, while individual interests would be protected incidentally. Nevertheless, what gives access to the judge is the existence of an individual interest to annulment<sup>46</sup>, whereas it is to protect general interest. Such a conception does not fit to environmental protection challenges. However, the interpretation of standing by the *Conseil d'Etat* may be explained by the fact that the design of standing conditions is indicative of the conception of the function of judging and of judicial review. The court is not

<sup>45</sup> J. DARPÖ (dir.), *Effective Justice? Synthesis report of the study on the Implementation of articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, Rapport pour la Commission européenne, 2013.

<sup>46</sup> A. DESRAMEAUX, *L'intérêt donnant qualité pour agir en justice. D'une règle du contentieux administratif à l'esprit du droit administratif français*, in V. DONIER, B. LAPÉROU-SCHENEIDER (dir.), *L'accès au juge – Recherche sur l'effectivité d'un droit*, Bruxelles, Bruylant, 2013, p. 319.

the place where the general interest and political choices must be debated by individuals. Its access is always conditioned by an individual interest to be defended or protected. But it is above all the practical argument that seems to prevail, since the restrictive conception of the interest to act is a means of controlling access to the courtroom and avoid to overcrowd it<sup>47</sup>. It is unfortunate that in the face of mass litigation the solution remains the restriction of access to the judge, and thus the infringement of a fundamental right, both procedural and substantive<sup>48</sup>. Indeed, since the right to a healthy environment is a fundamental right, a human right<sup>49</sup>, the enforcement of an effective remedy appears all the more essential. Surely, judicial action does not make the right<sup>50</sup>, and here an important limitation lies in the fact that it is not recognized as a subjective right. The growing gap between the fundamentalization process of environmental standards<sup>51</sup> and the ever more difficult access to the administrative judge, strongly impairs the effectiveness of the body of environmental norms<sup>52</sup>.

The absence of specificity in the assessment of standing requirements for judicial review on decisions which have an impact on the environment affects the approach deemed liberal and extensive by the French administrative court. The legislative definition of a regime applicable to approved NGOs confirms the existence of its limits. There is therefore a growing gap between the interest in environmental protection issues from a substantive law point of view and the procedural arrangements for asserting and protecting the interests at stake. Now, the matching of the conditions for assessing standing with the objectives of judicial review, which is the guarantee of the Rule of Law, seems to remain between the hands of the administrative judge himself. Indeed, the salvation will not come from the legislator, which seems to keep on considering the ex-

<sup>47</sup> A. DESRAMEAUX, *L'intérêt donnant qualité pour agir en justice*, *op. cit.* This type of argument supported also the restrictive approach of standing by the Court of Justice of the European Union, see E. CHEVALIER, *Le rôle politique de la Cour de justice en matière environnementale*, *op. cit.*

<sup>48</sup> On the evolution in French Law of the assessment of standing of NGOs to challenge planing law decision, see G. KALFLÈCHE, C. MOROT-MONOMY, *La limitation organisée de l'accès à la justice en droit de l'urbanisme*, in J. BÉTAILLE (dir.), *Le droit d'accès à la justice en matière d'environnement*, *op. cit.*

<sup>49</sup> M. PRIEUR, *Le principe de non régression au cœur du droit de l'homme à l'environnement*, in C. COURNIL (dir.), *Changements environnementaux globaux et droits de l'homme*, Bruxelles, Bruylant, 2012, p. 109.

<sup>50</sup> See the fundamental common law principle «*Ubi Jus, Ibi Remedium*», T. THOMAS, *Ubi jus, Ibi Remedium: The Fundamental Remedy Under Due Process*, in *41 San Diego Law Review* 1633, 2004.

<sup>51</sup> The Conseil d'Etat, in Janin case, stated that the Charter for environment provisions, and specially Article 7 «*n'ont ni pour objet, ni pour effet de modifier les conditions d'appréciation par le juge administratif de l'intérêt donnant qualité pour agir contre les décisions ayant une incidence sur l'environnement*». See B. MATHIEU, *Observations sur la portée normative de la Charte de l'environnement*, in *Cahiers du Conseil Constitutionnel*, n° 15, 2004, p. 146; M. PRIEUR, *La charte de l'environnement : droit dur ou gadget politique ?*, in *Pouvoirs*, 4 (n° 127), 2008, p. 49.

<sup>52</sup> See for the question of access to Constitutional judge in France: E. CHEVALIER, J. MAKOWIAK, *Dix ans de QPC en matière d'environnement : quelle (r)évolution ?*, Titre VII, to be published online on Conseil Constitutionnel website, July 2020.

ercise of the right to judge in environmental matters as a brake on the conduct of economic activities. The promotion of international and European sources preserves the judge's margin of appreciation in regulating access to his courtroom. Nevertheless, even if the position of the *Conseil d'Etat* does not *a priori* seem to breach international and European requirements, it is not fully satisfactory with regard to the effectiveness of environmental rules, since access to the courtroom is the first condition for the enforcement of the environmental Rule of Law.