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Definition of an Environmental Organisation in the Aarhus Convention, Environmental Directives and Estonian Law

There is an on-going extensive environmental reform in Estonia. In the process, on 16 February 2011, the Estonian Parliament adopted the General Part of the Environmental Code Act^{*1} (hereinafter referred to as the GPECA) which, for the first time ever, provides for a universal legal definition of an environmental organisation in Estonian law.^{*2} The definition is paramount for implementation of the code as the provisions of the general part were drafted in line with the principle that environmental organisations carry a special role in the protection of environment-related public interest.^{*3} The requirement to recognise environmental organisations also stems from the Aarhus convention^{*4} and certain environmental directives.^{*5} The convention, directives and Estonian law all ascribe a special status to environmental organisations in environmental proceedings and access to justice in environmental matters. This article aims to clarify the conditions an organisation must meet in order to be treated as an environmental organisation for the purposes of the Aarhus convention, directives and Estonian law and, ultimately, to provide an answer as to whether or not the Estonian definition of an environmental organisation meets the framework conditions of the Aarhus convention and environmental directives. In view of the limited space afforded to this article, the focus will be on the definition of environmental organisations in the context of access to a review procedure.

¹ RT I, 28.2.2011, 1 (in Estonian).

² GPECA §31.

³ Keskkonnaseadustiku üldosa seaduse kontseptsioon (Concept of GPECA), p. 66. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=44910/Keskkonnaseadustiku+%FClidosa+seaduse+kontseptsioon.pdf> (14.6.2011) (in Estonian).

⁴ The UN convention on accession to information, public participation in decision-making and access to justice in environmental matters was opened for signature on 25 June 1998 at the 4th conference of ministers of environment in Århus on 25 June 1998. The convention entered into force on 30 October 2001. Available at <http://www.unece.org/env/pp/treatytext.htm> (14.6.2011).

⁵ In particular, the following directives are relevant: Council directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (hereinafter referred to as EIA directive). – OJ L 175, 5.7.1985, pp. 40–48; directive 2004/35/EC of the European Parliament and Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter referred to as Environmental Liability Directive). – OJ L 143, 30.4.2004, pp. 56–7; directive of the European Parliament and Council 2008/1/EC of 15 January 2008 concerning integrated pollution and control (codified version) (hereinafter referred to as IPPC directive). – OJ L 24, 29.1.2008, pp. 8–29. As from 7.1.2014 the IPPC directive will be replaced by directive 2010/75/EU of the European Parliament and Council of 24 November 2010/75/EU on industrial emissions. – OJ L 334, 17.12.2010, pp. 17–119.

1. Arguments in favour of restrictions imposed on limited jurisdiction

The more apparent the restrictions imposed by the environment on the exercise of fundamental rights, the more rooted the understanding that the protection of the environment is not merely a public interest but rather that everyone should personally invest in the condition of the environment. Alas one cannot but acknowledge that the implementation of environmental law by the public authorities is far from perfect.⁶ The governments lack the resources and, every so often, the will. Such an observation has contributed to the conviction that the general public should have a greater say in environmental matters. Effective access to a review procedure in environmental matters is an essential precondition in ensuring the greater say of the general public. Access to justice in environmental matters has been restricted throughout history.⁷ In many countries, access continues to be significantly restricted whereas restrictively interpreted terms of standing is one of the main obstacles.⁸ Arguments in favour of restrictions of standing typically rely on the overburdening of courts and halting of economic development and associated potential abuse of standing.⁹

Very often the restriction of standing is justified by the need to protect the courts against overburdening. This argument seems to be rooted in the belief that should a court become just a little more accessible, there will be plenty of those who rush to bring forth their complaints. Such a causal link has not been proven. For example, a survey was conducted in 2002 which focused on the court cases initiated in the public interest in eight European Union Member States between 1996 and 2001. The survey showed that the number of environment-related court cases was relatively very low, less than 150 in most countries, and could not be linked to the scope of standing in the countries.¹⁰ Also, no increase in the number of complaints has been observed in Estonia's court practice after the environmental standing was substantially expanded.

The overburdening of courts is sometimes associated with the actions of the so-called professional complainants who bring trivial matters to courts. Such behaviour may also be regarded as an abuse of standing. Strict restrictions on standing will hardly curb the ardour of professional complainants, though they can be expected to help the courts in fending off such complaints. However, strict restrictions limit access to justice in serious matters. Trivial complaints should, therefore, not be fought with general restrictions of standing but rather with specific regulations designed to filter out trivial complaints.

The second argument—putting a halt to economic development—is caused by a fear that a wide standing may postpone the implementation of projects important for the country's economy and increase the costs of implementation. This would eventually result in a general insecurity which suppresses new investments. In principle, this argument is difficult to contest: it seemingly justifies certain restrictions on standing.¹¹ It should, however, be stressed that economic development should not occur at any cost. The principle of sustainable development requires that besides economic arguments social and environmental considerations should also be taken into account. The understanding that the say of the general public in environmental matters should be increased results, to a large extent, from the fact that economic interests tend to overshadow other interests.

The argument of halted growth is also associated with the fear that standing will be abused by using the pretext of public interest to interfere with projects which are not compatible with the complainant's actual interests, mainly business interests. Even if such complaints are ultimately rejected, the time spent on disputes may significantly hold back a project. This argument is difficult to overturn or agree with as there is no reliable information on abuse. For instance, in Estonia popular complaints in planning matters have

⁶ Directive of the European Parliament and Council on access to justice in environmental matters [COM(2003)624], p. 2. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/c.om2003_0624en01.pdf (14.6.2011).

⁷ J. Ebbesson. *Comparative Introduction / Introduction Comparative*. – J. Ebbesson (ed.). *Access to justice in Environmental Matters in the EU / Accès à la justice en matière d'environnement dans l'UE*. The Hague: Kluwer Law International 2002, p. 5.

⁸ G. Pring, C. Pring. *Greening Justice. Creating and Improving Environmental Courts and Tribunals*. The Access Initiative, 2009, p. 33. Available at http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final_31399_WRI_o.pdf (14.6.2011).

⁹ See, e.g., *ibid.*, p. 33; M. Dross. *Access to Justice in EU Member States*. – *Journal for European Environmental and Planning Law* 2005 (2) 1, p. 23.

¹⁰ N. Sadeleer, G. Roller, M. Dross. *Access to Justice in Environmental Matters*. ENV.A.3/ETU/2002/0030 Final Report 2002, pp. 3 and 5. Available at http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf (14.6.2011).

¹¹ See G. Pring, C. Pring (Note 8), p. 39.

been allowed for years, however, there is no reliable information regarding the extent (if any) to which wide standing has caused an increase in the instances of abuse. Given that abuse is extremely difficult to prove, it is even unclear whether or not such an overview would be possible to be compiled. It would be, however, naive to think that no one would actually resort to using public interest as a pretext. Therefore, some restrictions on standing seem justified to prevent abuse. On the other hand, the hypothetical risk of abuse should not be overemphasised. Abuse cannot be totally prevented even if a very limited circle of people were to be entitled to standing.

2. Definition of an environmental organisation in the Aarhus convention and EU directives

The Aarhus convention and EU environmental directives regard environmental organisations as a special part of the interested public who should be involved in certain proceedings and to whom a right of access to justice should be ensured in certain cases. Specific requirements to ensure specific standing to environmental organisations arise out of Article 9 (2) of the Aarhus convention, the EIA and IPPC directives which secure the convention at the EU level, and the Environmental Liability Directive. Article 6 of the convention requires that environmental organisations participate in a procedure in which permission to engage in activities which have a significant impact on the environment is being decided. Pursuant to Article 9 (2) of the convention, environmental organisations must be ensured access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6. EIA and IPPC directives provide for access to a review procedure which is virtually identical to that of Article 9 (2). Under Article 12 of the Environmental Liability Directive, a Member State is required to allow environmental organisations submitting to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage and requesting the competent authority to take preventive or remedying action. Article 13 of the directive sets out the obligation to ensure access to justice, in order to contest the procedural and substantive legality of the decisions, acts or failure to act under the directive. Both the convention and the directives contain the same definition of an environmental organisation: a non-governmental organisation which promotes environmental protection and meets any requirements under national law.^{*12} One can guess that the lack of more specific criteria is due to inability to reach a compromise. Requirements concerning associations of persons are significantly different across Europe.^{*13} The European Commission has attempted to put national requirements in a certain framework. In October 2003, the Commission tabled a draft directive in which criteria regarding environmental associations form an essential part.^{*14} However, it seems that today the initiative has faded away due to strong opposition from the Member States.

2.1. Elements of the definition of an environmental organisation: non-governmental and promotion of environmental protection

The convention does not define what 'non-governmental' means. Pursuant to a widespread approach, a non-governmental organisation (hereinafter referred to as the NGO) is any organisation which is independent from the government and non-profit, acts for a legitimate purpose and is not a political party.^{*15} The implementation guideline of the convention too mentions both the non-governmental and legitimate

¹² Article 2 (5) of the convention; Article 2 (15) of the IPPC directive; Article 1 (2) of the EIA directive; Article 12 (1) of the Environmental Liability Directive. Given that the definitions set out in the directives repeat that of the convention, the analysis below makes reference to the directives only where their provisions are different from the regulation provided for in the convention.

¹³ See, e.g., N. Sadeleer. *Synthesis of the National Reports. – N. Sadeleer, G. Roller, M. Dross et al. Access to Justice in Environmental Matters and the Role of NGOs.* Groningen: Europa Law Publishing 2005.

¹⁴ Directive of the European Parliament and Council on access to justice in environmental matters [COM(2003)624. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/c.om2003_0624en01.pdf (14.6.2011).

¹⁵ P. Willetts. What is a Non-Governmental Organization? UNESCO Encyclopaedia of Life Support Systems. Section 1 Institutional and Infrastructure Resource Issues. Article 1.44.3.7. Available at <http://www.ihrnetwork.org/files/3.%20What%20is%20an%20NGO.PDF> (14.6.2011).

purpose.^{*16} Being non-profit means that companies cannot, as a rule, be regarded as environmental organisations, since their primary aim is to earn profits. The definition of a ‘public authority’ as defined in Article 2 (2) of the convention helps delimit the requirement of being non-governmental, i.e., any organisation meeting this definition cannot be regarded as an environmental organisation for the purposes of the convention.

The convention also does not provide instructions as regards how to define the second criterion—promotion of environmental protection. Firstly, it is not clear from the convention what should be considered ‘promotion’. For example, should an environmental purpose be formulated in the articles of association or do actual activities count more? Secondly, the exact scope of the notion of ‘environment’ is unclear. The convention does not define the environment, though it is indirectly defined in the definition of ‘environmental information’ provided for in Article 2 (3). It emerges from the definition that the environment covers at least such elements as air, atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components. This definition of environmental information may be helpful if one needs to reinforce the conviction as to a particular environmental organisation. But it is not so safe to rely on the indirect and incomplete definition of the environment as provided in the convention in deciding that an organisation is not an environmental organisation. Thirdly, it is unclear what ‘environmental protection’ is for the purposes of the convention. Who and what is actually protected in protecting the environment? Concrete human interests, general interests or intrinsic value? However, Article 1 of the convention—the convention objective—clarifies that at least the protection of every person of present and future generations to live in an environment adequate to his or her health and well-being should be regarded as environmental protection. In addition, nature conservation should be regarded as environmental protection for the purposes of the convention. Such a conclusion is supported both by the wide definition of environmental information which, *inter alia*, makes a reference to biodiversity, as well as the need to ensure that all environmental considerations are taken into account in decision-making. Issues related to nature conservation are definitely covered by the definition of environmental protection as regards the Environmental Liability Directive which focuses on the protection of natural values.

To sum up, it can be said that both the conventions and directives allow the Member States a wide degree of discretion in specifying the inherent criteria of environmental organisations. However, such discretion is not unlimited. Besides the requirements of being non-governmental and promoting environmental protection, national law must take into account the general requirements of the directives and the objectives of their adoption^{*17} and, where necessary, guarantee effective implementation of this legislation. For example, the European Court of Justice has judged that the requirement under Swedish law that the existence of 2000 members is a condition precedent to standing is contrary to the objectives of the EIA directive. Due to such a criterion, just two associations qualify as environmental organisations and right of standing is precluded for small local organisations. The directive does not, however, deal only with national projects. Although smaller organisations could bring action via larger organisations such a filter would be in direct contrast to the spirit of the directive. A large organisation might not have the same interest in a local project. And a large organisation is also likely to receive many requests for action and must select which to accept. A small organisation is in no position to dispute such a selection.^{*18}

2.2. The criterion of concern in the convention and directives

The requirements of being non-governmental and promoting environmental protection are linked to the nature of an environmental organisation. If these requirements are met, an organisation may, in principle, be regarded as an environmental organisation. Besides inherent conditions, the convention also includes the criterion of concern which shows whether or not an organisation has standing regarding a particular point of dispute. The criterion of concern is set out in Article 9 (2) of the convention:

¹⁶ UNECE. The Aarhus Convention Implementation Guide, p. 32. Available at <http://www.unece.org/env/pp/publications.htm> (14.6.2011).

¹⁷ In particular the 18th paragraph of the convention preamble, 25th paragraph of the preamble of the Environmental Liability Directive and Articles 1 and 3 of the convention.

¹⁸ Case C-263/08, 15.10.2009, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*.

Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure [...]

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5 shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The alternative bases of standing as set out in Article 9 (2) are not intended to create a choice for the parties: alternative options are provided in order to accommodate differing legal systems of the parties.^{*19} In other words, Article 9 (2) refers to existing national standards of standing, though the provision emphasises that existing standards should be interpreted widely.^{*20} The main innovation introduced by the convention in connection with environmental organisations can be found in the second paragraph of Article 9 (2). At first glance, the paragraph seems unambiguous: an environmental organisation must automatically be guaranteed the right of a review procedure.^{*21} When explored further, such an interpretation becomes questionable. Firstly, the paragraph does not directly provide for an automatic right of standing but just states that as regards the standing of environmental organisations, it is presumed that the national standards of standing are met. This raises the question as to how narrowly a state may prescribe a basis of standing. This was the problem that Germany faced when implementing the EIA directive. In Germany, a violation of a subjective public right forms the basis of standing. In other words, the complainant needs to point out that a provision which also protects his or her individual interests, in addition to public interest, has been violated. As far as recognised environmental organisations are concerned, the only presumption is that they have the same rights as individuals though, under German law, they do not and cannot have such rights. In other words: environmental organisations can protect just the interests of individuals but not public interest. However, a lot of environmental issues are solely within the sphere of public interest and do not directly concern the interests of individuals. The Advocate General of the European Court of Justice took a stance, in proceedings for the preliminary ruling, that a Member State cannot restrict an environmental organisation's standing by using the narrow definition of standing. The wording and context of judicial protection in the EIA directive implies that an environmental organisation may invoke a violation of their right even if such a violation cannot exist under the country's legal system. Be it the case, violation of a "fictitious" right must be presumed. In other words, the Advocate General reasserted her position that the provision gives automatic standing to environmental organisations.^{*22} The European Court of Justice adopted a slightly different stance. The court held that, in principle, a Member State is free to decide what to treat as a violation of a right in the context of the provision. However, a Member State still needs to follow the principle of effectiveness according to which they must not render virtually impossible or excessively difficult the exercise of rights conferred by the directive. A large portion of environmental law is aimed at protecting public and not individual interest. The requirement that environmental organisations may invoke solely subjective rights is contrary to the principle of effectiveness and to the goal that the public concerned must be ensured a broad access to justice. In short, the court took the stance that a Member State must ensure that environmental organisations have a standing even where the national provisions which transpose EU law or directly applicable EU provisions, whose aim is to protect just public interest, are being violated.^{*23}

¹⁹ Implementation Guide (Note 16), p. 129.

²⁰ It should be pointed out that the Environmental Liability Directive does not provide for a clause on guaranteeing wide access.

²¹ Such a position was adopted, e.g., by the Advocate General in case C-263/08, Opinion of Advocate General Sharpston, 2.7.2009, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, paragraph 43.

²² Opinion of Advocate General Sharpston, 16.12.2010, case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg Trianel Kohlekraftwerk Lünen*, paragraphs 46–67.

²³ Case C-115/09, 12.5.2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg Trianel Kohlekraftwerk Lünen*, paragraphs 43–50.

The judgment of the European Court of Justice does not clarify the limits within which a state may define the standing of environmental organisations. However, the opinion of the court is in greater accord with the convention than the Advocate General's interpretation of an automatic standing because the convention does not distinguish between the criterion of the concern of an organisation and other criteria that relate to the nature of an organisation. If one were to adopt a position that environmental organisations do have automatic standing, it would create a situation where every organisation should be given standing in any environment-related matter. Of course, it is not generally thought that an environmental organisation should be entitled to standing no matter what the case. For example, pursuant to the draft directive of the Commission, access to justice is based, *inter alia*, on a condition that the matter of review in respect of which an action is brought is covered specifically by the statutory activities of the organisation and the review falls within the specific geographical area of activities of that organisation.^{*24} If automatic standing were to be presumed, it would not be clear whether a state could impose such conditions as they may form a part of a national standard of standing which an environmental organisations is supposed to meet. For example, in France in administrative matters standing is generally based on 'interest'. The existence of an interest of certain organisations is, among other things, assessed on the basis of the statutory goal and area of activity of the organisation concerned.^{*25}

To sum up, I hold that the meaning of the provisions of Articles 2 (5) and 9 (2) of the Convention is as follows as regards the criteria of concern. Firstly, the provisions preclude the interpretation that an environmental organisation is without concern because the general criterion of standing in national law principally excludes an environmental organisation being concerned. For example, the interpretation that an environmental organisation cannot be concerned insofar that nobody's subjective rights have been violated has to be incorrect. Secondly, the provisions do not oblige to presume automatically that every environmental organisation is entitled to standing in any environmental matter: the parties may specify the criteria of concern in national law. Thirdly, the provisions require that the special role of environmental organisations in the protection of environment be acknowledged. Such requirements of concern in national law which do not allow environmental organisations to fulfil this role are not permitted. Those requirements of national law which, in case of disputes related to Article 9 (2), do not entitle an environmental organisation to standing are definitely contrary to the Convention.

3. Definition of an environmental organisation in Estonian law

Estonia ratified the Aarhus convention on 6 June 2001. The provisions of the directives regulating legal protection had to be transposed by 25 June 2005 and 30 April 2007 at the latest. Nevertheless, for a long time the notion of an environmental organisation was defined in Estonian law solely in the context of environmental liability.^{*26} In Estonia, a violation of subjective rights is the principal basis of access to justice and one might have presumed that in practice the standing of environmental organisations would be extremely limited. In reality, however, it turned out to be notably wide because the principal institution in charge of reviewing environmental matters—the administrative court—has preferred a broad interpretation of Article 9 (2) of the convention^{*27} and has applied it directly. In environmental matters, courts have accepted complaints from non-profit associations, the standing of foundations and, in principle, the standing of civil law partnerships.^{*28} On one occasion the court of first instance even seems to recognise the standing of private

²⁴ Draft directive [COM(2003) 624] (Note 6), Article 5 (1).

²⁵ Milieu Ltd., Measures on access to justice in environmental matters (Article 9 (3)) Country report for France, pp. 19–20. Available at http://ec.europa.eu/environment/aarhus/study_access.htm (14.6.2011).

²⁶ Keskkonnastutuse seadus (Environmental Liability Act), adopted 14.11.2007. – RT I 2007, 62, 396 (in Estonian).

²⁷ The Supreme Court holds that standing under Article 9 (2) extends to any decision and action within the scope of the convention provided that the decision or action can, by its nature, be contested in an administrative court. See ALCSCd, 29.1.2004, 3-3-1-81-03.

²⁸ E.g., the decision of 24.11.2003 of the Pärnu Administrative Court in administrative case 3-119/2003 recognised the Estonian Ornithological Society, the decision of 2.12.2002 of the Tartu Administrative Court in administrative case 3-289/2002 recognised the Estonian Nature Conservation Society, the decision of 17.10.2003 the Tallinn Administrative Court in administrative case 3-1398/2003 recognised the Estonian Green Movement, the decision of 11.9.2003 of the Tallinn Administrative Court

limited companies as an environmental organisation.^{*29} As a rule, the courts have been rather laconic in their arguments. They have usually limited themselves to a reference to the articles of association or other relevant documents of an association indicating that environmental protection is an objective of that association. Such laconism may be due to the fact that a majority of the complaining associations have been renowned environmental organisations. Respondents might also have had a role in this, failing to provide convincing arguments as to why the complaining association cannot be regarded as an organisation promoting environmental protection. One should also not overlook the fact that the Supreme Court has, in several ground-breaking decisions, stressed the singularity and importance of environmental matters. Perhaps the most significant is the decision in which the Supreme Court took the stance that as far as environmental matters are concerned, it is not necessary to invoke a violation of a right in filing a complaint but rather it is possible to refer to an essential and real concern in connection with the disputed administrative act or action.^{*30}

The environmental law of Estonia has been codified since 2007. The process does not involve just the consolidation and systematisation of existing law but also includes a critical review of current law, tackling of contradictions and bridging of gaps—in other words, the codification is substantive.^{*31} In the process, on 16 February 2011, the General Part of the Environmental Code Act was adopted, §31 of which provides for a definition of an environmental organisation. However, the definition is not legally valid as the GPECA has not yet entered into force and the date of enforcement has not been scheduled.^{*32} Nevertheless, current law defines the notion of an environmental organisation as far as the most important issue is concerned, i.e., access to justice in environmental matters. As a result of an infringement procedure initiated against Estonia^{*33}, the special provision of the GPECA on standing was exceptionally added to the draft Code of Administrative Act Procedure^{*34} and it was enforced ahead of the other provisions of the draft.^{*35} As the provision is so recent, there is no case-law regarding its implementation.

3.1. Inherent criteria of an environmental organisation in the Code of Administrative Court Procedure

Pursuant to §292 (2) of the Code of Administrative Court Procedure^{*36} (hereinafter referred to as the CACP), a non-governmental environmental organisation means a non-profit association and a foundation whose statutory goal is environmental protection and who promotes environmental protection in its activity; also an association which is not a legal person who, subject to a written agreement of its members, promotes environmental protection and represents the views of a significant part of the local population. Thus, the Estonian definition establishes three inherent criteria for environmental organisations: they must be non-

in administrative case 3-1207/03 recognised Nõmme Tee Society, the decision of 24.11.2003 of the Pärnu Administrative Court in administrative case 3-119/2003 recognised the Estonian Fund for Nature, and the decision of 4.3.2005 of the Tartu Administrative Court in administrative case 3-596/04 recognised civil law partnership Green Urvaste as environmental organisations for the purposes of the convention.

²⁹ The decision of the Tallinn Administrative Court in administrative case 3-78/2005.

³⁰ ALCSd, 28.2.2007, 3-3-1-86-06.

³¹ Explanatory Memorandum to the GPECA, p. 2. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=1147282&u=20110616182716> (14.6.2010) (in Estonian).

³² Pursuant to §63 of the GPECA, the Act will enter into force at the same time as its special part. Pursuant to the agenda of the governing alliance, the special part will be adopted by 2015 at the latest. See Erakonna Isamaa ja Res Publica ning Eesti Reformierakonna valitsusliidu programm aastateks 2011–2015 (Agenda of the Governing Alliance Union of Pro Patria and Res Publica and the Estonian Reform Party for 2011–2015). Õiguskord 4.b. Available at <http://valitsus.ee/UserFiles/valitsus/et/uudised/taustamaterjalid/Valitsusliit%20I.pdf> (14.6.2011) (in Estonian).

³³ Infringement procedure 2008/2292. The European Commission has adopted a position that, *inter alia*, Estonia has not properly transposed the provisions of the IPPC directive regulating legal protection. At this time (spring 2011), the procedure is still on-going: The Commission has submitted its reasoned opinion and Estonia has responded, however, the Commission has not notified about the closing of the procedure or about its referral to the court. The Estonian Ministry of Foreign Affairs treats the documents of the ongoing infringement procedure as information to which the general public has no access. The author relies on the reasoning presented on page 60 of the Explanatory Memorandum to the Draft Code of Administrative Court Procedure and on the letters exchanged with the Ministry of Foreign Affairs.

³⁴ Explanatory Memorandum to the GPECA, p. 60. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=1020325&u=20110616183217> (14.6.2010) (in Estonian).

³⁵ The provision entered into force on 5.3.2011, the draft as a whole will enter into force on 1.1.2012. CACP §315.

³⁶ Halduskohtumenetluse seadustik. – RT I 1999, 31, 425; RT I, 23.02.2011, 3 (in Estonian).

governmental, operate in a certain form and promote environmental protection. In addition, such associations that are not legal persons must represent the views of a significant part of the local population.

The CACP regards a non-profit association, a foundation and an association which is not a legal person as the forms of an environmental organisation. Acceptance of the form of a non-profit association obviously needs no justification insofar as it is the ideal form of a non-governmental organisation. Recognition of a foundation as an environmental organisation is more dubious. This is because the public may have very little leverage to affect how a foundation operates.^{*37} A foundation has no members, it is controlled by a supervisory board, which may have just three members, and the appointment and removal of board members is specified in the articles of association.^{*38} To compare, the highest body of a non-profit association is the general meeting of its members and anybody who meets the requirements set out in the articles may become a member.^{*39} In other words, whether or not the public can have a say in the activity of a foundation is largely dependent on the articles of association of a foundation. At the same time one should not overlook the fact that the articles of association of a foundation may grant the public a big say as regards the organisation of the foundation's activity. Likewise, the public having leverage to greatly affect the activity of an organisation need not be central in recognising an association as an environmental organisation. I hold that what is more important than the option for control granted to the public is the organisation's dedication to the protection of environment-related public interests and its capability to actually protect such interests. In Estonia, there are several active and capable organisations promoting environmental protection which operate in the form of a foundation.^{*40} It should also be stressed that the foundation has been recognised by all instances of court. To sum up, I hold that in Estonia the recognition of the form of a foundation is justified.

In addition to non-profit associations and foundations, the CACP also recognises an association which is not a legal person. This form is recognised based on the presumption that it is highly likely that local residents can file individual complaints in issues affecting their living environment.^{*41} Unlike non-profit associations and foundations, an association which is not a legal person must represent the views of a significant part of the local population. This requirement, too, refers to the fact that the primary goal of recognising an association which is not a legal person has been to simplify the protection of the shared environment-related interests of the local population. The CACP does not clarify the number of persons who should be regarded as a significant part of the local population. It is also unclear what exactly is meant by the representation of interests. However, a ground-breaking judgement of the Supreme Court provides certain guidance.^{*42} The judgement precedes the provision of the CACP but should be nevertheless considered in interpreting §292 of the CACP as obviously the wording of said section is modelled on the judgement of the Supreme Court. The court took the stance that an association which is not a legal person and has just two members can, in principle, file a complaint as an environmental organisation. In order to avoid abuse, such an association must represent the views of at least a significant part of the local population, especially if the association has been founded recently. An organisation can be regarded as a representative of the local people if the views or opinions of the organisation and a significant part of the population (considered as the general public) coincide and the general public accepts such a representative and its relevant activities in one form or other. An informal association must, if it resorts to a court of law, be able to demonstrate that it meets such conditions. The court may presume that the general public accepts an association if it has in its previous activity enjoyed public support in a particular area. The court held that the requirement of

³⁷ E.g., in drafting the Environmental Code, the government of Sweden held that only such associations may be regarded as environmental organisations which are open to the general public, in which anybody may become a member and express his or her opinions and direct the activity of the organisation. For that reason, foundations or other organisations, including Greenpeace which is not governed by a body elected by its members, cannot be regarded as environmental organisations. Milieu Ltd, Measures on access to justice in environmental matters (Article 9 (3)) Country report for Sweden, p. 11. Available at http://ec.europa.eu/environment/aarhus/study_access.htm (14.6.2011).

³⁸ Subsection 1 (1), §8 9), §24, §26 (1) of the Foundations Act (sihtasutuste seadus). – RT I 1995, 92, 1604; RT I, 17.12.2010, 20 (in Estonian).

³⁹ Subsection 12 (1), §18 (1) of the Non-profit Associations Act (mittetulundusühingute seadus). – RT I 1996, 42, 811 (in Estonian).

⁴⁰ E.g., the Estonian Fund For Nature, Web site www.elfond.ee; the Institute of Sustainable Estonia (SEI Tallinn), Web site www.seit.ee; the Estonian Environmental Law Center, Web site www.k6k.ee.

⁴¹ Concept of the CPECA (Note 3), p. 76.

⁴² ALCSCd, 28.11.2006, 3-3-1-43-06.

representation was met in the case under consideration as, *inter alia*, 546 local residents had supported the organisation with their signature.

Pursuant to §292 of the CACP, being non-governmental is one of the features of an environmental organisation. CACP does not define clearly what being non-governmental means. The requirement of being non-profit, as contained in the criterion, should be guaranteed already through the acceptable forms of environmental organisations. Thus, the CACP's criterion of being non-governmental should be primarily understood as being independent from the government. For example, the Environmental Investment Centre cannot be regarded as an environmental organisation as it is the vehicle via which the state finances environmental projects. The said centre is, in its form, a foundation which carries out administrative duties in accordance with its articles of association. The criterion of being non-governmental also does not allow treating local government associations as environmental organisations. Though the say of local governments in environmental matters affecting local life should be self-evident, in the broad sense, local governments form a part of the government. The Supreme Court has adopted the same position.^{*43} Unfortunately, the criterion of being non-governmental has not been worded the best in the CACP. Namely, §292 (2) of the CACP does not define an environmental organisation whose being non-governmental is one of its features but a 'non-governmental environmental organisation' which has a certain form and the promotion of environmental protection as its features.^{*44} Thus, if one were to read §292 (2) of the CACP literally, one could conclude that for the purposes of the CACP a non-governmental environmental organisation also includes organisations set up by the state for the fulfilment of administrative duties.

The third feature of an environmental organisation is that the goal of protecting the environment has been laid down in its articles of association and that in its activities the organisation promotes environmental protection. These requirements are cumulative. However, it appears from §292 (4) of the CACP that the recognition of an association as an environmental organisation does not necessarily require that the association has been previously active. According to the subsection, in assessing the promotion of environmental protection, the association's capability to implement its statutory goals must be considered in view of the association's activity to date; if there has been no activity, the organisational structure, number of members and the qualification criteria for membership as set out in the articles should be considered. In other words, for the purposes of the CACP, an association which has environmental protection as its statutory goal and which is capable of actually promoting its goal to protect the environment can be regarded as an environmental organisation. In assessing capability, the activity to date must be considered; if there has been no activity, capability should be assessed indirectly by exploring the association's organisational structure, number of members and statutory qualification criteria for membership.

The CACP does not define the notion of 'environment' and the exact scope of this notion cannot be found elsewhere in current law. The notion has not been defined in the GPECA albeit using it in a broad sense. Under §1 of the GPECA, the objective of the code is, *inter alia*, to promote sustainable development, protect biodiversity and reduce environment degradation as far as possible with a view to protecting the well-being and property and cultural heritage of people. Neither does the CACP fully define the notion of 'environmental protection'. Subsection 292 (3) of the CACP stipulates that the protection of environmental elements in the name of the health and well-being of people and the exploration and promotion of nature and natural heritage are *also* regarded as environmental protection. CACP does not specify what lies at the core of environmental protection. Based on the Explanatory Memorandum to the GPECA, nature conservation appears to be that core.^{*45}

The promotion of environmental protection is the key inherent requirement, as it is through promotion that it should be possible to ensure that only those associations which really desire, and are capable of, standing for public environmental interests are regarded as environmental organisations. However, the fact that under the CACP environmental protection need not be the main goal of an organisation may pose problems. Lack of such clarification allows arguments that those associations whose main goal may compete

⁴³ *Ibid.*

⁴⁴ Subsection 292 (2) of the CACP sets out: "For the purposes of this Code, a non-governmental organisations means:

- 1) a non-profit association and a foundation whose statutory goals is environmental protection and who promotes environmental protection in its activity;
- 2) an association which is not a legal person who, subject to a written agreement of its members, promotes environmental protection and represents the views of a significant part of local population."

⁴⁵ Pursuant to the Explanatory Memorandum to the draft GPECA, the protection of the natural environment is primarily understood as the promotion of environmental protection. See Explanatory Memorandum to the CPECA (Note 31), p. 34.

with the public environmental interest should also be treated as environmental organisations. This, in turn, causes the question whether the public environmental interest is really at the heart of a complaint of an organisation. For instance, the primary goal of a non profit association of undertakings of certain industry is to promote the (business) interests of their members but such organisation may also have promotion of environmental protection as an ancillary goal. I am convinced that such associations cannot be regarded as environmental organisations; however, one must concede that the CACP does not provide for a clear basis to preclude such associations from the definition of an environmental organisation.

3.2. The criteria of concern in the CACP

The requirement of concern has been provided for broadly. Pursuant to §292 (1) of the CACP, it is presumed that where a non-governmental organisation disputes an administrative act established or an action performed in the area of environmental protection, such organisation either has justified interest or its rights have been violated if the disputed administrative act or action is linked to the environmental goals of the organisation or to its area of activity in environmental protection to date. The code does not specify how narrowly a goal or an area of activity should be delimited in order to give rise to concern. Given that an organisation can change its statutory goals and area of activity at discretion, a requirement of exact coincidence would probably be excessive. Although the code does not require concern with the geographical area of activity, this requirement is applicable, to a certain extent, to an association which is not a legal person where the precondition to the recognition is that it represents the views of a significant part of local population. Given the smallness of Estonia, a requirement of geographical concern would not obviously be justified.

4. Conclusions

This article aimed to clarify which are those conditions an organisation must meet in order to be regarded as an environmental organisation for the purposes of the Aarhus convention, directives and Estonian law. It arises from the convention and the directives that in certain issues, the special standing of non-governmental organisations which promote environmental protection must be accepted. Promotion of environmental protection covers both the protection of environmental elements to ensure the health and well-being of people as well as nature conservation. Neither the convention nor the directives require automatic presumption that any environmental organisation is concerned with any environmental matter—the Member States are free to decide on the details of concern. At the same time, Member States are required to acknowledge the special role of environmental organisations in environmental protection. Such requirements of concern in national law which do not allow environmental organisations to fulfil this role are not permitted. The provisions preclude, *inter alia*, the interpretation as if an environmental organisation cannot be concerned with a concrete case because the general criterion of standing in national law principally excludes an environmental organisation having concern in such issues.

The definition of an environmental organisation in §292 of the CACP is broad. Such formal criteria as a minimum number or minimum period of activity have been avoided. The Estonian definition includes three inherent criteria applicable to environmental organisations: being non-governmental, obligation to operate in the form of a non-profit organisation, foundation or an association which is not a legal person, and the promotion of environmental protection. In addition, associations which are not legal persons must represent the views of a significant part of the local population. The latter requirement points to the fact that the recognition of an association which is not a legal person is intended primarily to simplify the protection of the shared environmental interests of the local population. Of the conditions mentioned above, the promotion of environmental protection is the key inherent requirement as it is through promotion that it should be possible to ensure that only those associations which really desire, and are capable of, standing for public environmental interests are regarded as environmental organisations. For the purposes of the CACP, environmental protection mostly covers nature conservation, but also the protection of environmental elements with a view to protecting the health and well-being of people as well as the exploration and promotion of nature and natural heritage. Under the CACP, in evaluating the promotion of environmental protection, the

association's ability to implement its statutory goals must be considered in view of the association's activity to date; if there has been no activity, the organisational structure, number of members and the qualification criteria for membership as set out in the articles should be considered.

The inherent conditions applicable to an Estonian environmental organisation are in keeping with the objectives of the convention and with two concrete criteria, i.e., those of being non-governmental and the promotion of environmental protection. However, it is questionable whether the solution according to which environmental protection needs to be just one and not the main goal of an organisation completely matches the spirit of the convention. Lack of such clarification allows arguments that those associations whose main goal may compete with the public environmental interest should also be treated as environmental organisations.

Under Estonian law, it is presumed that where a non-governmental organisation disputes an administrative act established or an action performed in the area of environmental protection, such an organisation either has justified interest or its rights have been violated if the disputed administrative act or action is linked to the environmental goals of the organisation or to its activity in environmental protection to date. Such a definition of concern matches the spirit of the convention and the directives.