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ARTICLE

Empowering Through Law: Environmental NGOs as Regulatory Intermediaries in EU Nature Governance

Suzanne Kingston,* Edwin Alblas,** Micheál Callaghan*** and Julie Foulon****

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Abstract

Private 'bottom-up' enforcement has been central to the efforts of the European Union (EU) to promote effective compliance with its ambitious environmental laws. This approach is strengthened by the EU's implementation of the Aarhus Convention, which aims to democratize environmental enforcement by conferring citizens and environmental non-governmental organizations (ENGOs) with legal rights of access to environmental information, rights of public participation, and rights of access to justice (the so-called 'Aarhus mechanisms'). This article empirically assesses the extent to which the Aarhus mechanisms empower ENGOs to take an active role in the private enforcement of the EU Habitats and Birds Directives. Based on 75 surveys and 30 interviews with ENGOs from three Member States (France, Ireland, the Netherlands), we apply regulatory intermediary theory to show how European ENGOs play a vital role in intermediating between (i) EU Member States and their citizens, (ii) the EU and individual citizens, and even (iii) the EU and its Member

* General Court of the European Union (Luxembourg); University College Dublin (Ireland). Email: Suzanne.kingston@ucd.ie.

** Wageningen University & Research, Wageningen (The Netherlands). Email: Edwin.alblas@wur.nl.

*** Community Wetlands Forum, Moate (Ireland). Email: michealcallaghan@gmail.com.

**** European Commission, DG ENV, Brussels (Belgium). Email: jfl.foulonjulie@gmail.com.

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States. We bring new empirical insights into the role of law as an enabler of regulatory intermediaries, and its potential as a tool for orchestrating regulatory intermediaries.

Keywords: Enforcement of environmental law, Regulatory intermediary theory, Aarhus Convention, Environmental non-governmental organizations, Empirical legal research

1. INTRODUCTION

The European Union (EU) is commonly regarded as a 'global ecological leader'[1] based on its ambitious body of environmental laws. The effectiveness of these laws, however, is severely compromised by under-enforcement.

In its Eighth Environmental Action Programme (2020–2030), the EU identified 'ensuring effective, swift and full implementation' of the EU environmental *acquis* as one of its main priorities,[2] estimating the costs associated with under-implementation to be around €55 billion annually.[3] In reviewing the preceding Seventh Environmental Action Programme (2013–2020), the Commission had already concluded that major implementation challenges remain in areas such as air quality and nature conservation, which require 'above all a continued effort to implement existing legislation'.[4]

Encouraging 'bottom-up' private enforcement of environmental law has long formed a central plank of the EU's efforts to address this serious problem. In particular, when the EU approved the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), in February 2005,[5] it joined an innovative legal experiment in environmental governance. The Aarhus Convention aims to democratize environmental enforcement by conferring third party citizens and environmental non-governmental organizations (ENGOs) with legal rights of access to environmental information, rights of public participation, and rights of access to justice in environmental matters. In addition, ENGOs are granted privileged legal rights to participate in environmental governance and to bring environmental judicial proceedings, in recognition of their particular 'importance' in ensuring environmental protection,[6] thus effectively conferring them with special standing to 'speak for the environment' in legal proceedings.[7]

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1 See, e.g., J. Le Cacheux & E. Laurent, *The EU as a Global Ecological Leader: Report on the State of the European Union* (Palgrave Macmillan, 2015). See also European Commission, 'Proposal for a Decision on a General Union Environment Action Programme to 2030', 14 Oct. 2020, COM(2020) 652 final (Art. 2 of which states that the Union 'sets the pace for ensuring the prosperity of present and future generations globally': ibid., p. 10). The Programme entered into force on 2 May 2022. See n. 2 below.

2 Decision (EU) 2022/591 on a General Union Environment Action Programme to 2030 [2022] OJ L 114/22, Art. 3(a).

3 Ibid., Recital para. 3.

4 European Commission, Report from the Commission on the Evaluation of the 7th Environment Action Programme, 15 May 2019, COM(2019) 233 final, p. 3.

5 Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: https://www.unece.org/env/pp/treatytext.html. At present the Convention has 46 parties, which include not only all EU Member States but also non-EU European states (such as the United Kingdom (UK)) and certain states outside Europe (such as Kazakhstan, Tajikistan, and Turkmenistan).

6 Ibid., Preamble, para. 13.

7 Ibid., Arts. 2(5), 9(2).

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Further strengthening the Aarhus principles constitutes one of the core commitments of the EU Green Deal. This ambition is demonstrated by the recent amendment of the 'Aarhus Regulation',[8] which applies the Aarhus principles to EU institutions, as well as by Green Deal Communications such as the 2020 Communication on Improving Access to Justice in Environmental Matters.[9] Among the reasons for the move towards private enforcement mechanisms are the persistent problems that have plagued public enforcement within the EU, which include a lack of resources and the inherent difficulty for any public authority, even if well resourced, in ensuring environmental compliance without the support of other societal actors.[10] At the level of the EU institutions, particularly, we see a strong narrative of Aarhus Convention rights 'empowering' ENGOs to help in filling enforcement gaps and enabling 'environmental democracy'.[11] Thus far, however, there has been little empirical work to investigate whether such claims are supported by evidence.

This article empirically assesses the extent to which the Aarhus mechanisms 'empower' ENGOs to take an active role in the private enforcement of environmental laws. We provide a comparative investigation of Europe's attempt to revolutionize environmental governance by means of law, focusing on the field of nature conservation, where the disconnect between law on the books and the practical reality is particularly striking.[12] More specifically, our focus is on the implementation of the Aarhus Convention within the EU in the fields of the Birds Directive[13] and Habitats Directive.[14] Despite the critical importance of urgent action on biodiversity and the EU's strict nature laws,[15] the European Environment Agency concluded in 2020 that 60% of species and 77% of habitats listed in the Habitats Directive showed predominantly unfavourable conservation status.[16] The Council

[8] Regulation (EU) 2021/1767 amending Regulation (EC) No. 1367/2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies [2021] OJ L 356/1.

[9] European Commission, 'Communication on Improving Access to Justice in Environmental Matters in the EU and Its Member States', 14 Oct. 2020, COM(2020) 643; see also European Commission, 'Communication on the European Green Deal', 11 Dec. 2019, COM(2019) 640.

[10] See S. Kingston, V. Heyvaert & A. Čavoški, *European Environmental Law* (Cambridge University Press, 2017), Ch 7. See further S. Kingston et al., 'The Democratisation of European Nature Governance 1992–2015: Introducing the Comparative Nature Governance Index' (2022) 22(1) *International Environmental Agreements: Politics, Law and Economics*, pp. 27–48; A. Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' (2019) 28(2) *Environmental Politics*, pp. 342–64.

[11] European Commission, n. 9 above.

[12] We do not address enforcement outside the EU law context because of our specific interest in how intermediation works in the context of the EU, the Member States and ENGOs.

[13] Directive 2009/147/EC on the Conservation of Wild Birds [2009] OJ L 20/128 (Birds Directive).

[14] Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7 (Habitats Directive).

[15] Reflected, e.g., in the recent proposal of the European Commission for an EU Nature Restoration Law, published in June 2022, which if passed will set further legally binding targets for nature restoration in the EU: European Commission, 'Nature Restoration Law', available at: https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-law_en.

[16] European Environment Agency (EEA), *The European Environment: State and Outlook 2020* (Publications Office of the EU, 2019), available at: https://www.eea.europa.eu/publications/soer/2020.

concluded in 2019 that this was one of the areas where 'least progress' had been made since 2013.[17]

Based on 75 surveys and 30 interviews with ENGOs from three selected Member States – France, Ireland, and the Netherlands[18] – we build on recent advances in regulatory intermediary theory by showing how European ENGOs play a vital role intermediating between (i) EU Member States and their citizens, (ii) the EU and individual citizens, and even (iii) the EU and its Member States. We bring new empirical insights into the role of law as an enabler of regulatory intermediaries, and its potential as a tool for orchestrating regulatory intermediaries. By highlighting the 'tri-facing' role of ENGO intermediaries, we also develop the literature on *'chameleonic' intermediaries* – that is, intermediaries that can take different roles in multilevel governance settings.[19] Finally, by examining the role of *regulatory intermediaries in the field of environmental enforcement*, our study brings together environmental law scholarship and compliance and regulatory enrolment literature.

2. STATE ORCHESTRATION AND THE ROLE OF ENGOs AS REGULATORY INTERMEDIARIES

Existing literature has noted how both governments and international institutions reach out to non-state actors such as ENGOs to aid in the pursuit of policy goals.[20] Hickmann and Elsässer, for instance, show how international bureaucracies engage ENGOs to help to exert influence on the outcome of international environmental negotiations.[21] In the case of the EU's endorsement of the Aarhus Convention, we see a move towards promoting a more active role for ENGOs in environmental governance as a way of increasing environmental enforcement activities with little direct cost to Member States. The concept of enforcement, in this sense, is understood as encompassing not only more traditional mechanisms such as litigation, but all efforts aimed at improving compliance with environmental rules, including more informal mechanisms of encouraging compliance, such as monitoring, education, and the provision of information to regulatees.[22]

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[17] Council of the EU, 'The 8th Environment Action Programme: Turning the Trends Together – Conclusions', 12795/19, 4 Oct. 2019, para. 4, available at: https://www.consilium.europea.eu/media/40927/st12795-2019.pdf.

[18] On the criteria for selection of the 3 Member States, see Section 4 below.

[19] See, e.g., T. Havinga & P. Verbruggen, 'Understanding Complex Governance Relationships in Food Safety Regulation: The RIT Model as a Theoretical Lens' (2017) 670(1) *Annals of the American Academy of Political and Social Science*, pp. 58–77, at 58.

[20] See J. Steffek, 'Explaining Cooperation between IGOs and NGOs: Push Factors, Pull Factors, and the Policy Cycle' (2013) 39(4) *Review of International Studies*, pp. 993–1013; and, more broadly, K.W. Abbott, D. Levi-Faur & D. Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670(1) *Annals of the American Academy of Political and Social Science*, pp. 14–35.

[21] T. Hickmann & J.P. Elsässer, 'New Alliances in Global Environmental Governance: How Intergovernmental Treaty Secretariats Interact with Non-State Actors to Address Transboundary Environmental Problems' (2020) 20(3) *International Environmental Agreements: Politics, Law and Economics*, pp. 459–81.

[22] M. Blauberger & B. Rittberger, 'Conceptualizing and Theorizing EU Regulatory Networks' (2015) 9(4) *Regulation & Governance*, pp. 367–76, at 368. By 'compliance', we mean attaining the broad aims of

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We theorize the EU's turn towards private enforcement as embodying a form of 'orchestration' of ENGOs in the environmental governance domain.[23] Orchestration, in this sense, denotes a form of indirect governance whereby a regulator 'enlists and supports intermediary actors to address target actors in pursuit of [its] governance goals'.[24] Orchestration is distinct from traditional, hierarchy-based principal–agent relationships, as it is based on voluntary cooperation between parties pursuing correlated objectives with a mutually dependent relationship.[25]

The theoretical underpinnings of the concept of orchestration are found within the broader literature on regulatory intermediaries.[26] In essence, regulatory intermediary theory posits a three-party regulator-intermediary-target (RIT) model of regulation, in which 'intermediaries … provide assistance to regulators and/or targets, drawing on their own capabilities, authority and legitimacy'.[27] Regulators can turn to intermediaries for a range of tasks, including processes of monitoring, verification, auditing and certification, as well as enforcement tasks.[28] Intermediaries are often more able than regulators to make contact with certain regulatory targets, which enhances their ability to perform various tasks aimed at achieving regulatory objectives.[29]

If intermediaries are intended to act as credible monitors of compliance, it is vital for the intermediary to be independent of the regulator *and* of the regulatory targets.[30] Koenig-Archibugi and MacDonald argue that the success of intermediation depends on the degree of separation of the intermediary from the regulator, whether or not the intermediary has a separate identity from the regulator, and the extent to which the intermediary can be said to represent the regulator's interests.[31] For

legislation, not only by means of legal sanctions and taking formal legal enforcement action but also by positively incentivizing and enabling action in conformity with the legislative goals; see N. Gunningham, 'Enforcement and Compliance Strategies', in R. Baldwin, M. Cave & M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010), pp. 120–46.

23 See Hickmann & Elsässer, n. 21 above.

24 K. Abbott et al., *International Organizations as Orchestrators* (Cambridge University Press, 2015), p. 4.

25 Ibid.

26 As certain authors have observed, the regulatory intermediary literature builds on, and is closely linked to the literature on new governance and regulatory enrolment, which has previously drawn attention to the phenomenon of the enrolment of non-state actors for regulatory purposes in the financial services and food safety areas: see Havinga & Verbruggen, n. 19 above; J. Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003)(Spring) *Public Law*, pp. 63–91; J. Black, 'Paradoxes and Failures: "New Governance" Techniques and the Financial Crisis' (2012) 75(6) *The Modern Law Review*, pp. 1037–63; C. Abbot, 'Bridging the Gap: Non-State Actors and the Challenges of Regulating New Technology' (2012) 39(3) *Journal of Law and Society*, article 329358; C. Abbot & M. Lee, 'Economic Actors in EU Environmental Law' (2015) 34(1) *Yearbook of European Law*, pp. 26–59.

27 K.W. Abbott, D. Levi-Faur & D. Snidal, 'Introducing Regulatory Intermediaries' (2017) 670(1) *Annals of the American Academy of Political and Social Science*, pp. 6–13, at 6.

28 D. Levi-Faur & S.M. Starobin, 'Transnational Politics and Policy: From Two-Way to Three-way Interactions', *Jerusalem Papers in Regulation & Governance*, Working Paper No. 62, Feb. 2014, p. 7, available at: http://regulation.huji.ac.il/papers/jp%2062.pdf.

29 Abbott, Levi-Faur & Snidal, n. 20 above, p. 20.

30 A. Kourula et al., 'Intermediary Roles in Regulatory Programs: Toward a Role-Based Framework' (2019) 13(2) *Regulation & Governance*, pp. 141–56.

31 M. Koenig-Archibugi & K. Macdonald, 'The Role of Beneficiaries in Transnational Regulatory Processes' (2017) 670(1) *Annals of the American Academy of Political and Social Science*, pp. 36–57.

regulators, however, such independence may risk situations of 'policy drift' in which an intermediary uses its competences in ways that do not align with the regulator's ideas or goals, to act in its own interests or those of regulatory targets instead.[32] As Havinga and Verbruggen add, intermediaries do not always intermediate in the same direction, and may ultimately 'change colour' and diverge from regulators' objectives.[33] This may result in friction and cost for the regulator and may threaten the achievement of public policy objectives.[34] In order to minimize such risks, Kourula and others have emphasized the importance of understanding an intermediary's organizational motives, resources and the (public-private) relationships at play in a specific regulatory arrangement.[35]

Our article seeks to build on and develop this literature by conceptualizing the implementation of the Aarhus Convention as a means of *orchestrating ENGOs as regulatory intermediaries in the domain of private environmental enforcement*. Against the context of the Aarhus rules privileging ENGOs as private environmental enforcers, we hypothesize that the Aarhus Convention has led to greater enforcement of environmental law by ENGOs, and thereby to the *strengthening of the role of ENGOs as intermediaries, enabling ENGOs through law*. Our research design aims to test this hypothesis.

Our work also draws on and develops the literature on the role of (E)NGOs and the reasons why they choose to use, or not to use, law to achieve their objectives. In this context, a rich body of literature has developed on 'legal mobilization' to capture NGOs' strategic use of law in efforts to shape social change.[36] Academic literature tends to focus on the use of litigation by NGOs,[37] and has offered valuable insights into the reasons why ENGOs turn to law and, in particular, court litigation to achieve their goals. Those reasons include the applicable institutional and legal framework in the state at issue, as well as factors such as the NGO's 'worldview' and internal culture.[38] We develop this literature by focusing upon the role of ENGOs as intermediaries between the EU, its Member States and citizens. We empirically test NGOs' use of law – not confined to litigation – against the claims made by regulatory intermediary

[32] J. van der Heijden, 'Brighter and Darker Sides of Intermediation: Target-Oriented and Self-Interested Intermediaries in the Regulatory Governance of Buildings' (2017) 670(1) *Annals of the American Academy of Political and Social Science*, pp. 207–24, at 221; K. Bawn, 'Political Control versus Expertise: Congressional Choices about Administrative Procedures' (1995) 89(1) *American Political Science Review*, pp. 62–73.

[33] Havinga & Verbruggen, n. 19 above.

[34] K.W. Abbott et al., 'Two Logics of Indirect Governance: Delegation and Orchestration' (2016) 46(4) *British Journal of Political Science*, pp. 719–29, at 723.

[35] Kourula et al., n. 30 above, p. 143.

[36] C. Abbot & M. Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (University College London Press, 2021), p. 8; see also C. Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9(2) *Journal of European Public Policy*, pp. 238–55.

[37] However, Abbot & Lee (ibid., p. 9) note that ENGOs' use of law is far broader, including, but not confined to campaigning or lobbying work around legal obligations.

[38] See L. Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland and Italy (2018) 51(3) *Comparative Political Studies*, pp. 380–412.

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theory in the context of the Aarhus Convention, which specifically aims to empower ENGOs to use legal instruments to achieve their goals.

3. DEMOCRATIZING ENVIRONMENTAL GOVERNANCE THROUGH LAW

The EU treaties have, from the outset, provided for strong public enforcement tools empowering the European Commission to take action against Member States, notably the infringement procedure pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFEU).[39] Pursuant to this procedure, the Commission can bring an action before the Court of Justice of the EU (CJEU) for a Member State's failure to fulfil its EU law obligations. These actions may be brought on the Commission's own motion or following a complaint from a natural or legal person. While it is free to lodge a complaint, the CJEU has made clear that the Commission has no obligation to bring infringement proceedings or exercise its other treaty enforcement powers in any particular case.[40] The primary duty of public enforcement of EU environmental law therefore falls on national authorities, which are obliged to take 'any appropriate measure' to ensure fulfilment of their treaty obligations pursuant to Article 4(3) of the Treaty on the European Union (TEU).[41]

The CJEU's seminal case law dating back to the 1950s and 1960s has made clear that private parties may invoke many provisions of EU law directly before their national courts.[42] Absent specific EU legislation harmonizing national procedures and remedies for breaches of EU law, however, the principle of national procedural autonomy empowers Member States to stipulate their own procedural rules (including rules on standing, time limits for bringing proceedings, and legal costs). National rules need only ensure that the remedies available for breaches of EU law are (i) effective, and (ii) equivalent to those available for breaches of national law.

The implementation of the Aarhus Convention in EU law since 2005 has effectively turned the principle of national procedural autonomy on its head, in the areas covered by the Convention. As concerns ENGOs, the Aarhus Convention grants them privileged status to participate in environmental governance and enforce environmental law. Thus, ENGOs 'promoting environmental protection and meeting any requirements under national law' are deemed to be part of the 'public concerned' by any decision falling within the scope of Article 6 of the Convention. As a result, they enjoy the Convention's public participation rights, including the right to be informed in an 'adequate, timely and effective manner' of the features of the proposed activity and the decision-making procedure, and the right to request all information

[39] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, Art. 258.

[40] Case 247/87, *Star Fruit*, ECLI:EU:C:1989:58.

[41] Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/13, Art. 4(3).

[42] For discussion of the case law, see Kingston, Heyvaert & Čavoški, n. 10 above, Ch. 7.

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relevant to the decision making available at the time of the public participation procedure.[43]

Qualifying ENGOs also enjoy privileged legal rights of access to environmental justice under the Convention. Specifically, they do not have to prove that they have legal standing (*locus standi*) to bring proceedings to challenge the 'substantive and procedural' legality of decisions covered by Article 6 of the Convention before a court and/or other independent and impartial body established by law, but enjoy *locus standi* to bring such proceedings as of right. Furthermore, proceedings falling within the scope of the Aarhus Convention must, pursuant to its Article 9(4), not be 'prohibitively expensive' for the parties involved.

The special position of ENGOs in EU law has been expressly transposed in the areas of environmental impact assessment, industrial emissions and major accident hazards, which are the areas where the EU considers its laws to regulate decisions on 'specific activities' falling under Article 6 of the Convention. As with the Aarhus Convention itself, the specific definition of what constitutes a qualifying ENGO has been left to Member States. The CJEU has held, however, that Member States' definition of a qualifying ENGO must satisfy the principle of effectiveness of judicial remedies for breach of EU environmental law: it is not acceptable, for instance, to limit the definition of a qualifying ENGO to those organizations with at least 2,000 members. Standing requirements must not be such as to run counter to the objectives of the EU Directive that implements the Aarhus Convention (in that case, Directive 2003/35/EC) 'and in particular the objective of facilitating judicial review of projects which fall within its scope'.[44]

Outside the fields where the EU has expressly transposed the Aarhus Convention, the CJEU, in its landmark *Slovak Brown Bear* judgment, established that national courts must interpret their national procedural rules 'in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'.[45] The EU's expansive approach to the legal standing of ENGOs to date has been confined to standing before national courts, however; the CJEU has declined to expand the legal standing rules for direct access to the EU courts, maintaining the long-established doctrine that applicants seeking to challenge an EU law directly must show that they are 'individually concerned' by that law in a manner that differentiates them from all others.[46] Following a long-running case before the Aarhus Convention Compliance Committee in which the Committee made clear its view, inter alia, that the CJEU approach to *locus standi* did not comply with the

[43] On participation see M. Lee & C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention (2003) 66(1) *The Modern Law Review*, pp. 80–108.

[44] Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening* v. *Stockholms kommun genom dess marknamnd*, ECLI:EU:C:2009:631, para. 47. See Directive 2003/35/EC providing for Public Participation in the Drawing up of Certain Plans and Programmes relating to the Environment and Amending with regard to Public Participation and Access to Justice Council Directives 85/3377/EEC and 96/61/EC [2003] OJ L 156/17.

[45] Case C-240/09, *Lesoochranárske zoskupenie VLK* v. *Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125 (*Slovak Brown Bear* case).

[46] For discussion of the case law see Kingston, Heyvaert & Čavoški, n. 10 above, Ch. 7.

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Aarhus Convention, the EU amended the Aarhus Regulation in 2021 to make it easier for citizens and ENGOs to seek internal review of the decisions of EU institutions concerning environmental matters.[47]

4. METHODOLOGY

The data collection for this study was part of a large empirical research project examining European environmental governance law and compliance, taking the particular cases of Ireland, France, and the Netherlands.[48] These states were selected to reflect the variety of geographic size of Member States, record of compliance with EU environmental law, legal 'family' to which the legal system belongs (common law, civil law), and length of time taken to ratify the Aarhus Convention. Capturing such a variety in our qualitative research design was important given that, pursuant to the principle of national procedural autonomy discussed above, national remedial and enforcement structures vary significantly between Member States.

The qualitative data used for this research comprises survey data and in-depth interviews with ENGOs. For all three countries, the ENGOs active in nature conservation-related fields in the respective jurisdiction were identified via online searches; 148 ENGOs were subsequently invited to participate in our survey via email: 25 for Ireland, 56 for France, and 67 for the Netherlands. The total survey response was 78, made up of 13 Irish ENGOs (52% response rate), 30 French ENGOs (53.6% response rate), and 35 Dutch ENGOs (52.2% response rate). Semi-structured interviews were subsequently carried out with those ENGOs that were particularly active in the nature conservation field and had indicated willingness to be interviewed. In total, 27 ENGOs were interviewed: 10 for Ireland, 7 for France, and 10 for the Netherlands.

In the case of the in-depth interviews, the questions were guided by the results of the survey, with the semi-structured format allowing greater flexibility to probe issues of particular interest arising from the ENGO responses, within the overall framework of the interview. The interviews were conducted during May 2019 and March 2020. Interviews generally lasted for around 60 minutes and were done face to face, with a small number[49] carried out over the telephone where a face-to-face interview was not possible. Interviews and surveys were conducted in English, French and Dutch, and were subsequently translated into English.

We used a thematic analysis to structure results around themes that became apparent from the data collected in each of the studied countries.[50] This allowed for an in-depth

[47] See G. Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9(2) *Transnational Environmental Law*, pp. 221–38. See further Regulation (EU) 2021/1767, n. 8 above.

[48] See further S. Kingston et al., 'Europe's Nature Governance Revolution: Harnessing the Shadow of Heterarchy' (2022) 22(4) *International Environmental Agreements*, pp. 793–824; Kingston et al., n. 10 above; S. Kingston et al., 'Magnetic Law: Designing Environmental Enforcement Laws to Encourage Us to Go Further' (2021) 15(S1) *Regulation & Governance*, pp. 143–62.

[49] For the Netherlands, one interview was carried out by telephone; for France, three were carried out by telephone; for Ireland, one interview was carried out by telephone.

[50] For more detail see G. Guest, K.M. MacQueen & E.E. Namey, *Applied Thematic Analysis* (SAGE, 2011).

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Table 1 Comparative Data for Jurisdiction Selection

	Ireland	France	The Netherlands
Area (km^2) (excluding overseas territories)	70,273	551,695	41,198
Area (km^2) of Natura 2000 protected sites (incl. marine areas)	19,481	203,564	20,605
Open environmental infringement actions (Art. 258 TFEU) in 2015	13	18	1
Legal 'family'	Common law	Civil law (Romanistic)	Civil law (Germanic)
Length of time taken to ratify the Aarhus Convention (from 1998)	14 years	4 years	6 years

Sources European Commission; European Environment Agency; K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998); United Nations Economic Commission for Europe (UNECE), *The Aarhus Convention: An Implementation Guide*, 2nd edn (UNECE, 2014).
Note We selected the number of open infringement actions at the commencement date of the research, rather than, e.g., the total cumulative historical infringement cases closed and open against the Member State at issue, because this fits better with our research design, which sought to ascertain ENGOs' perceptions of their role at the date on which the research was carried out. The historical date of infringement proceedings closed in the past was therefore of less direct relevance in selecting the Member States to be studied.

account of stakeholder experiences to emerge. We report these experiences through a text-rich narrative, including detailed accounts as well as quotations from interviewees. In the light of the sensitive nature of some of the questions asked in the interviews, the ENGO responses have been anonymized. Each ENGO has been given a separate code for identification, consisting of the letter E (for ENGO) + the first letter of the Member State (for instance, I for Ireland) + an identifying number.[51]

5. RESULTS: ENGOs AS *INTERMEDIARIES* IN EU ENVIRONMENTAL GOVERNANCE

5.1. *ENGOs and the Aarhus Mechanisms: National Differences in Approach*

Our results shed new light on the ways in which ENGOs mediate between regulators and citizens in EU environmental governance. Through analysis of the quantitative and qualitative data we gathered, we distinguish between three principal configurations of intermediation: ENGOs as intermediaries between (i) EU Member States and their citizens (5.2), as well as (ii) EU institutions and national citizens (5.3), and even (iii) the EU and its Member States (5.4). We explore these three configurations in the following sections.

We found significant differences in ENGO take-up of the Aarhus mechanisms among the three Member States (Figure 1). In Ireland, most ENGOs did not rely directly on the legal tools provided by the Aarhus mechanisms, but preferred awareness raising, lobbying, and direct practical work. Some, however, had made complaints to

[51] For more detail and descriptions for each ID, see the Annex.

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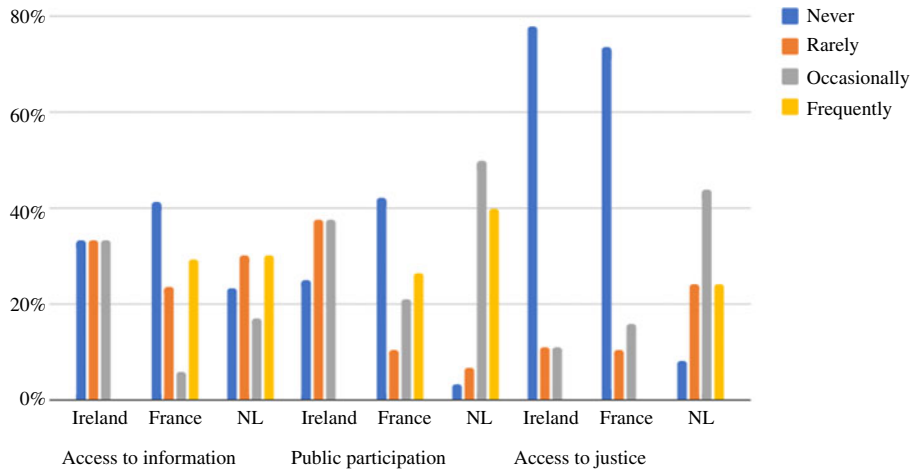

Figure 1 Responses to the Question: 'How Often Does Your Organization Make Use of the Aarhus Instruments?'

the European Commission pursuant to Article 258 TFEU.[52] Similarly, French ENGOs saw a particularly important role for themselves in raising public awareness on environmental issues, such as through education and environmental campaigning, as well as through practical nature conservation work. By contrast, in the Netherlands, we observed a much stronger reliance on the Aarhus mechanisms, as Figure 1 illustrates.

In investigating the context for these differences, we found significant variations between the regulatory frameworks in Ireland, France and the Netherlands giving effect to the Aarhus Convention concerning ENGOs.

In Ireland – the last EU country to ratify the Convention – ratification took place in 2012, some 14 years after the Convention was concluded. Legislation implementing Aarhus provisions is found in a range of different laws, reflecting the fragmented nature of environmental and planning legislation in Ireland.[53] As concerns access to environmental information, any natural or legal person (including an ENGO) has the right to request such information from public authorities on payment of a small fee.[54] With regard to public participation, ENGOs can make submissions or observations on applications for planning permission to Ireland's independent administrative planning appeals body, An Bord Pleanála, again subject to payment of a fee.[55] Regarding access to justice, in selected areas of EU law, including environmental impact assessment and

[52] See Section 3 above.

[53] See, e.g., Y. Scannell, 'The Catastrophic Failure of the Planning System' (2011) 33 *Dublin University Law Journal*, pp. 393–428.

[54] For the up-to-date charges see An Bord Pleanála, 'Fees: Planning Appeals', available at: https://www.pleanala.ie/en-ie/fees/fees-appeals. Note that certain other bodies also have competence in specific sub-fields linked to nature conservation, such as the Forestry Appeals Commission, which handles forestry licensing and permitting. For further detail on the Irish regulatory framework see Kingston et al., n. 10 above.

[55] Ibid.

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the EU Birds and Habitats Directives, a special costs regime applies, which foresees that each party pays its own costs as opposed to the losing party having to pay all costs.[56] While this drastically reduces the financial risks involved in bringing proceedings invoking environmental law, the European Commission has stated its view that problems of access to justice still remain, among other reasons, because of the applicable costs regime.[57]

In France, the rights of access to information and public participation in environmental decision making have constitutional status,[58] and are elaborated upon in the French Environmental Code.[59]

Implementation challenges remain, however, particularly relating to the right of access to information. This right was the topic of a 'Letter of Formal Notice' by the European Commission to France in May 2020, which urged the government to improve citizens' access to environmental information.[60] The Aarhus Convention's public participation dimension did not lead to significant changes in French law:[61] ENGOs can participate through, inter alia, public consultations on decisions that are likely to affect the environment,[62] public consultation on the development of plans and programmes,[63] and public debates on infrastructure projects.[64] As concerns access to justice, ENGOs that have obtained an *agrément* – a type of governmental approval – are presumed to have a legal interest in bringing legal proceedings. However, such *agrément* requires an ENGO to show that environmental protection is its principal aim, that it has existed for at least three years, has a sufficient number of members, and operates on a non-profit basis.[65] An ENGO that does not have the benefit of an *agrément* must prove that the decision in issue has a direct link with its field of activities as defined by the organization's statutes, as well as a sufficient geographical link, in order to have standing. Legal aid may be available to ENGOs bringing proceedings where they do not have sufficient resources.[66]

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[56] See, in particular, the Planning and Development Act 2000, as amended, s. 50B. See also the Birds Directive, n. 13 above, and Habitats Directive, n. 14 above; and Directive 2011/92/EU on the Assessment of the Effects of certain Public and Private Projects on the Environment [2012] OJ L 26/1.

[57] See K. O'Sullivan, 'EU Official Castigates Government over Environmental Court Costs (2022) *The Irish Times*, available at: https://www.irishtimes.com/news/environment/eu-official-castigates-government-ogver-environmental-court-costs-1.4782718.

[58] Charte de l'environnement, Art. 7.

[59] French Environmental Law Code, L.124-1; Art. L. 110-1 II.4-5.

[60] European Commission, 'Access to Environmental Information: Commission Urges France to Improve Citizens' Access to Environmental Information', INF/20/859, available at: https://ec.europa.eu/commission/presscorner/details/en/inf_20_859.

[61] See B. Drobenko, 'La Convention d'Aarhus et le droit français' (1999) 24(1) *Revue Juridique de l'Environnement*, pp. 31–61.

[62] French Environmental Law Code, Art. L. 123-1.

[63] Ibid., Art. 121-1-A.

[64] Ibid., Art. L. 121-8.

[65] Ibid., Art. 141-2. By way of illustration, in 2020, 43 ENGOs benefited from this specific approval at the national level; see 'Participation des associations au dialogue environnemental : agrément et habilitation à siéger dans les instances consultatives', 13 Apr. 2023, available at: https://www.ecologie.gouv.fr/participation-des-associations-au-dialogue-environnemental-agrement-et-habilitation-sieger-dans.

[66] Ibid.

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The procedural rights of Dutch ENGOs in relation to the three Aarhus pillars were largely in place before the Convention entered into force, but have been amended in certain respects to fit the Aarhus requirements.[67] ENGOs have the right to request publicly held environmental information, and public bodies have a responsibility to actively disseminate environmental information.[68] In terms of public participation, ENGOs are allowed to make submissions freely in respect of any plan that is open to public participation. With regard to access to justice, an ENGO may bring proceedings in the public interest if the subject matter falls within the ENGO's statutory aims and activities. While this requirement has sometimes been interpreted restrictively,[69] a more lenient approach to standing has crystallized in recent case law.[70] While the 'loser pays' principle applies generally in legal proceedings, legal costs are generally far lower than is the case in common law countries. In addition, means-tested legal aid can be requested by both citizens and ENGOs.[71]

Against the context of these differences in legal frameworks, we turn to our findings on the different means of ENGO intermediation in European environmental governance.

5.2. *ENGOs as Intermediaries between EU Member States and Individual Citizens*

Our survey data shows widespread agreement among ENGOs across all three Member States that they have an important role to play in the enforcement of environmental laws within their state (Figure 2).

During the interviews we found that the structures and frameworks that enable ENGO enforcement, and the reliance on intermediaries in this context, differ considerably per Member State.[72] Firstly, certain Member States have supported specific regulatory intermediary structures designed to bring ENGOs together. This is so in Ireland, where the Irish Environmental Network (IEN) is the umbrella organization for 33 nationally active ENGOs, with over 35,000 citizen members.[73] As intermediary, the IEN is responsible for distributing state funding to its

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[67] See Wet uitvoering Verdrag van Aarhus (2005). See also L. Squintani, 'G. The Netherlands' (2017) 28 *Yearbook of International Environmental Law*, pp. 327–23; C.W. Backes, 'The Implementation of Article 9.3 of the Aarhus Convention on Access to Justice in the Netherlands' (European Commission, 2012).

[68] Wet Milieubeheer (1993), Art. 19.1c.

[69] See J.H. Jans & A.T. Marseille, 'The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands' (2010) 22(3) *Journal of Environmental Law*, pp. 373–90; H. Tolsma, K. de Graaf & J. Jans, 'The Rise and Fall of Access to Justice in The Netherlands' (2009) 21(2) *Journal of Environmental Law*, pp. 309–21.

[70] See, e.g. Case C-826/18, *LB and Others* v. *College van burgemeester en wethouders van de gemeente Echt-Susteren*, ECLI:EU:C:2021:7. See also E. Alblas & S. Kingston, 'Milieuorganisaties in Beroep: Toegang tot de Rechter vanuit Empirisch Perspectief' (2021) 27 *Nederlands Juristenblad*, pp. 2194–201.

[71] Alblas & Kingston, ibid.

[72] On the challenges and rewards of collaboration between ENGOs, particularly in the context of Brexit, see Abbot & Lee, n. 36 above, Ch. 6.

[73] To become a member of the IEN, a group must be nationally active, have a formal legal structure, be not-for-profit, have bank accounts, a track record of activity, be tax compliant, and be an environmental group. As a result, it does not encompass the full range of environmental groups and associations across Ireland, some of which operate on a localized or ad hoc basis. A similar structure is employed in the case of

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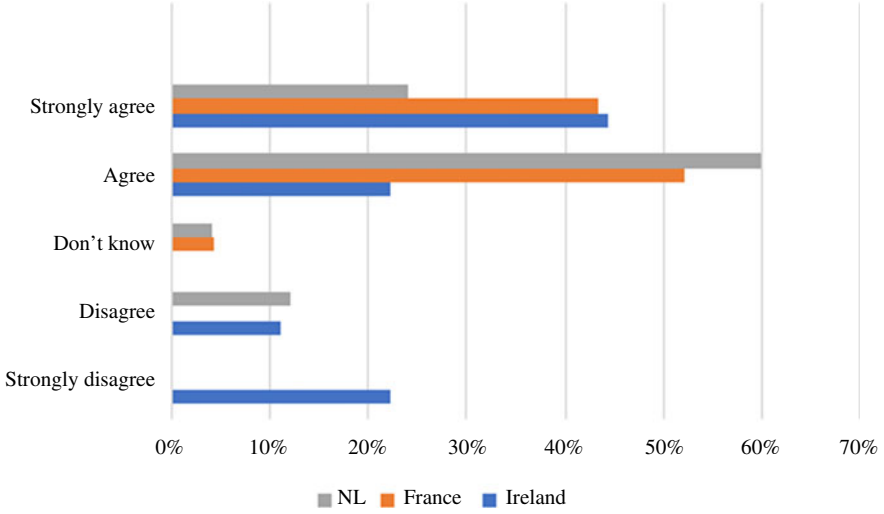

Figure 2 Percentage of Respondents Who Agree that 'Environmental Organizations Have an Important Role to Play in Making Sure that Environmental Laws Are Enforced'.

ENGO members to enable them to undertake their (largely volunteer-led) work [EI8].[74] French ENGOs also described a similar umbrella organization in the form of France Nature Environnement (FNE), the French federation of ENGOs that acts as spokesperson for more than 6,209 associations, grouped within 47 member organizations.[75] As with the IEN, the FNE conceives of itself as the voice of associations for the protection of nature and the environment, acting as an intermediary between individual ENGOs and other (public) actors, with the aim of uniting public authorities, elected officials, the media and civil society in a single movement.[76] Conversely, we did not find any similar ENGO umbrella networking group in the Netherlands, despite the existence of a large number of active ENGOs across a wide range of domains.[77]

Secondly, a further theme of our results was the perception on the part of ENGOs as intermediating between the state and regulatees – in particular, farmers – in order to achieve better environmental outcomes. In Ireland, for instance, many ENGOs highlighted how they see their role as mediating between the state and farmers, to

another ENGO, which is responsible for distributing state funding among citizen groups involved in wetland conservation across the country [EI1].

74 The IEN is funded by government funding for core operations on an annual basis by the Department of Communications Climate Action and Environment (DCCAE). In 2021, €750,000 in Core Funding was allocated to the IEN by the DCCAE, available at: https://ien.ie.

75 France Nature Environnement, 'Notre Vision', available at: https://fne.asso.fr/notre-vision.

76 Ibid.

77 Stichting De Natuur en Milieufederaties, 'Jaarverslag 2018', available at: https://www.natuurenmilieufederaties.nl/wp-content/uploads/2020/01/NMFs_jaarverslag2018-website.pdf. In 2018, over 1.8 million people were members of one of the largest four Dutch ENGOs: Natuurmonumenten (Nature Monuments), Wereld Natuurfonds (World Wildlife Fund), Provinciale landschappen (the 12 provincial nature organizations), and Vogelbescherming (Bird Protection Agency) – 1,826,391 to be precise, out of a population of 17.5 million.

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ensure that nature protection policies and laws are complied with on the ground. For instance, two of the ENGOs engaged in practical conservation work explained that they organize advice and training sessions on ecological issues for farmers, thus acting as intermediary in order to communicate directly the importance of governmental conservation objectives to farmers [EI2; EI7]. However, fulfilling such a role can be difficult in practice. One interviewee expressed a desire for greater cooperation between the ENGO and farmers through one of the principal farmers' organizations in Ireland, the Irish Farmers' Association (IFA), noting that 'we want to work with farmers. We would love for the IFA to come to us' [EI9]. Yet, the same interviewee also recognized that their organization had 'never sat down with the IFA' to discuss their work, particularly because they felt the IFA had a very negative attitude towards the environmental matters for which the ENGO campaigned.

As in Ireland, French ENGOs, too, described providing farmers with important legal and/or technical knowledge about environmental rules to help them to understand and comply with regulatory requirements [EF1, EF2, EF5, EF7]. Many ENGOs felt that landowners are often unaware of environmental rules and that 'a lot of breaches of environmental rules are due to their ignorance, but it is not intentional' [EF1]. Some ENGOs, however, noted difficulties in engaging in constructive dialogue with farmers. One ENGO explained that when farmers are struggling economically, they 'do not want to know' whether their farming methods may have an impact on protected habitats or species [EF2]. This can lead to 'situations of total mistrust' between the ENGO and farmer, inhibiting effective intermediation by the ENGO.

A striking example of intermediation between state and farmers concerns the management of protected Natura 2000 sites in France. French Natura 2000 legislation allows landowners to sign Natura 2000 contracts through which they can receive fiscal benefits in return for carrying out conservation work. We heard that farmers are often reluctant to sign such contracts because they are afraid it would lead to a '*mise sous cloche*' of their land – that is, a situation where any activity on their land would be severely limited and would prevent them from carrying out their agricultural work [EF2]. To overcome such suspicions, several ENGOs reported taking on the role of Natura 2000 'guides' (*animateurs*),[78] as provided for in the relevant regulations [EF2; EF4]. Designated *animateurs* support and oversee pro-environmental activities on the protected site. They also promote the conclusion of Natura 2000 contracts with landowners [EF2; EF4].

Thirdly, our results show a wide spectrum of views among ENGOs as to their role in using the Aarhus mechanisms (as distinct from more general ENGO activities such as raising awareness, fundraising and direct conservation activities). Across all three Member States, we found ample evidence of strategic enrolment of ENGOs by public authorities to achieve regulatory targets through traditional ENGO activities, rather than by reliance on Aarhus mechanisms. In Ireland, for instance, certain ENGOs perceived their role as assisting the state in ensuring that the objectives of EU nature

[78] Natura 2000, 'Fiche Métier Animateur Natura 2000', available at: http://www.natura2000.fr/outils-et-methodes/documentation/fiche-metier.

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law and policy are met. It is in that function that they engage with local communities and farmers concerning, for instance, the establishment of European funded conservation projects [EI7]. In the Netherlands, two of the ENGOs interviewed had taken on important roles as managers of public protected nature sites, as part of which they also engaged in inspection activities to ensure that the relevant nature conservation laws are followed [EN1; EN8].[79]

Further, ENGOs in Ireland and the Netherlands recounted difficulties in using the Aarhus mechanisms because of what they perceived to be the restrictive attitude of the state. Our data shows that certain ENGOs therefore view themselves as *assisting* the state and are *restricted by* the state at the same time. One Irish ENGO raised the example of ENGO involvement in public consultation procedures. An unhelpful regulatory culture, it complained, created a barrier to participation:

> The government has its own guidelines on public consultation, and they are quite good, but nobody in the department takes notice of them. We regularly get calls, for example, for public consultation with seven days' notice, or less, or not at all. I've had to complain to them several times this year about this kind of thing. They might send things out just before Christmas, with a deadline on the 20th of January. That kind of stuff [EI8].

Similarly, various Dutch ENGOs explained that the state invites them to participate in public participation procedures in order to represent the public interest. Such participation, however, can sometimes appear to be of a tokenistic nature: ENGOs are encouraged to give their opinions, but they feel that the 'real' decisions have already been made [EN1; EN2]. One interviewee emphasized the reputation cost that such situations can create for an ENGO: 'We are not actually able to exercise influence, but we *are* held accountable by our members or other members of the public when the outcome is non-favourable for the environment' [EN9].[80]

Indeed, all Dutch ENGOs interviewed indicated a preference for using methods such as education, public participation and active dialogue, as opposed to taking legal action against individual regulatees. As one interviewee explained, 'it is understandable that, as long as the government does not make a single effort to make sure the rules are complied with, farmers will not actually make an effort to comply either. We lay the blame at the state, not the farmer' [EN4].

Interestingly, the Dutch interviews also provide evidence of intermediation in the opposite direction: citizens reaching out to ENGOs to try and stop the state from breaching environmental laws. This type of reverse intermediation makes use of the special enforcement rights conferred on ENGOs by, inter alia, the Aarhus Convention. ENGOs explained that citizens sometimes signal a specific environmental issue to an ENGO in the hope that the latter will act on it. As one ENGO added, 'citizens rarely see a role for themselves besides "enrolling" the ENGO to take action' [EN2]. Many respondents felt that it can hardly be expected for ordinary citizens to

[79] Note that while the state has delegated certain enforcement roles to the ENGO with regard to carrying out inspections, actual sanctioning is still carried out only by state actors.

[80] On the reputational risks for ENGOs of participation, particularly in the context of collaboration concerning Brexit, see Abbot & Lee, n. 36 above, Ch. 6.

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play an active role in environmental enforcement. The amount of expertise, time, and resources needed to do so acts as a barrier to such involvement. In this context, two ENGOs mentioned explicitly that they had intermediated between citizens and the state *for* the citizen [EN5; EN9]. One of the two ENGOs focuses on facilitating and coordinating grassroot campaigns [EN9], while the other actively takes on court cases where citizens lack the capacity to do so themselves [EN5]. In this regard, the second interviewee stressed that 'you need to know about all relevant environmental laws, need to know what procedures to follow. This is almost impossible for the average citizen, so they often come to us' [EN5].

5.3. *ENGOs as Intermediaries between EU Institutions and Individual Citizens*

Most ENGOs across the three Member States surveyed consider that the state should play the main role in environmental enforcement (Figure 3). Dutch ENGOs agreed with this statement particularly strongly. Respondents also indicated that in reality, however, the state often does not demonstrate the capacity or even willingness to enforce the environmental laws which it has signed at the EU level. As a consequence of this enforcement 'vacuum', we found that numerous ENGOs were orchestrated for enforcement purposes not by their own Member States, but rather by the EU – in particular, by the European Commission as 'watchdog' of the treaties under Article 258 TFEU.

Our interview data gave us more detailed insights into ENGO perceptions of their role as intermediaries between the EU and citizens.[81] As with the citizen-state relationship, most ENGOs did not perceive their role primarily as intermediaries enabling enforcement through litigation against landowners. Rather, enforcement is achieved by assisting regulatees to comply. In Ireland, for instance, our interview results indicate a widespread view among ENGOs that the application and enforcement of EU environmental law cannot occur effectively without communicating and engaging with local communities. As one interviewee noted, '[we are trying] to work with local communities. When change happens on the ground, it happens when local communities get involved and start agitating for these things' [EI2]. ENGOs expressed a desire to work more closely with farmers; they felt that it was important for farmers to understand and buy in to laws rather than attempting to 'get them to comply' [EI8] by means of the threat of formal legal sanction. Another interviewee noted that part of their strategy was to 'go out onto the hills', engage with farmers on the rationale for EU environmental laws, and explain to them the ecology that exists on their land [EI7].

French ENGOs similarly considered themselves as legal/technical advisers to regulatees [EF1; EF5]. ENGOs reported monitoring the evolution of EU environmental legislation applicable to farmers and providing technical support to those farmers to help them to comply with these rules. They considered this necessary because farmers

[81] This role is apparent in our results, notwithstanding the fact that, as with all EU Directives, there is a layer of implementing national legislation in the case of the Birds and Habitats Directives.

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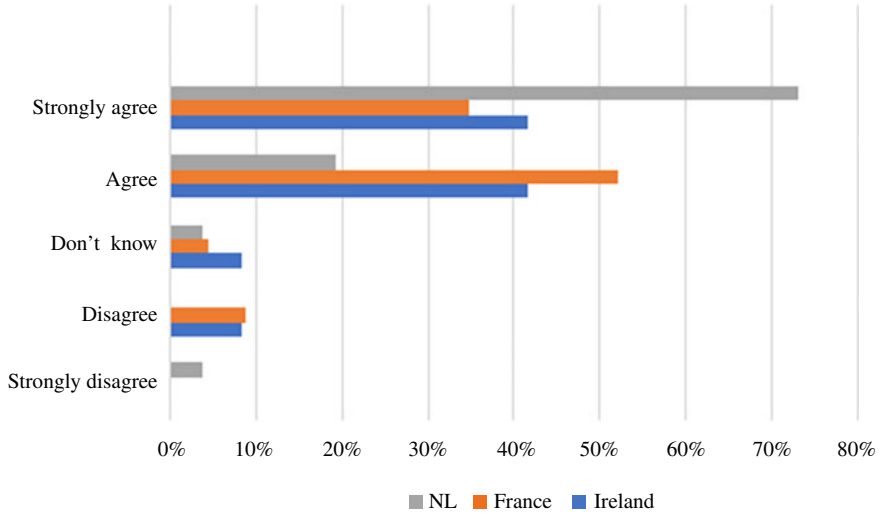

Figure 3 Percentage of Respondents Who Agree that 'It Is Up to the State and State Agencies to Make Sure that Environmental Law Is Properly Enforced'.

often lack the time, and have little desire, to understand and to follow legislative changes. Here, ENGOs specifically emphasized the importance of raising awareness among farmers in relation to the EU network of protected sites under the Natura 2000 title [EF1; EF2]. Again, through their involvement as Natura 2000 *animateurs*, many ENGOs reported assuming a role in overseeing landowners' implementation of EU environmental rules on the ground.

We also found evidence that ENGOs consider themselves as intermediaries between the EU and citizens generally, rather than regulatees only. They promote awareness and understanding of EU environmental law, including the Aarhus Convention. This view was particularly strong in the Netherlands, where ENGOs widely agreed that the Dutch government has put the onus on ENGOs and citizens to ensure compliance with EU nature rules. One interviewee expressed this sentiment as follows: 'The Government seems to "bet" on people not taking action. As long as citizens don't act, they can keep on doing what they're doing' [EN2]. As such, the Dutch ENGOs interviewed considered it of great importance for citizens to gain a better understanding of the EU regulatory framework and of their rights under the Aarhus Convention. Empowered by this knowledge, citizens can monitor and flag infringements of environmental rules.

Dutch ENGOs also considered themselves as enablers of citizen environmental enforcement: 'We can help citizens to exercise Aarhus rights. Citizens can learn about their Aarhus rights; they are very accessible. We can show them how to exercise them' [EN6]. While the Dutch government has a habit of negatively framing nature protection efforts as 'onerous requirements from Brussels', a great deal of the work of one Dutch ENGO goes into framing nature as something positive, something to be 'proud of' [EN9]. Among other things, this work included educational events and the close involvement of citizens through public campaigns.

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Similarly, most French ENGOs interviewed considered that it was an important part of their role to raise citizens' awareness of EU environmental rules and of environmental issues by means of campaigns, educational events, and conferences. While certain ENGOs reported that they informed citizens about their rights derived from the Aarhus Convention, French interviewees were more sceptical about whether this actually results in increased enforcement of environmental laws compared with their Dutch counterparts [EF2; EF4]. Rather, their view was that citizens should not be burdened with the task of public participation in helping the state to assess whether a proposed development consent conforms with EU laws [EF4].

Our results also show the relationship between the EU and ENGOs moving in the opposite direction – that is, not only ENGOs raising citizens' awareness of EU law (top down), but also acting on behalf of citizens to enforce EU law at national and EU levels (bottom up). In Ireland, for instance, ENGOs report a sense of responsibility as organizations with staff and technical expertise, to act on behalf of citizens to ensure that EU nature law is enforced in Ireland. This includes bringing litigation and making complaints to the Commission [EI3, EI6]. ENGOs in the Netherlands reported actively assisting citizens in starting legal actions. They assist with building societal support for those cases, provide legal advice, and even institute proceedings on behalf of citizens in order to enforce EU nature law [EN5]. In France, ENGOs considered that they needed to play a role in enforcing EU nature law on behalf of citizens, including by means of litigation where necessary, as private enforcement was too difficult for ordinary citizens [EF1, EF4, EF5].

5.4. *ENGOs as Intermediaries between the EU and its Member States*

As a matter of EU law, the task of implementing and enforcing EU environmental law rests principally on Member States. However, ENGO survey respondents across all three Member States were in broad agreement that their state was not sufficiently prioritizing environmental protection within their territories (Figure 4).

Throughout the interviews, we found considerable evidence across all three states that ENGOs view themselves as intermediating between the EU and the Member State levels in enforcing EU nature law. The direction of this intermediation was overwhelmingly one way: ENGOs seeking to enforce EU law against the state in order to better achieve the objectives of EU nature law.

The Aarhus Convention mechanisms were cited by ENGOs as important in performing this intermediation role in Ireland and France, but were viewed as less important in the Netherlands. In Ireland, for instance, most ENGOs cited underfunding of enforcement agencies – in particular, the National Parks and Wildlife Service in the nature conservation domain – as a key factor hampering the effective enforcement of EU nature laws. A number of ENGOs named other difficulties, including the strength of the agricultural lobby in Ireland. The latter factor makes it politically costly for the state to take pro-environmental action where doing so may interfere with the interests of the agricultural sector.

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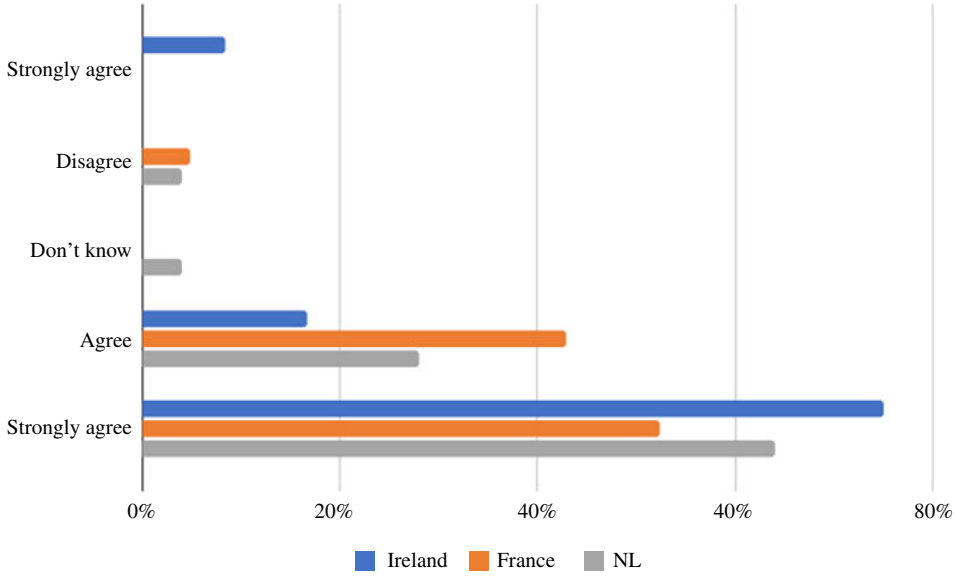

Figure 4 Respondents Who Are of the View that 'Environmental Protection Is Not Sufficiently Prioritized by the State'.

In response to these difficulties, Irish ENGOs consider that they have assumed the responsibility of ensuring that EU environmental law is properly enforced by the Irish state, and employ a range of different instruments to this effect. Five ENGOs reported using access to information requests in their work, with one interviewee noting that this mechanism played a vital role in gathering information to submit complaints to the European Commission. Another interviewee gave the example of a case in which an access to information request led to the discovery of improper procedures for attaching conditions to forestry licences, which ultimately led to a change of procedure by the forestry service [EI6].

Many Irish ENGOs have made complaints to the European Commission; one ENGO emphasized that this is a particularly cost-effective strategy. Once Member States know that a complaint has been made, it often propels them to act in order to avoid formal enforcement proceedings by the Commission [EI10]. A number of ENGOs specifically pointed to the EU as a source of authority that helps them in carrying out their work in terms of protecting the environment. As an Irish ENGO stated: 'Every day, I am thankful that we still have the Birds and Habitats Directives intact' [EI5].

At the same time, several ENGOs complained that their role as watchdogs is undermined by a lack of resources [EI8]. ENGOs further reported that the Aarhus Convention had made a positive impact in Ireland [EI2; EI3; IE8], particularly in so far as it has led to special costs protection for environmental cases,[82] increasing the

[82] See Section 5.1 above.

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ability of ENGOs to take up legal cases [EI3]. However, we found that a degree of 'specialization' has arisen between Irish ENGOs. While only two of the ENGOs interviewed reported using litigation as an enforcement tool, these two were very active in this field.

In France, we found that ENGOs placed greater emphasis on the importance of the role of the state in the implementation and enforcement of EU environmental law. Yet, interviewees complained that sometimes central and local government have little understanding of 'what's happening on the ground' [EF2]. They underlined their role in assisting the French state to achieve compliance by providing technical support and expertise, for instance, in ensuring robust environmental impact assessments [EF2]. Several interviewees also explained how they alert the state or territorial public authorities when there is a breach of environmental rules or when there is a requirement to carry out an impact assessment for specific development projects [EF1; EF6].

Despite this pre-eminent role of the state, some French ENGOs saw themselves as monitoring the state's own compliance with EU environmental rules and, where necessary, take legal action against the state to enforce these rules. These ENGOs emphasized the need to enforce laws against local administrative authorities such as mayors and town councils, for instance, by taking legal action before local administrative courts to prevent development of a Natura 2000 site [EF2]. Access to environmental information was considered essential to build judicial and/or administrative cases [EF1; EF3]. In addition, as with Ireland, several ENGOs reported having taken on the role of 'watchdog' to ensure compliance with EU law, complaining to the European Commission directly in cases of breach of EU environmental rules by the state. This legal enforcement intermediation was seen as complementing ENGOs' more traditional advocacy activities to further promote compliance with EU environmental law.

Our interviews showed that ENGOs in the Netherlands have assumed an important role in monitoring state compliance with EU environmental laws. They take enforcement action in cases of perceived non-compliance, 'making sure the government respects and implements the existing national and EU laws, which unfortunately in practice is not happening' [EN4]. Many Dutch ENGOs view EU law as the main legal tool available to them to protect nature. In this context, ENGOs widely agreed that the state bears the responsibility of ensuring correct implementation and enforcement of the environmental laws that it has signed, but that it does not currently demonstrate the 'will' or intention to fulfil this role in practice [EN1; EN2; EN4; EN9]. While ENGOs do not wish to replace the state as the principal enforcers of EU environmental rules, they may feel that they 'have to' [EN6].

Dutch ENGOs reported using a range of instruments for EU law enforcement, from non-legal methods such as lobbying, public campaigning, to – as a last resort – legal proceedings. Where such actions were exceptionally directed at private parties, the ultimate objective was nonetheless to alter government policy. However, few Dutch ENGOs considered that the Aarhus Convention in itself had been a major influence on their pre-existing procedural rights. Two respondents considered that their rights had been broadened and that ENGOs should further invest in exercising their Convention rights, though [EN5; EN6].

To act against national non-compliance, as with Ireland and France, many Dutch ENGOs reported having complained to the EU Commission where local remedies are either exhausted or deemed non-effective. However, while the Commission can exert the necessary pressure on the state, the 'process takes so long that often the damage is already done by the time the Commission has acted' [EN8]. Another ENGO stressed the need for the Commission to take a more active role in enforcement, with greater priority attached to the correct implementation of EU environmental rules at the local level, through EU-level enforcement. As the respondent put it:

> It takes a lot of work and time to get your complaint heard in Brussels, and it does not mean something will happen with your complaint. What we need is a more active enforcement role taken by the Commission, which has currently taken a very light-touch approach to environmental enforcement, unfortunately' [EN9].

Furthermore, ENGOs were frustrated about states' faulty implementation of the Aarhus Convention, which restricted their ability to enforce EU nature law. This sentiment was particularly strong in France in relation to the right to access environmental information, described as 'theoretical' [EF3]. Although the legislative framework exists, the rights cannot effectively be exercised in practice. ENGOs explained that delays in response to requests for access to environmental information, followed by subsequent delays from the appellate body,[83] meant that in practice projects often received development consent before ENGOs received the requested information necessary to evaluate their potential impacts on Natura 2000 sites [EF3; EF6].

Similarly, French ENGOs reported that delays in response to access to information requests affected their capacity to participate meaningfully in environmental decision making. A number of ENGOs also felt that public participation procedures are often organized too late in the decision-making process. They emphasized the importance of being able to participate at a point in time when various options are still open, and being given sufficient time to do so [EF6]. Failure to enable effective participation had forced some ENGOs to become 'reactive' to perceived 'poor' decision making, and resort to taking legal action [EF7].

Similarly, certain Dutch ENGOs noted that the regulatory culture of the Netherlands is such that the Aarhus rights are not vindicated in practice: 'If we request information, we'll get an explanation of why they're cutting down a specific forest, and it's often already too late' [EN7]. Similar statements were made concerning legal proceedings brought by various ENGOs where succeeding in court had not resulted in actual environmental wins in practice, as a result of the state's unwillingness to act on environmental protection [EN1; EN2; EN4; EN7; EN9]. As one ENGO put it:

> The state is extremely non-cooperative. If they lose a case, the official response is always something along the lines of 'this is an obstacle, but our legal team will find a way to get around it'. Every time! And so we take another case, we win again, and the same happens [EN4].

[83] This appellate body is known as the Commission d'Accès aux Documents Administratifs (CADA), available at: https://www.cada.fr.

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6. ANALYSIS: ENGOs AS INTERMEDIARIES ENABLED THROUGH LAW?

Our results paint a complex picture of how ENGOs in all three Member States step into the environmental enforcement gap to intermediate between the EU, Member States, regulatees, and interested third-party citizens. Four points deserve particular mention.

Firstly, returning to our hypothesis that the Aarhus Convention has led to the strengthening of the role of ENGOs as intermediaries, our results indicate a mixed picture in several respects. As Figure 1 shows, the extent to which ENGOs actually make use of the legal mechanisms provided by the Aarhus Convention varies considerably per state: Dutch ENGOs made far more use of the mechanisms than did French or Irish ENGOs. Figure 1 also reveals that there are large differences in the extent to which the different mechanisms are used within the same state. While access to information and public participation mechanisms are used relatively frequently across all three Member States, very few ENGOs had made use of the access to justice mechanism in Ireland or France. These differences are explained in part by the regulatory differences between states discussed in Section 5.1 above: to take an example, going to court in Ireland is more costly than going to court in the Netherlands as a result of differences in the structure of the legal systems and the role of oral hearings in the common law tradition.[84]

Our findings also show, however, that these differences are in large part attributable to other features of the regulatory culture within the state at issue, beyond differences in black-letter law or the features of the legal system as such. For instance, in some Member States (such as Ireland), we found that a form of 'specialization' has arisen between ENGOs, whereby a relatively small number bring legal proceedings regularly, and others make little use of this instrument, preferring to leave it up to the specialist ENGOs that have acquired the know-how for, and invested resources in, accessing environmental justice before the courts.

In other instances, ENGOs highlighted aspects of the broader regulatory culture that affected the extent to which they had used the Aarhus mechanisms of intermediation. These relate not only to the effective implementation of Aarhus rights in practice (for example, in relation to access to information in France) but also to the attitude of the Member States. Particularly in the Netherlands, the perception of many ENGOs was that the government does not show the will to prioritize environmental protection over economic and other interests. If ENGO involvement were to actually make enforcement significantly more effective, this would require a more cooperative stance from the state, so that the two complement as opposed to counteract each other.

ENGOs across all three Member States reported that practical difficulties, such as short deadlines set for individual calls for participation, can severely hamper their ability to exercise their Aarhus rights. Scholarship suggests that effective intermediation implies orchestration, which means a process through which a regulator enlists and supports intermediary actors in the pursuit of its governance goals.[85] Practical difficulties

[84] See further, e.g., Kingston et al. (2021), n. 48 above.
[85] Abbott, Levi-Faur & Snidal, n. 20 above.

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of the type reported interfere with this process and lead to less effective intermediation by ENGOs.

Importantly, we found that the *realpolitik* of ENGOs' strategic decision making as to the likely benefit of participation can significantly affect whether they decide to use the Aarhus mechanisms and become involved. For instance, a perception that ENGO participation will make no difference to the ultimate outcome (and will be purely 'tokenistic', as one Dutch ENGO put it), or that it might jeopardize their other activities, can lead ENGOs to decline to use their Aarhus rights in specific cases.

Secondly, our results show that ENGO intermediation in compliance does not go one way, invoking the enforcement rights conferred by the Aarhus Convention against the state or indeed against the EU. Rather, ENGOs play a fascinating role not just as conduits for citizens' actions aimed at improving state environmental compliance, but also in the reverse direction, 'translating' regulatory objectives from the EU and Member States to individual citizens. More than this, ENGOs also intermediate within the EU's own system of multilevel governance (between the EU and its Member States), and between regulated parties such as farmers and other regulatory actors. This multidirectional intermediary role is depicted in Figure 5.

Much of the recent literature on EU environmental enforcement and the Aarhus Convention has tended to focus on the role of ENGOs as enforcers seeking to hold the state to account for breaches of EU environmental law.[86] This is understandable from a legal perspective, as the Convention grants ENGOs legal rights as part of the 'public concerned' to access environmental information, to participate in environmental decision making, and to bring legal proceedings before courts or administrative tribunals at a cost that is not 'prohibitively expensive'. In this, the Convention, as implemented in EU law, follows on from a long tradition of scholarship on the potential role of ENGOs as public interest environmental enforcers, which goes back to seminal discussions in the 1960s and 1970s arguing that if trees cannot themselves have *locus standi*, ENGOs should be empowered to act on their behalf.[87] Without detracting from the importance of that scholarship, our empirical results remind us that this role of ENGOs forms only one part of the picture. Examining their role through the theoretical lens of regulatory intermediation highlights their rich contributions to EU environmental governance as vital actors in the enforcement matrix.

Our results also emphasize the benefits of orchestrating ENGOs as intermediaries for the European Commission and, indeed, for Member States. For the European Commission, deploying ENGOs as intermediaries in the enforcement of environmental laws may be an efficient way to tap into their expertise in and commitment to nature

[86] See, e.g., Hofmann, n. 10 above. Among the legal literature see, e.g., J. Darpö, 'Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law', in S. Bogojević & R. Rayfuse (eds), *Environmental Rights in Europe and Beyond: Swedish Studies in European Law* (Hart, 2019), pp. 253–82.

[87] See, most famously, C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review*, pp. 450–501. See, further, M. Peeters, 'About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs' (2018) 24(3) *European Public Law*, pp. 449–572.

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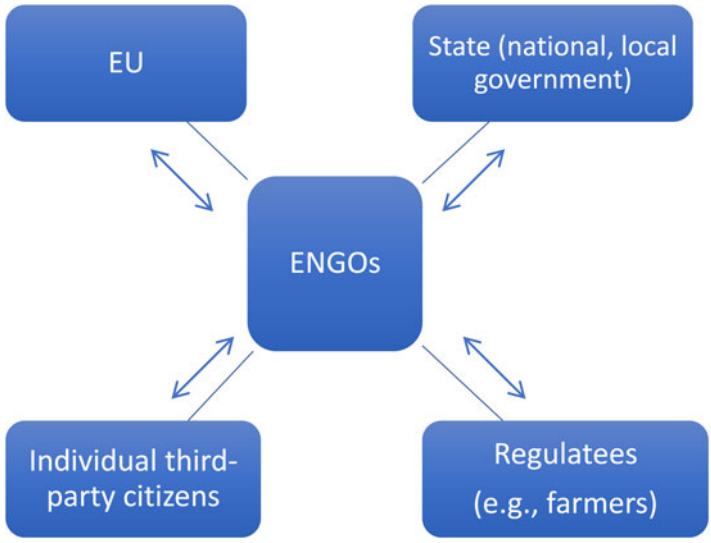

Figure 5 Intermediary Configurations with ENGOs as Regulatory 'Go-Betweens'.

conservation, without facing significant financial or political cost.[88] Particularly where Member States adopt a more lenient approach to environmental enforcement, the involvement of ENGOs can act as an important counterforce.

Nevertheless, our results also indicate that a stronger commitment by Member States and the EU to environmental enforcement can potentially reach much further than the increased involvement of ENGOs. Many ENGOs do not have sufficient expertise and financial resources to carry out significant enforcement tasks. Further, an overreliance on ENGOs leaves the state exposed to the risk that enforcement will be patchy (based on the interests or expertise of the ENGO). ENGO intermediation risks detracting from the need for Member States to invest in and commit to state enforcement efforts.

Thirdly, the multidirectional nature of ENGO intermediation raises fascinating questions about the nature of the intermediation role envisioned in the Aarhus Convention. While the enforcement rights conferred by the Convention at times may lead to a focus on ENGOs as enforcers against the state, their role as compliance intermediaries is more complex. From a theoretical perspective, this multidirectional aspect provides important insights into the concept of *orchestration* developed in the regulatory intermediary scholarship. In particular, the various directions of ENGO intermediation show that there is no single or simple answer to the question 'who is orchestrating whom in EU environmental governance?'

Our results show that ENGOs may in fact have many potential 'orchestrators': the EU, individual citizens, or even the state. We found weighty evidence that ENGOs indeed act as tri-facing intermediaries, intermediating between the EU, Member States, and citizens. Firstly, we can understand the EU's promotion of Aarhus rights

[88] See, in this context, Levi-Faur & Starobin, n. 28 above, p. 21.

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as a way of orchestrating ENGOs to take on enforcement roles *for* the European Commission. The fact that ENGOs often rely on EU environmental law to make their case illustrates this relationship, which is based on voluntary cooperation, shared objectives, and mutual dependence.[89] Secondly, we also saw various cases in which Member States orchestrate ENGOs to take on certain governance tasks, such as the creation of environmental platforms (Ireland) or participation in environmental decision making (the Netherlands). Thirdly, ENGOs often directly target the state for what they perceive as non-compliance with (overarching EU) environmental rules. In doing so, ENGOs act either specifically for citizens or for their own objectives.

In this sense, ENGOs resemble *chameleons* when enforcing EU nature law, acting as intermediaries for regulators and for citizens, and also in their own self-interest, in so far as they are influenced by the need to preserve their own resources, bargaining power, or political force.[90] However, we found no convincing evidence that ENGOs' connection to regulators at the EU and national levels, as well as to their regulatory targets (such as farmers), hamper their ability to act as credible monitors of compliance.[91]

Fourthly, our results underscore the importance of maintaining a delicate balance in the relationships of ENGOs with other regulatory actors. Only this balance ensures that their intermediary function remains robust and healthy in all directions. The ENGOs in all three jurisdictions showed a keen awareness of how their use of, or failure to use, certain enforcement tools can damage trust and lead to a perception of lacking independence. We heard examples of extreme cases where this mutual respect had plainly disappeared, creating situations of 'total mistrust' between ENGOs and regulatees, as one French ENGO put it. The majority of ENGOs interviewed demonstrated a strong preference for communication and engagement with farmers and landowners over legal proceedings under the Aarhus Convention, the latter being considered strictly as a last resort.

Having recourse to the courts can create not only institutional and organizational costs for the particular ENGO (in terms of staff time and financial resources) but also potential reputational costs for that ENGO's status as an intermediary in environmental governance as such. This may be so irrespective of the legal merits of a particular case, even where the lawsuit succeeds. One recent example of this phenomenon concerns court proceedings brought by an ENGO in Ireland, concerning the alleged failure to carry out an environmental impact assessment prior to the draining of a turlough designated under the Natura 2000 network.[92] Despite the fact that the Irish courts at first instance were sympathetic to the ENGOs' case, the legal

[89] See, further, Abbot & Lee, n. 36 above.

[90] See Havinga & Verbruggen, n. 19 above. See further L. Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home' (2018) 40(1) *Law & Policy*, pp. 110–7 (observing that 'civil society agents are not passive agents situated within legal opportunity structures but instead are strategic actors who can develop and shape access to justice through policy entrepreneurialism and litigation': ibid., p. 110).

[91] Kourula et al., n. 30 above, p. 141.

[92] For a summary see L. O'Carroll, 'Nobody Knows What Happened: The Row over the Non-Vanishing Irish Lake', *The Guardian*, 29 Mar. 2022, available at: https://www.theguardian.com/world/2022/mar/29/row-non-vanishing-irish-lake-lough-funshinagh-drain-flooding-environment-legal.

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proceedings gave rise to a bitter row between the ENGO, local landowners, and the local public authority over flooding risk from the turlough.[93]

Notwithstanding such costs and risks, our findings show that ENGOs sometimes consider it necessary to bring proceedings in order to avoid imminent environmental damage, even if this may undermine their intermediary role in the longer term. While filing a complaint with the European Commission could be one way of avoiding such difficulties, ENGOs rarely considered it a reliable solution. The complaint procedure does not guarantee that the Commission will take action, or do so swiftly enough to prevent damage. Furthermore, certain ENGOs consider that robust (legal) action further strengthens their claim to independence from the state, and therefore reinforces their ability to intermediate in the direction of citizen to state.

7. CONCLUSION

Encouraging 'bottom-up' enforcement forms a central plank of the EU's efforts to address under-compliance with EU environmental laws. Focusing on the role of ENGOs in the (private) enforcement of EU environmental law, this article provides a cross-country empirical investigation of Europe's attempt to revolutionize environmental governance by means of law. Our findings demonstrate how European ENGOs play a vital role in intermediating between (i) Member States and their citizens, as well as (ii) the EU and national citizens, and even (iii) the EU and Member States.

We further show how ENGOs have taken on multiple enforcement tasks in the regulatory landscape. While the law – more specifically, the environmental procedural rights embedded in the Aarhus Convention – empowers ENGOs to exercise these rights, many legal, practical, and societal barriers remain. In this context, the mixed messages that states send to ENGOs in their role as intermediaries warrant further thought as to how a more constructive relationship can be fostered between states and ENGOs.[94]

For future research, our findings suggest that much work remains in assessing how best to harness the potential of ENGOs within the field of environmental governance. From the perspective of many of the ENGOs examined, enforcement should not be left to ENGOs. In fact, many ENGOs described enforcement tasks (in particular, taking legal action) not only as difficult and time-consuming, but also as distracting from other potentially useful tasks, such as educating the public on environmental matters. There was a strong shared sentiment that enforcement is often a highly reactive activity, whereas most ENGOs would prefer to work towards improving environmental protection in a more constructive manner.

[93] Ibid.

[94] On the push and pull factors that can influence ENGO strategies and use of law, see Abbot & Lee, n. 36 above.

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There were certainly exceptions to this sentiment. Some ENGOs specialized primarily or even entirely in legal enforcement actions.[95] Others (particularly in Ireland and the Netherlands) considered that they had no option but to engage in legal enforcement in the face of state inaction. Even in these cases, however, the enforcement activities of ENGOs were limited by resources, requiring them to prioritize some enforcement activities over others. Those choices may or may not cohere with the priorities of the state (or, indeed, the EU) and, in the latter case, lead to the phenomenon of 'policy drift'. In this sense, orchestrating ENGOs to address enforcement gaps is an imperfect mechanism that complements, but is not a substitute for, adequate state action.

[95] As Vanhala's work has argued in the context of ClientEarth in the UK, e.g., decisions to focus largely or exclusively on legal mobilization in ENGO work can depend on a multitude of factors, including the culture of the organization and the number of lawyers within it; see Vanhala, n. 38 above, p. 406.

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ANNEX

ENGO IDs and Descriptions

Country	ID	Short description of ENGO
Ireland	EI1	Organization with a national remit, which focuses on the conservation of wetlands
	EI2	Organization with a national remit, which focuses on campaigning to protect wildlife and biodiversity
	EI3	Large national ENGO with a focus on advocacy and policy work related to heritage and the environment
	EI4	Organization with a national remit, which campaigns on a variety of environmental issues
	EI5	Organization with a national remit involved in practical conservation work and campaigning for biodiversity
	EI6	Organization with a national remit, which frequently makes use of the Aarhus mechanisms, including access to justice, to protect the environment
	EI7	Organization with a national remit, which engages in advocacy and practical conservation of upland habitats
	EI8	Large national organization with a focus on advocacy and policy work across a range of environmental issues
	EI9	National organization engaging in both practical conservation work and advocacy for nature protection
	EI10	Regional organization with a focus on practical conservation of habitats for wild birds
France	EF1	Regional nature conservation organization, active in management of nature areas, advising activities, and the provision of scientific studies such as wildlife inventories
	EF2	Regional nature conservation organization, active in management of nature areas, advocacy, advisory activities, and in certain cases environmental litigation
	EF3	Regional nature conservation organization, active in management of protected nature areas and advisory activities
	EF4	National nature conservation organization, activities include advocacy and public awareness campaigns
	EF5	National nature conservation organization, active in management of nature areas and public awareness campaigns
	EF6	National nature conservation organization, activities include advocacy and environmental litigation
	EF7	Regional nature conservation organization, active in management of nature areas and public awareness campaigns
The Netherlands	EN1	Regional nature conservation organization, active in management of nature areas, advocacy and, to a lesser extent, environmental litigation
	EN2	Regional nature conservation organization active in management of nature areas, advocacy and, to a lesser extent, environmental litigation
	EN3	National network group of organizations that monitor and collect biodiversity data
	EN4	Regional organization, which frequently makes use of the Aarhus mechanisms including access to justice, to protect local nature sites
	EN5	Organization with a national remit, which frequently makes use of the Aarhus mechanisms including access to justice, to protect the environment
	EN6	Organization with a national remit, which frequently makes use of the Aarhus mechanisms including access to justice, to protect the environment
	EN7	Regional advocacy organization with a focus on the protection of forestry
	EN8	National advocacy ENGO focused on species protection
	EN9	National nature conservation organization active in the management of nature areas, advocacy and, to lesser extent, environmental litigation
	EN10	Regional organization engaging in both practical conservation work and advocacy for nature protection

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