Nourishing Nature's Needs:

Effective Enforcement of the Nature Restoration Regulation by Individuals and NGOs?

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Preface

Before you lies the master thesis "Nourishing Nature's Needs: Effective Enforcement of the Nature Restoration Regulation by Individuals and NGOs?" This thesis fulfils my graduation of the Legal Research Master, which program I have followed the past two years at Utrecht University. From February to June 2025, I have researched the possible remedies which individuals and NGOs could receive in case of a violation of Articles 4 and 15 of the Nature Restoration Regulation and to what extent these possible remedies provide sufficient effective enforcement. I really enjoyed diving into the shared European, European Convention on Human Rights and national legal orders for this research. I learned a lot about the area of environmental and nature restoration law and further developed my research and writing skills.

To achieve the current result of my thesis, I received invaluable help and guidance. I am in particular grateful to my supervisors, Professor Rob Widdershoven and Professor Chris Backes. From the start of the research, they have guided me with great enthusiasm and knowledge about the topic. Our meetings always, without exception, exceeded the time scheduled for them, even though we had made one and a half hours available. During our discussions, my motivation for working on my thesis always grew and Rob and Chris provided me with very helpful insights and food for thought.

I would also like to thank my family and friends for supporting me during the process. Whether it was the help of my father to spar about European law or the potentials of the Nature Restoration Regulation, the refreshing coffee breaks with my mother, overloading my boyfriend with legal stories that were way too technical or the endless study sessions with my sister, brother and friends, it has all made writing this thesis even more enjoyable for me.

This thesis has taught me valuable lessons both professionally and personally. I am very happy to explore the topic of environmental and nature restoration law and the profession of being a researcher further in the next step of my career, during my PhD at Utrecht University. Thank you for taking the time reading this thesis, which has become quite comprehensive. I hope you enjoy reading!

Tamar van de Gronden

Utrecht, 27 June 2025

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List of Abbreviations

Charter of Fundamental Rights of the European Union	EU Charter
Court of Justice of the European Union	CJEU
Dutch Civil Code	CC
Dutch General Administrative Law Act	GALA
Environmental Impact Assessment Directive	EIA Directive
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Union	EU
Nature Restoration Regulation	NRR
Treaty on European Union	TEU
Treaty on the Functioning of the European Union	TFEU

Chapter 1. Introduction

1.1 The Need for Nature Restoration and the European Nature Restoration Regulation

"Biodiversity on land and in the ocean is the variety of life on Earth. This web of living things is the very fabric of life."[1] The European Commission opens its website titled "Nature Needs You And We Need Nature Too" with this statement. An important synergy exists between nature, biodiversity and climate change: a good level of biodiversity leads to a better nature and climate status and, simultaneously, good functioning ecosystems are crucial for a good level of biodiversity.[2] Currently, more than 80% of habitats within the European Union (hereafter: EU) is in "poor condition".[3] Restoring these habitats is thus necessary to protect and increase biodiversity and to limit global warming.[4] The EU is bound by the essential temperature targets from the Paris Agreement to combat climate change. The increase of the global average temperature must stay well below 2° Celsius and preferably below 1.5° Celsius.[5] In order to comply with these targets, the EU has established the Green Deal.[6] The Green Deal includes legislation that should contribute to the EU's targets of achieving net zero greenhouse gas emissions by 2050 and achieving negative emissions after 2050.[7] Part of the Green Deal is the Biodiversity Strategy that sets interim goals related to increasing the EU's biodiversity for 2030.[8] The restoration and protection of ecosystems forms an essential instrument to achieve these biodiversity goals.[9]

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[1] European Commission, 'Environment. Nature Needs You And We Need Nature Too' (*Environment EC Europa*) <https://ec.europa.eu/environment/stories/nature-needs-you/> accessed 25 May 2025.
[2] ibid.
[3] European Commission, 'Environment. Nature Restoration Law' (*Environment EC Europa*) <https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-law_en#timeline> accessed 3 February 2025.
[4] ibid.
[5] Paris Agreement (Paris, 12 December 2015) 55 I.L.M. 740 [2016], *entered into force* 4 November 2016, art 2(1)(a).
[6] European Commission, 'The European Green Deal. Striving to be the first climate-neutral continent' (*Commission Europa*) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> accessed 3 February 2025.
[7] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243/1 (hereafter: Reg (EU) 2021/1119), art 2(1); ibid.
[8] European Commission, 'Biodiversity Strategy for 2030' (*Environment EC Europa*) <https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en> accessed 3 February 2025.
[9] ibid.

The need for nature restoration is thus urgent. In August 2024, an important new legislative instrument of the EU's Green Deal and Biodiversity Strategy entered into force: the Nature Restoration Regulation (hereafter: NRR).[10] The Regulation obliges Member States to recover and restore ecosystems and biodiversity.[11] These obligations include, amongst others, the restoration of freshwater, marine, urban, agricultural and forest ecosystems.[12] Member States have to draw up a national restoration plan from which follows how they aim to achieve the obliged restoration targets per habitat type during the period until 2050.[13] They are free to choose the concrete measures they take to fulfil these targets.[14] This freedom makes effective application of the NRR's obligations on the national level and adequate control of this application necessary.[15] Since the Regulation only entered into force last year, in August 2024, the process of the application in practice and enforcement thereof still remains to be awaited.

1.2 Enforcement of the Nature Restoration Regulation by Individuals and NGOs

1.2.1 Enforcement on the European Level

Regardless of the way of application of the NRR in practice, the freedom for Member States in establishing the specific measures to fulfil their obligations from the NRR makes good enforcement of the Regulation necessary, in order to guarantee this fulfilment. It is important to realise coherent application and enforcement of the NRR's norms throughout the EU, so that the environmental targets can be achieved in cooperation between the Member States.[16] The enforcement of EU law is based on the principle of national procedural autonomy. This means that, as long as issues of enforcement have not been regulated by EU secondary law, the enforcement in principle takes place on the national level and is thus dependent on the Member

[10] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L (hereafter: Reg (EU) 2024/1911); European Commission (n 3); European Commission (n 6); European Commission (n 8).
[11] Reg (EU) 2024/1911, art 1(1)(a).
[12] ibid arts 4, 5, 8, 11 and 12.
[13] ibid arts 14(1) and 15(1).
[14] ibid art 15(3)(c).
[15] D Hering and others, 'Securing success for the Nature Restoration Law. The EU law would complement many others, but challenges loom' (2023) 382 Science 1248, 1250; for the importance of uniform application and enforcement of European environmental law, also see: AJC de Moor-van Vugt and RJGM Widdershoven, 'Administrative Enforcement' in: JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 265.
[16] De Moor-van Vugt and Widdershoven (n 15) 265.

States.[17] The European legal system and the national legal system must therefore be seen as integrated or "shared" systems.[18] Enforcement on the national level takes place within administrative procedures via administrative authorities and within judicial procedures before national courts.[19] Here, the role of individuals and private parties such as NGOs comes forward, as it is up to them to start such procedures, if they are entitled to do so.[20] This role for individuals regarding the enforcement of EU law is confirmed by the Court of Justice of the European Union (hereafter: CJEU) in the *Van Gend & Loos* case. From this case follows that individuals derive rights directly from EU law, to which rights they can appeal before national courts.[21] Thus, when a Member State violates obligations from the NRR, individuals should – under certain conditions – be able to seek enforcement of these obligations on the national level. In addition, individuals should – again under certain conditions – be able to receive compensation for possible damage that such violations cause.[22]

This leads to the question *how* the obligations from this Regulation can be effectively enforced by individuals or other private parties, such as NGOs. National judges of EU Member States have an important role in enforcing EU law on the national level, both in administrative and civil procedures.[23] The principle of national procedural autonomy implies that Member States in principle have discretion in choosing the type of remedies they make available for this effective

[17] ibid 263 and 268; R Ortlep and RJGM Widdershoven, 'Rechtsbescherming' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 328; MJM Verhoeven and RJGM Widdershoven, 'Betere bescherming van de burger door de rechter – bespiegelingen vanuit het Unierecht' in J Uzman and others, *Toetsing door de bestuursrechter. Preadviezen* (VAR Vereniging voor Bestuursrecht, Boom Juridisch 2024) 229; S Prechal, 'Europeanisation of National Administrative Law' in JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 43.

[18] S Prechal and RJGM Widdershoven, 'Inleiding' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 5.

[19] AJC de Moor-van Vugt and RJGM Widdershoven, 'Bestuurlijke handhaving' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 267-269.

[20] Ortlep and Widdershoven (n 17) 327, 332; Prechal (n 17) 44-45.

[21] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-00003; JH Jans and MJM Verhoeven, 'Europeanisation via Consistent Interpretation and Direct Effect' in JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 88.

[22] APW Duijkersloot, RJGM Widdershoven and JH Jans, 'Overheidsaansprakelijkheid' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 433; JH Jans and APW Duijkersloot, 'State Liability' in JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 437.

[23] S Prechal and RJGM Widdershoven, 'Principle of effective judicial protection' in M Scholten, *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 81; I Pernice, 'The Right to Effective Judicial Protection and Remedies in the EU' in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T.M.C. Asser Press 2013) 382; they also enforce EU law in criminal law procedures, but that area of law is less relevant for my research.

protection.[24] As we will see in chapter 3 of this research, this principle is not absolute but limited by other European enforcement principles. Following from these principles, individuals can invoke EU law in the first place via an appeal to the direct effect and consistent interpretation of certain EU obligations.[25] In principle, individuals can directly apply to provisions from regulations, both in horizontal (towards private parties) and vertical (towards Member States) relations, without the need for them to be transposed into national law.[26] This direct application differs from the mechanism of direct effect. This latter mechanism is addressed in chapter 4 of this research. In short, where direct applicability entails that the rule follows directly from the European regulation instead of from a national legal instrument implementing this regulation, provisions of regulations with direct effect entail that parties can directly appeal to these provisions.[27] The CJEU for example addressed the direct effect of European environmental legislation in the *Janececk* and *ClientEarth* cases, in which it assessed the obligation for Member States to draw up environmental plans following from the Air Quality Directive.[28] Even if a provision from an EU regulation does not have direct effect, national courts should still interpret the applicable national law consistently with the applicable EU law.[29] Thus, individuals can to some extent always rely on the obligations that are imposed on the Member State by the NRR. A successful claim concerning provisions of the NRR will, depending on the circumstances, lead to the obligation to set conflicting national rules aside or to the imposition of commands on the Member State. In addition to the mechanisms of direct effect and consistent interpretation, individuals can in the second place appeal to the mechanism of State liability. The CJEU has developed a State liability doctrine in the *Francovich* case and following case-law, providing a remedy of monetary compensation that serves the European enforcement principles.[30] This doctrine entails

[24] Ortlep and Widdershoven (n 17) 328; Prechal (n 17) 46; M Hedemann-Robinson, *Enforcement of European Union Environmental Law. Legal Issues and Challenges* (Routledge 2015) 331-332.
[25] MJM Verhoeven and JH Jans, 'Doorwerking via conforme interpretatie en rechtstreekse werking' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 63; Hedemann-Robinson (n 24) 333; Jans and Duijkersloot (n 22) 442.
[26] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter: Treaty on the Functioning of the European Union), art 288; see for example: E Rotondo, 'The legal effect of EU Regulations' (2013) 29 Computer Law & Security Review 437, 438 and 441.
[27] Verhoeven and Jans (n 25) 63; Hedemann-Robinson (n 24) 333; Jans and Duijkersloot (n 22) 442.
[28] Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221; case C-404/13 *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs* (European Court of Justice Second Chamber 19 November 2014).
[29] Rotondo (n 26) 443; Verhoeven and Jans (n 25) 65.
[30] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357; joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029; joined cases C-178/94, C-179/94, C-188/94 and C-190/94 *Erich Dillenkofer and others v Bundesrepublik Deutschland* [1996] ECR I-04845; Duijkersloot, Widdershoven and Jans (n 22) 433-437; Jans and Duijkersloot (n 22) 438-445; Hedemann-Robinson (n 24) 332 and 340.

that individuals can hold Member States liable when they violate EU law, when certain conditions are fulfilled. This mechanism is addressed in chapter 4 as well. The CJEU for example addressed the possibility for individuals to receive compensation for environmental damage in the *JP* case, concerning the Air Quality Directive.[31] If individuals suffer damage because of a violation of the NRR by a Member State, they might be able to receive monetary compensation for the damage caused by the violation if they fulfil the (European) State liability conditions.

1.2.2 Enforcement on the European Convention on Human Rights Level

Recently, the interplay between the European legal order and the European Court of Human Rights (hereafter: ECtHR) regarding environmental and climate litigation cases has increased.[32] Recent climate litigation cases before the ECtHR show a trend in appeals to the violation of human rights as a means to oblige Member States to comply with certain environmental and climate targets.[33] These human rights are also being invoked in national environmental and climate litigation cases.[34] The European Convention on Human Rights (hereafter: ECHR) does not include a specific right to a healthy environment.[35] Human rights that are often being appealed to in these types of cases are the right to life and the right to respect for private and family life, as determined in Articles 2 and 8 of the ECHR.[36] Environmental harm could in itself lead to violations of these Articles if States fail to adequately protect people from such damage.[37] When there is both a violation of EU environmental or climate law, such as the NRR, and of an ECHR provision at hand, a case could thus potentially also be brought before the ECtHR, providing additional possible remedies for individuals and NGOs.[38] Similar to the enforcement of EU law, the starting point is that State Parties to the Convention provide the enforcement of the Convention rights.[39]

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[31] Case C-61/21 *JP v Ministre de la Transition écologique en Premier ministre* (European Court of Justice Grand Chamber, 22 December 2022).
[32] See for example: M Martins Pereira, 'Inadmissible in Luxembourg, admissible in Strasbourg? Locus standi of climate litigants before the CJEU and the ECtHR' (2024) 49 European Law Review 571.
[33] ibid 572; C Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33 The European Journal of International Law 925, 926; H Keller, C Heri and R Piskóty, 'Something Ventured, Nothing Gained? – Remedies before the ECtHR and Their Potential for Climate Change Cases' (2022) 22(1) Human Rights Law Review 1, 2.
[34] Heri (n 33) 926.
[35] ibid 927; Hedemann-Robinson (n 24) 351.
[36] Heri (n 33) 927; Hedemann-Robinson (n 24) 351; Keller, Heri and Piskóty (n 33) 11.
[37] Heri (n 33) 932-933.
[38] Martins Pereira (n 32) 579.
[39] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; *entered into force* 3 September 1953 (hereafter: European Convention on Human Rights), art 13; Council of Europe, 'Practical Guide on Admissibility Criteria' (*ECHR*

In some cases however, the ECtHR also has the possibility to award remedies. The ECtHR can in the first place provide just satisfaction to claimants.[40] This just satisfaction can consist of both financial compensation and remedies for non-pecuniary damage.[41] Examples of these remedies in environmental cases are compensation for physical damage or psychological distress caused by climate or environmental damage.[42] Next to just satisfaction, the ECtHR can in the second place indicate so-called consequential orders to guide the State in taking individual and/or general measures in order to comply with their obligations under the ECHR.[43] Examples of these remedies in environmental and climate cases are measures to reduce greenhouse gas emissions or environmental policy measures.[44] Depending on the circumstances of the case, the indicated measures can either be similar to injunctions or more lenient indications.[45]

1.2.3 Enforcement on the National Level

As follows from the previous paragraphs, the enforcement of (material) European law and the ECHR rights in principle takes place on the national level. The three legal systems should therefore be considered as integrated, shared systems. Individuals can invoke the direct effect of certain EU obligations or claim financial compensation based on the principle of State liability before the national court when they are concerned by the risks caused by a possible violation of these obligations by the Member State. They can do this via the applicable national administrative procedures, which must make it possible to enforce the EU law at hand, and before the national administrative and civil courts. If provisions of the NRR have direct effect, individuals and NGOs can – under certain conditions – directly invoke them before their national court. Since the European State liability doctrine is a mechanism of minimum harmonisation, Member States can, in line with the principle of national procedural autonomy, choose to apply less strict conditions than those established by the CJEU.[46] Next to applying the European State liability doctrine, Member States are obliged to provide their own sufficient remedies to ensure effective legal

COE 2024) <https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng> last updated 31 August 2024, para 110.

[40] European Convention on Human Rights, art 41; Martins Pereira (n 32) 579; Keller, Heri and Piskóty (n 33) 2.

[41] Keller, Heri and Piskóty (n 33) 2.

[42] ibid 12 and 15.

[43] European Convention on Human Rights, art 46; ibid 3 and 17.

[44] Keller, Heri and Piskóty (n 33) 18-19.

[45] Council of Europe, 'Guide on Article 46 of the European Convention on Human Rights. Binding force and execution of judgments' (*ECHR COE* 2025) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_46_eng> last updated 28 February 2025 paras 13 and 17; Keller, Heri and Piskóty (n 33) 3.

[46] Jans and Duijkersloot (n 22) 442.

protection of EU law.[47] It is thus possible for a Member State to apply its own (State) liability doctrine when a violation of EU law occurs, as long as this doctrine offers at least as much protection to individuals as the European doctrine and ensures sufficient effective legal protection of EU law. In chapter 6 of this research, the enforcement possibilities of the NRR before the Dutch court are analysed, by means of a case study. Where the European State liability doctrine only provides for the possibility to claim compensation for an individual's damage, on the Dutch national level it is also possible to claim an injunctive relief before the civil courts, based on an obligation from a wrongful act.[48] In the Netherlands, State liability claims regarding environmental and climate issues therefore often aim at a command or prohibition: the applicant asks the judge to oblige the State to comply with certain norms.[49] In these cases, similar requirements as to European State liability apply, although they might operate a bit differently in the national practice.[50] A recent example of a Dutch State liability case in which the injunction mechanism is being used is the *Greenpeace* case, in which the Dutch court ruled that the Dutch State acts unlawful by taking insufficient measures to comply with the targets from the Habitats Directive and Birds Directive, as implemented in the national Environmental Law Act ("Omgevingswet"), for 2025 and, most likely, for 2030.[51]

1.3 Problem Statement and Research Aim

As follows from the previous section, for the NRR to be effective it is essential that its application by the EU Member States can be enforced by individuals. As will become clear in chapter 2 of this research, the obligations for Member States turned out to be less strict in the final version of the Regulation as opposed to the (first) proposal.[52] The final version leaves more discretion for

[47] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (hereafter: Treaty on European Union), art 19(1); Hedemann-Robinson (n 24) 332-333.
[48] Dutch Civil Code, *Stb* 1822, 10 ("Burgerlijk Wetboek") (hereafter: Dutch Civil Code), art 3:296; JJ van der Helm, *Het rechterlijk bevel en verbod als remedie* (Burgerlijk Proces en Praktijk, Wolters Kluwer 2023) 94.
[49] See for example: L Bergkamp, 'De effectiviteit van het rechterlijk bevel tot emissiereductie in klimaatzaken' (2023) 2(113) Nederlands Juristenblad, para 1; E Engelhard and others, 'Urgenda, Milieudefensie/Shell and beyond: Over de invloed van klimaatzaken' (2024) 2 Nederlands Tijdschrift voor Burgerlijk Recht 28, 28-29; Rb Den Haag 24 June 2015 ECLI:NL:RBDHA:2015:7145 *AB* 2015/336 (*Stichting Urgenda v De Staat der Nederlanden (Ministerie van Infrastructuur en Milieu)*); Rb Den Haag 25 May 2021 ECLI:NL:RBDHA:2021:5337 *AB* 2022/258 (*Vereniging Milieudefensie and others v Royal Dutch Shell Plc*); Rb Den Haag 22 January 2025 ECLI:NL:RBDHA:2025:578 *JOM* 2025/27 (*Stichting Greenpeace Nederland v De Staat der Nederlanden*).
[50] Van der Helm (n 48) 96-87, 108-112 and 114-115.
[51] *Greenpeace* (n 49) para 5.53.
[52] European Parliament, 'Legislative Train Schedule. Proposal for a regulation on nature restoration in "A European Green Deal"' (*Europarl Europa*) <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-restoration-of-healthy-ecosystems> accessed 4 March 2025.

Member States in the operationalisation of the Regulation. At the same time, effective enforcement of the NRR is necessary for the Regulation to actually fill in the gaps left by the Habitats Directive and Birds Directive and thereby support the EU's Green Deal and Biodiversity Strategy and achieve the temperature targets from the global Paris Agreement. Successful nature restoration can support these targets by increasing biodiversity and limiting global warming. Member States are obliged by European law to provide such effective enforcement. Their discretion regarding the NRR's operationalisation makes it more complicated for the EU to manage this enforcement. This increases the importance of the role for the CJEU, ECtHR and national courts in monitoring the enforcement. When a Member State violates its obligations from the NRR, individuals and other private parties such as NGOs should have possibilities to enforce these obligations, following from their important role in the enforcement of EU law, and to get compensation for potential damage they have suffered because of the violation.

The aim of this research is to evaluate the possibilities for individuals and NGOs in enforcing the NRR in case of possible violations of this Regulation. I conduct this evaluation on the three different levels on which such enforcement might take place: the European level, the ECHR level and the national level, for which I have selected the Dutch legal system. The word "level" refers to the legal framework that is underlying to each of these legal systems, including their influences from and on the other legal systems as these three lines of enforcement provide both their own and joint remedies. Using the phrase "level", I conduct an overall analysis of these lines, individually and in conjunction with one another. As explained, the three levels should be regarded as shared legal systems. The European legal order and the ECHR need the national legal order for the enforcement of EU law and ECHR rights, and the national legal order is subjected to these laws and rights. Furthermore, the ECHR rights are applicable to EU law and correspond with the European fundamental rights as well. Although the legal orders can be distinguished from one another, they can thus not be completely separated. This research aims to show how these shared legal systems apply the enforcement of the NRR. Central to the aim of this research is the guarantee of the European principles of judicial enforcement with regard to the NRR. Whether this guarantee proves to be existent for individuals and/or NGOs will depend on the possible mechanisms and remedies on the levels.

1.4 Research Question and Sub-questions

The main question that is central to my research is: *To what extent do the existing remedies for individuals and NGOs on the European level, the European Convention on Human Rights level and the Dutch national level fulfil the conditions of the European enforcement principles in case*

of a violation of Articles 4 and 15 of the Nature Restoration Regulation by, for example, the Dutch State?

In order to answer this research question, I have formulated the following sub-questions:

1. What are the central aims of the Nature Restoration Regulation and which specific obligations for Member States that are relevant for the possible enforcement by individuals and NGOs follow from Articles 4 and 15?
2. What are the European enforcement principles and what do they require?
3. To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the European level fulfil the European enforcement principles?
4. To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the European Convention on Human Rights level fulfil the European enforcement principles?
5. To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the Dutch national level fulfil the European enforcement principles?

1.5 Research Outline and Methodology

1.5.1 Theoretical Framework

The first sections of this introduction include the theoretical framework for my research.[53] I have first provided an explanation and introduction of the following key concepts of my research: (i) nature restoration as part of the climate goals; (ii) the proposed Nature Restoration Regulation; (iii) the European enforcement principles; (iv) the European remedies of State liability and direct effect; (v) the remedies before the ECtHR of just satisfaction and consequential orders; and (vi) the Dutch remedies via administrative enforcement and State liability. These concepts are further developed in the following chapters of my research. Next, I have embedded the research in the current state of the art by outlining the characteristics of the remedies on the European, the ECHR and the Dutch national level that could potentially be applied to the NRR, in context to relevant case-law. Then, I have indicated the approach of my research by explaining the aim of evaluating these three possible lines of enforcing the NRR, assessed to the European principles of

[53] See for example: S Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' (2018) February *Law and Method* February 1, 3-5.

enforcement. Finally, this section includes an explanation of the outline and methodology I use for this research.

1.5.2 Legal Framework

After this introduction, the first step in answering my research question is providing an overview of the legal framework of the NRR that forms the central thread to my research. In chapter 2, I therefore zoom in on the NRR and answer the first sub-question: *What are the central aims of the Nature Restoration Regulation and which specific obligations for Member States that are relevant for the possible enforcement by individuals and NGOs follow from Articles 4 and 15?* I globally explain the general means of the NRR and I highlight the obligations from Articles 4 and 15 of the Regulation for Member States, which serve as prototypes for my research.

1.5.3 Normative Framework

My research is of normative nature: I assess to what extent the current possible remedies offer sufficient (judicial) protection for individuals and/or NGOs in case of a violation of Articles 4 and 15 of the NRR by (the Dutch) Member State(s). Once the theoretical and legal framework are clear, the next step in answering my research question is thus establishing a normative framework. The third chapter serves as this normative framework, to which I can assess the evaluative part of my research. In this chapter I answer the second sub-question: *What are the European enforcement principles and what do they require?*

The normative framework that I use to answer my research question is based on the European principles of administrative and judicial enforcement. As explained in paragraph 1.2.1 of this introduction, the principle of national procedural autonomy forms the starting point of the enforcement of EU law. This procedural autonomy is being limited by the principle that determines EU law to have primacy over national law. This principle obliges Member States to realise rules from EU law in their national practice. Procedural autonomy is furthermore being limited by the principle of effective judicial protection. This principle forms the leading framework for the way in which Member States have to realise rules from EU law in their national practice. Within this framework, I analyse the following three dimensions of enforcement: (i) the admissibility before the court, in other words: *who* can appeal to the remedy; (ii) the norms to apply, in other words: *how* can the remedy be invoked; and (iii) the remedy themselves, in other words: *what* can be claimed within the concerning remedy? The principle of procedural autonomy

is lastly being limited by the *Rewe* and *Greek Maize* principles of equivalence, effectiveness, proportionality and dissuasiveness and by (European) legislation in specific areas of law.

1.5.4 Evaluation of the Remedies on Three Levels

Once the normative framework is set forth, the evaluative aspect of this research can be addressed. In the next chapters I thus assess the remedies individuals and NGOs can use in case of a violation of the NRR on the three levels indicated before. Sub-questions 3 to 5 include a separate analysis of the possible remedies within the European, the ECHR and the Dutch legal systems. After this separate analysis, the shared legal systems are brought together again in the conclusion of my research.

In the fourth chapter of my research, I focus on the possible remedies for individuals and NGOs following from the existing mechanisms on the European level in relation to a violation of Articles 4 and 15 of the NRR. In this chapter, I answer sub-question 3: *To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the European level fulfil the European enforcement principles?* To answer this question, I analyse the mechanisms of direct effect and consistent interpretation of EU law in the national legal orders of Member States. Next, I analyse the conditions of the EU State liability doctrine. Within this analysis, I make a comparison between the NRR and other (EU) environmental or climate legislation, such as the Air Quality Directive, the Habitats Directive, the Birds Directive and the Aarhus Convention and Directive. I focus on the relevant case-law in relation to enforcement via the direct effect and consistent interpretation and the European State liability doctrine in relation to EU environmental law, such as the *Wells* case, the *Janecek* case, the *JP* case and the *Papier Mettler* case.[54]

The fifth chapter addresses the possibility of starting a case before the ECtHR when a Member State violates Articles 4 and 15 of the NRR. In this chapter, I answer sub-question 4: *To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the European Convention on Human Rights level fulfil the European enforcement principles?* To answer this question, I analyse whether a violation of these obligations by a Member State could also lead to a violation of, for example, Articles 2 and 8 ECHR. For this analysis, I make a comparison with case-law regarding other possible violations

[54] Case C-201/02 *The Queen on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-00723; *Janecek* (n 28); *JP* (n 31); case C-86/22 *Papier Mettler Italia S.r.l. v Ministero della Transizione Ecologica and Ministero dello Sviluppo Economico* (European Court of Justice Third Chamber, 21 December 2023).

of (European) environmental and climate law that led to a violation of the ECHR, such as the *KlimaSeniorinnen* case, the *Öneryıldız v. Turkey* case and the *Budayeva and Others v. Russia* case.[55]

In the sixth chapter, I focus on the possible remedies following from the existing mechanisms on the Dutch national level in case of a violation of Articles 4 and 15 of the NRR. The Dutch legal system is used as a case study for the enforcement of the NRR on the national level of Member States. In chapter 6, I answer sub-question 5: *To what extent do the possible remedies individuals and NGOs have to enforce Articles 4 and 15 of the Nature Restoration Regulation on the Dutch national level fulfil the European enforcement principles?* To answer this question, I apply the impact of the EU and ECHR level to the national level and analyse the Dutch legal remedies via the possible direct effect of the NRR, namely an appeal before the national administrative court and the Dutch State liability doctrine before the civil court. Within this analysis, I look at relevant Dutch case-law regarding these types of litigation, such as the *Urgenda* case and the *Greenpeace* case.[56]

I end the research with a concluding chapter, in which I set forth my main findings and provide an answer to my main research question: *To what extent do the existing remedies for individuals and NGOs on the European level, the European Convention on Human Rights level and the Dutch national level fulfil the conditions of the European enforcement principles in case of a violation of Articles 4 and 15 of the Nature Restoration Regulation by, for example, the Dutch State?*

1.5.5 Legal Doctrinal and Comparative Methodology

In my research I mainly use the legal doctrinal methodology. As explained in the previous paragraph, I focus on analysing (i) EU, human rights and national law; (ii) EU, ECtHR and national case law; and (iii) (legal) literature, all related to the implementation and enforcement of European environmental and climate legislation.

My research furthermore contains a comparative element, since I compare remedies on the EU, ECHR and Dutch levels. Within this comparative methodology, I use the functional method. This method is used for comparisons between laws or legal systems that address the same objective. [57] Within this functional method, I apply the problem-solving approach, as I

[55] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024); *Öneryıldız v. Turkey* App No 48939/99 ECHR 2004-XII (ECtHR, 30 November 2004).
[56] HR 20 December 2019 ECLI:NL:HR:2019:2006 *AB* 2020/24 (*De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) v Stichting Urgenda*); *Greenpeace* (n 49).
[57] U Kischel, *Comparative Law* (2nd edn, Oxford University Press 2019) 88-89.

analyse how a specific legal problem (namely the violation of obligations from the NRR by Member States) is resolved in the three different but shared legal systems.[58]

1.5.6 Demarcation and justification

The scope of my research is to some extent limited, in the sense that it comprises around 45.000 words and the available time for it consisted of 5 months. I have selected the NRR as the specific focus and central thread of my research. This Regulation provides a relevant focus for two reasons. First, since it recently entered into force, no case-law regarding the enforcement of the Regulation has appeared yet and therefore the question to the possible remedies in case of a violation by a Member State is yet unanswered. Second, as explained before, the fact that Member States are free in choosing the concrete measures for achieving the Regulation's obligations, increases the importance of providing sufficient remedies in case of possible violations.

Within the NRR, I have chosen two specific obligations to focus on. First, I have chosen Article 4 on the restoration of terrestrial, coastal and freshwater ecosystems. In my research, this Article serves as a prototype for the articles from the NRR that have similar obligations for different ecosystems.[59] The Article includes targets for the improvement of certain habitats and obligations for Member States to provide restoration measures to achieve these targets.[60] A violation of this Article could potentially be a basis for a claim before (national) courts. Second, I have chosen Article 15 on the content of the national restoration plan. This Article provides the requirements for the realisation of the obligations from, for example, Article 4 in practice.[61] As will become clear from this research, individuals and NGOs might be able to appeal against this restoration plan before a (national) court.

A last demarcation I have made regarding the scope of my research is the selection of one Member State to focus on in the relation between the possible remedies on the European, ECHR and national level. I have chosen the Dutch legal system for this focus because the Netherlands is seen as a frontrunner in environmental and climate litigation cases and because of my knowledge of the Dutch language, which facilitates an in-depth evaluation of the legal sources.[62]

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[58] ibid.
[59] See for example: Reg (EU) 2024/1911, arts 5 and 8-12.
[60] ibid art 4(1)(a)-(b).
[61] Reg (EU) 2024/1911, art 15(3).
[62] See for example: Engelhard and others (n 49); M Minnesma, 'The Urgenda case in the Netherlands: creating a revolution through the courts' in C Henry, J Rockström and N Stern (eds), *Standing up for a Sustainable World: Voices of Change* (Edward Elgar Publishing 2020) 141-142; M Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research. Sense and Nonsense of "Methodological

Chapter 2. Nature Restoration Regulation

2.1 Introduction

The first step in answering my research question is to provide a global overview of this Regulation and of the obligations Member States have based on it. Providing a comprehensive analysis of what the NRR entails in its entirety does not fall within the scope of this research. Since the Regulation includes plenty of obligations for Member States regarding different ecosystems, plans, monitoring and reporting, an in-depth analysis thereof calls for a different type of research, with a specific focus on these obligations. In this research, I do not merely focus on the obligations but rather on the enforcement thereof. Therefore, I have chosen to highlight two of the NRR's Articles, which serve as prototypes for the evaluative part of my research. This chapter should be seen as a general legal framework, providing a basis for the assessment of the normative questions within this research.

In this chapter I first globally explain the aims and functions of the NRR (paragraph 2.2). Next, I zoom in on Article 4 on the restoration of terrestrial, coastal and freshwater ecosystems (paragraph 2.3). Then, I address Article 15 on the content of the national restoration plans (paragraph 2.4). Finally, I draw some interim conclusions regarding the NRR that are relevant for the rest of my research (paragraph 2.5).

2.2 The Nature Restoration Regulation and Its General Aims and Functions

2.2.1 Legislative Procedure

As explained in the introduction of this research, the European Commission proposed the NRR as a reaction to the urgent need for nature restoration.[63] The first proposal from 2022 did not immediately reach a majority within the Environmental Committee of the European Parliament.[64] Before approving the Regulation, some more flexibilities for Member States were included. For

Pluralism" in Comparative Law' (2015) 79 The Rabel Journal of Comparative and International Private Law 589, 608.

[63] European Commission (n 3); European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on nature restoration' COM (2022) 0195, procedure.

[64] European Parliament (n 52).

example, the general target for restoration of land and sea areas within the EU was reduced from 30% to 20% before 2030.[65] Another important derogation regards the prohibitions for Member States on allowing habitats to deteriorate, similar to the non-deterioration requirement of the Habitats Directive.[66] Where these used to be strict prohibitions in the first proposal, which were even further-reaching than the Habitats Directive because they included both Natura 2000 sites and other areas, in the final version of the Regulation there are only obligations for Member States left to provide measures that *aim* at non-deterioration of certain habitats.[67] With these (and some more) amendments made, the European Council and Parliament reached an agreement in 2023 and the NRR was officially adopted in 2024.[68]

2.2.2 Contents

The need for the restoration of ecosystems in view of biodiversity and achieving climate goals also follows from the NRR's preamble.[69] It states that European rules in this area are necessary to achieve climate mitigation and adaptation targets within the EU.[70] The EU has obliged itself to be climate neutral by 2050 and to achieve negative emissions after 2050.[71] According to the European legislator, restoring ecosystems can contribute to these goals by stimulating biodiversity, combating climate change and securing natural carbon sinks.[72] The NRR itself formulates its aims as follows: "(a) long-term and sustained recovery of biodiverse and resilient ecosystems; (b) achieving the Union's overarching objectives concerning climate change mitigation, climate change adaptation and land degradation neutrality; (c) enhancing food security; [and] (d) meeting the Union's international commitments."[73]

In order to achieve these aims, the NRR imposes obligations on the Member States to restore terrestrial, coastal, freshwater, marine, urban, agricultural and forest ecosystems, to use energy from renewable sources, to restore natural connectivity of rivers and pollinator

[65] ibid; Reg (EU) 2024/1911, art 1(2).
[66] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7 (hereafter: Dir 92/43/EEC), art 6(2).
[67] Reg (EU) 2024/1911, arts 4(11)-(12) and 5(9)-(10); see for example: BJ de Leeuw and ChW Backes, 'Het verslechteringsverbod in de Natuurherstelverordening. Een noodzakelijke en proportionele aanvulling van de Habitatrichtlijn of een draak met desastreuze gevolgen voor de maatschappij?' (2023) 8 Nederlands tijdschrift voor Europees recht 142,145.
[68] European Parliament (n 52).
[69] Reg (EU) 2024/1911, preamble, para 1.
[70] ibid.
[71] Reg (EU) 2021/1119, art 2(1).
[72] Reg (EU) 2024/1911, preamble, para 17.
[73] ibid art 1(1).

populations and to plant three billion additional trees within the EU by 2030.[74] Member States have to meet these obligations by adopting restoration plans, which should include the measures that Member States will take up until 2050 and some interim targets before that.[75] Furthermore, Member States have to monitor the habitats and ecosystems subjected by the Regulation and publish the data from this monitoring.[76] Last, the European Commission controls the progress made by the Member States via electronic reports handed in by the Member States.[77]

2.2.3 Type of Legislative Instrument

The Commission proposed the above-mentioned rules on nature restoration in the form of a regulation. Following from Article 288 of the Treaty on the Functioning of the EU (hereafter: TFEU), regulations have "general application" and are "binding in its entirety and directly applicable in all Member States".[78] They therefore differ from directives, which have to be implemented within the national legal orders of the Member States.[79] Because of the direct applicability of regulations, Member States are in principle prohibited to transpose the rules from regulations in their national legal systems.[80] Although Member States may not transpose regulations, they should still operationalise them in order to guarantee their effectiveness within the national practice.[81] This operationalisation should include: (i) the assignment of authorities for the application and enforcement of the regulation; (ii) the adjustment of national rules that are in conflict with the regulation; (iii) the establishment of further national measures necessary for the execution of the regulation; and (iv) the establishment of remedies for the enforcement of the regulation.[82] Member States are thus enabled and required to adopt certain national measures for the effective operationalisation of a regulation, as long as this does not affect its direct

[74] ibid arts 4-6 and 8-13.
[75] ibid arts 14(1), 15(1) and 15(3)(c).
[76] ibid art 20(1) and 20(8).
[77] ibid art 21.
[78] Treaty on the Functioning of the European Union, art 288.
[79] ibid.
[80] Case C-94/77 *Fratelli Zerbone Snc v Amministrazione delle finanze dello Stato* [1978] ECR I-00099, paras 23-26; Rijksoverheid Kenniscentrum voor beleid en regelgeving, 'Algemene kenmerken verordeningen: overschrijfverbod en operationaliseringsverplichting' (*kcbr*) <https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/handleiding-wetgeving-en-europa/1-module-1-eu-eisen-aan-implementatie-van-eu-regelgeving/11-instrumenten-van-de-eu/114-algemene-kenmerken-verordeningen-overschrijfverbod-en-operationaliseringsverplichting#:~:text=De%20bepalingen%20van%20een%20verordening,tegenover%20de%20staat%20(verticale%20directe> accessed 13 March 2025; Rotondo (n 26) 438; JW van de Gronden and JM Veenbrink, 'EHDS and Free Movement of Patients: What EU Intervention is Needed?' (2024) 12 April 2024 European Journal of Health Law 1, 5.
[81] Van de Gronden and Veenbrink (n 80) 5-6.
[82] ibid 6.

applicability.[83] States should apply the mechanism of consistent interpretation to these national measures, which means that they should adopt the measures in accordance with the regulation.[84] Next to the obligation for Member States to adopt national measures, provisions of European regulations may also have direct effect.[85] The mechanisms of direct effect and consistent interpretation are further addressed in chapter 4.

The NRR obliges Member States to take certain restoration measures and to draw up restoration plans for these measures. This thus means that Member States are allowed and obliged to adopt additional national legislation to the NRR, as long as the direct applicability of the Regulation's norms remains unaffected, the measures are consistent with these norms and an appeal to potential directly effective provisions of the Regulation remains possible. A consequence of the NRR being a regulation instead of a directive is that there will be in principle less differences within its national implementation, which could lead to a higher level of harmonisation.[86] However, the question remains to what extent this will be really the case for the NRR, since the Regulation leaves quite some room for Member States in establishing national implementation measures, as becomes clear in chapter 4.

2.2.4 Relation to Other (European) Legislation and Policy

In contrast to other already existing (international) restoration policies, the NRR adds *legally binding* obligations for Member States regarding nature restoration.[87] As part of the EU's Green Deal and Biodiversity Strategy, the NRR includes various targets for 2030 and 2050, relating to restoring and protecting ecosystems and biodiversity.[88] Where the Biodiversity Strategy sets goals up until 2030, the NRR takes further steps by setting interim targets for 2030 and 2040 and even higher targets for 2050.[89] The NRR is meant as additional legislation to other, already existing, European environmental legislation, such as the Habitats Directive and the Birds Directive.[90]

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[83] Case C-592/11 *Anssi Ketelä* (European Court of Justice Eight Chamber, 25 October 2012), paras 35-36; Rotondo (n 26) 439; Jans and Verhoeven (n 21) 91; JH Jans and HHB Vedder, *European Environmental Law. Treaty Based Law* (5th edn, Europa Law Publishing 2024) 160.
[84] Verhoeven and Jans (n 25) 108.
[85] See for example: W den Ouden, MJ Jacobs and JE van den Brink, *Subsidierecht (Mastermonografieën staats- en bestuursrecht)* (3rd edn, Wolters Kluwer 2021)12.
[86] Van de Gronden and Veenbrink (n 80) 5; Rijksoverheid Kenniscentrum voor beleid en regelgeving (n 80); Rotondo (n 26) 438.
[87] A Cliquet and others, 'The negotiation process of the EU Nature Restoration Law Proposal: bringing nature back in Europe against the backdrop of political turmoil?' (2024) 32(5) Restoration Ecology 1, 1; E Lees and OW Pedersen, 'Restoring the Regulated: The EU's Nature Restoration Law' (2025) 37 Journal of Environmental Law 75, 75.
[88] Reg (EU) 2024/1911, preamble, paras 2-3 and 10-11.
[89] ibid arts 4(1)-(2).
[90] ibid preamble, para 24; De Leeuw and Backes (n 67) 144.

These Directives regulate natural habitats and species, but they lack concrete deadlines to achieve these goals.[91] The NRR is supposed to build further on these Directives by establishing obligations for Member States such as the restoration goals for specific ecosystems expressed in specific quantities during specific timeframes.[92] The relation between the NRR and the Habitats and Birds Directives becomes apparent in Article 4, which is addressed in paragraph 2.3.

Although the NRR still includes various specific obligations for Member States and obliges Member States to come up with restoration plans, monitoring mechanisms and reports, the content of the Regulation is to some extent weakened during the negotiations.[93] Some therefore doubt the effectiveness of the NRR in practice.[94] Still, it remains the only international agreement that includes legally binding provisions on nature restoration and it does provide some new concrete rules in addition to the uncertainties left by the Habitats Directive and Birds Directive.[95] Adequate application of the NRR by Member States and adequate possible remedies for individuals and NGOs to enforce its potentials should therefore be in place.

2.3 Article 4 of the Nature Restoration Regulation

Chapter II of the NRR addresses the restoration targets and obligations. This chapter includes the concrete requirements for Member States per ecosystem. Article 4 forms the first article of this chapter and addresses the restoration of terrestrial, coastal and freshwater ecosystems. Other articles from the NRR include similar requirements for other types of ecosystems.[96] I have selected Article 4 as a prototype for the articles from Chapter II of the NRR, because it provides an example of what the restoration targets and obligations for Member States look like for the different ecosystems.[97]

[91] Reg (EU) 2024/1911 preamble, para 27; N Hoek, 'Have the Problems Been Solved? A Critical Analysis of the Proposed EU Regulation on Nature Restoration: Have the Problems Been Resolved?' (2022) October European Energy and Environmental Law Review 320, 322; Lees and Pedersen (n 87) 80.
[92] Reg (EU) 2024/1911, preamble, para 28; see for example: Reg (EU) 2024/1911, arts 4, 5, 8, 9, 11, 12 and 13; Hoek (n 91) 327-328.
[93] European Parliament (n 52); Cliquet and others (n 87) 4.
[94] See for example: Cliquet and others (n 87) 6.
[95] Lees and Pedersen (n 87) 78 and 80.
[96] See for example: Reg (EU) 2024/1911, arts 5 and 8-12.
[97] An article that may to some extent derogate from this prototype is Article 10(1) Reg (EU) 2024/1911, regarding the restoration of pollinator populations, which, amongst others, obliges Member States to "reverse the decline of pollinator populations at the latest by 2030". Failing to reverse this decline before 2030 would already establish a violation of the Article, which increases the stringency of the provision.

2.3.1 Restoration Measures

Article 4 obliges Member States to take three types of restoration measures. First, Member States have to adopt restoration measures for at least 30% of certain terrestrial, coastal and freshwater ecosystems by 2030, for at least 60% by 2040 and for at least 90% by 2050.[98] The terrestrial, coastal and freshwater ecosystems that fall within the scope of this provision are determined in Annex I to the NRR. This Annex defines the habitat types Member States should include within their restoration measures.[99] The habitat types included here are the same as the habitat types listed in Annex I of the Habitats Directive, which includes "habitat types of community interest whose conservation requires the designation of special areas of conservation".[100] Within their restoration measures up until 2030 Member States must prioritise Natura 2000 sites.[101] This further confirms the connection to the Habitats Directive, which is primarily focused on these Natura 2000 sites.[102] Second, Member States have to adopt further restoration measures in suitable areas other than those in which the habitat types do now appear, to increase the areas that are covered by and the condition of these habitat types.[103] These measures should be in place for at least 30% of these areas by 2030, for at least 60% by 2040 and for 100% by 2050. As explained, the specific timeframes connected to these first two types of measures aim to fill a gap left by the Habitats and Birds Directives, which do not provide such specific timeframes for their obligations.[104] Third, Member States have to adopt additional restoration and re-establishing measures for terrestrial, coastal and freshwater habitats that fall within the scope of the Habitats Directive and Birds Directive.[105] This provision again shows a connection between the NRR and these Directives.

As mentioned before, the restoration measures obliged by Article 4 NRR require further national implementation of the Regulation by Member States. This becomes clear from the wording of the Article, stating that "Member States shall put in place the restoration measures".[106] This means that, although the Regulation's provisions are in principle directly applicable in national law, a certain extent of discretion is left to Member States to fill in the restoration measures.[107] Article 4 provides some guidance regarding this national

[98] Reg (EU) 2024/1911, art 4(1).
[99] ibid Annex I.
[100] ibid; Dir 92/43/EEC, Annex I; Hoek (n 91) 325.
[101] Reg (EU) 2024/1911, art 4(1).
[102] Dir 92/43/EEC, art 3.
[103] Reg (EU) 2024/1911, art 4(4).
[104] Hoek (n 91) 327 and 322.
[105] Reg (EU) 2024/1911, art 4(7).
[106] ibid art 4(1).
[107] Jans and Vedder (n 83) 160 and 189.

implementation: Member States have to base all three types of restoration measures on the best available knowledge and latest scientific evidence and by 2030 they should provide knowledge of the condition of the concerning habitat types.[108]

2.3.2 Targets

Article 4 sets forth some targets that should be achieved with the national restoration measures. In general, the measures should *aim* to improve the habitats.[109] Eventually, 90% of the first type of areas, determined in Annex I, should be in "good condition".[110] The measures for the additional suitable areas should lead to a "favourable reference area" per habitat type.[111] The measures regarding the habitats that fall in the scope of the Habitats and Birds Directives should be improving towards a "sufficient quality and quantity".[112] What these targets entail is specified in Article 3 NRR. Areas are in "good condition" when they "reflect the high level of ecological integrity, stability and resilience necessary to ensure its long-term maintenance".[113] A "favourable reference area" is the area that is "the minimum necessary to ensure the long-term viability of the habitat type".[114] Habitats are of "sufficient quality and quantity" when they meet the "ecological requirements of a species [...] at any stage of its biological cycle so that it is maintaining itself on a long-term basis as a viable component of its habitat in its natural range".[115] Where the percentage of areas included in the measures is connected to specific time periods, the achievement of these targets is not subjected to any time deadlines. Furthermore, the Regulation does not specify when these measures qualify as sufficient restoration measures but leaves discretion to Member States in determining them.[116] Therefore, the question arises to what extent the targets from Article 4 lead to concrete obligations for Member States.[117] This question is further addressed in chapter 4.

[108] Reg (EU) 2024/1911, art 4(8)-(9).
[109] ibid art 4(11).
[110] ibid art 4(17)(a).
[111] ibid.
[112] ibid art 4(17)(b).
[113] ibid art 3(4).
[114] ibid art 3(8).
[115] ibid art 3(9)-(10).
[116] Lees and Pedersen (n 87) 94-95; H Grabbe and others, 'Implementing the EU Nature Restoration Law: exploring pathways for Member States' (2025) 11 Working Paper Bruegel 1, 2.
[117] P Mendelts, 'De nieuwe Europese Natuurherstelverordening na behandeling door het Europees Parlement' (2023) 8 Milieu en Recht 664, 667.

2.3.3 Non-deterioration Requirements

Next to these targets, Article 4 includes two non-deterioration requirements. First, Member States should achieve a "continuous improvement" of the designated terrestrial, coastal and freshwater habitats and aim to avoid significant deterioration of habitats that have reached good condition and sufficient quality.[118] This requirement entails that eventual obtained results may not worsen again.[119] Second, Member States should aim to avoid significant deterioration of the habitat types determined in Annex I that are in good condition or that "are necessary to meet the restoration targets" of Article 4, as outlined in the previous paragraph.[120] This requirement entails that the current status of the condition of these habitats may not be worsened further.[121]

In areas that fall within Natura 2000 sites, failing to achieve these non-deterioration requirements is justified in case of (i) a force majeure; (ii) an unavoidable change in the habitats caused by climate change; and (iii) a plan or project within the meaning of Article 6(4) of the Habitats Directive.[122] In areas that do not fall within Natura 2000 sites, the required aim to prevent significant deterioration does not apply in case of (i) a force majeure; (ii) an unavoidable change in the habitats caused by climate change; (iii) "a plan or project of overriding public interest for which no less damaging alternative solutions are available"; and (iv) an action by a third country outside of the Member State's influence.[123] The non-deterioration requirements are formulated in the sense that Member States should *aim* to prevent deterioration of the habitats. This makes the requirements less far-reaching than the non-deterioration requirement of Article 6 of the Habitats Directive, which is formulated as a strict obligation.[124] At the same time, the scope of the NRR's non-deterioration requirements is broader than that of the Habitats Directive, since it also concerns areas outside of Natura 2000 sites.[125] Similar to the targets from Article 4, the question arises to what extent the non-deterioration requirements from Article 4 lead to concrete obligations for Member States.[126] This question is further addressed in chapter 4 as well.

[118] Reg (EU) 2024/1911, art 4(11)
[119] Lees and Pedersen (n 87) 87.
[120] Reg (EU) 2024/1911 art 4(12).
[121] Lees and Pedersen (n 87).
[122] Reg (EU) 2024/1911 art 4(16); see for an explanation of a plan or project within the meaning of Dir 92/43/EEC, art 6(4) for example: ChW Backes and others, *Natuur in de Omgevingswet* (Boom Juridisch 2024) para 4.2.10.
[123] Reg (EU) 2024/1911, art 4(14)-(15).
[124] Dir 92/43/EEC, art 6(2).
[125] Reg (EU) 2024/1911, art 4(11)-(12) and (14)-(15).
[126] Mendelts (n 119) 666-667; Cliquet and others (n 87), 4.

2.3.4 Derogation Possibilities

Finally, Article 4 provides the possibility to derogate from some of its obligations under certain conditions. Member States can derogate from the first type of restoration measures, for the habitats determined in Annex I, by excluding "very common and widespread habitat types that cover more than 3% of their European territory".[127] Conditions for this derogation are that Member States should (i) provide a justification of the exclusion; (ii) adopt measures for at least 80% (instead of 90%) of the areas from Annex I by 2050, for at least one third of this quantity by 2030 and at least two thirds of this quantity by 2040; and (iii) ensure that the favourable conservation status for the areas is not limited.[128] Member States can derogate from the second type of restoration measures, for the additional suitable areas, by lowering the quantity covered by the measures of 100% to 90%.[129] Conditions for this derogation are that Member States should (i) provide a justification of this limitation; and (ii) cover at least 30% and 60% of the lower percentage by 2030 and respectively 2050.[130] Regarding the third type of restoration measures, for the habitats that fall within the scope of the Habitats Directive and Birds Directive, derogation is not possible based on Article 4 NRR.

2.4 Article 15 of the Nature Restoration Regulation

2.4.1 General Obligation for National Restoration Plans

Chapter III of the NRR addresses the national restoration plans Member States have to make to meet the targets and obligations from Chapter II.[131] These plans form the central instruments for effectively putting the obligations into practice.[132] The obligation to prepare them is laid down in Article 14. Article 15 includes the required content of the restoration plans. Member States have to make plans up until 2050 for the obligations from Articles 4 to 13, in which the interim deadlines of 2030 and 2040 are being addressed as well.[133] The specific content of the restoration is left to the Member States themselves to determine. Thus, the NRR contains the general obligation for Member States to draw up a restoration plan but leaves discretion with regard to the content of the measures included in this plan.[134]

[127] Reg (EU) 2024/1911, art 4(2).
[128] ibid.
[129] ibid art 4(5).
[130] ibid.
[131] ibid art 14(1).
[132] Hoek (n 91) 326.
[133] Reg (EU) 2024/1911, art 15(1).
[134] Grabbe and others (n 116) 2.

2.4.2 Contents of National Restoration Plans

To provide some guidance for drawing up the restoration plans, Article 15 lists 24 elements that should be included within these plans.[135] In sum, the following required elements concern the fulfilment of Article 4: (i) the quantification of the areas for restoration; (ii) the "adequate justification" if the derogation possibilities of the first two measures of Article 4 are being used; (iii) a description of the specific measures for the restoration; (iv) a description of the specific measures for providing knowledge of the condition of the habitat types by 2030; (v) a description of the measures that aim to maintain habitat types in good condition and not to deteriorate protected habitats and habitats that are (eventually) in good condition; (vi) an explanation and justification when certain habitats are being deteriorated; (vii) the timing for the measures for the restoration; (viii) the monitoring, assessing and revising of the concerning areas and the corresponding measures; (ix) guarantees for continuous, long-term and sustained effect of the restoration measures; (x) the estimated co-benefits for and synergies with climate change mitigation and adaptation, nature and energy; (xi) the socio-economic impacts and benefits of the restoration measures; (xii) the estimated financial means needed for the restoration measures; (xiii) a description of existing subsidies that hold back the achievement of the NRR's targets; and (xiv) the process of effectuating the restoration plan.[136]

Member States are thus free to establish the specific measures they will take to achieve the restoration targets from the NRR within their restoration plans, as long as they fulfil the above-listed requirements. The format of the plans is in contrast not up to Member States to compose. They have to use the format as drawn up by the European Commission.[137] This format guarantees that all national restoration plans together form a coherent whole and reduces administrative burdens for Member States.[138] Since the NRR entered into force rather recently, in August 2024, the exact measures to be taken by the Member States still have to be awaited.[139] Member States have to draw up the first version of their national restoration plan by September 2026.[140] The first versions of the plans will be provided with feedback by the European Commission within 6 months, after which Member States have another 6 months to finalise their plans.[141] That means

[135] Reg (EU) 2024/1911, art 15(3).
[136] ibid art 15(3)(a)-(h), 15(3)(n) and 15(3)(p)-(w).
[137] ibid art 15(3) and 15(7).
[138] European Commission, 'Commission launches public feedback period on uniform format for Member States' nature restoration plans' (*Environment EC Europa* 13 January 2025) <https://environment.ec.europa.eu/news/commission-launches-consultation-nature-restoration-plans-2025-01-13_en> accessed 6 March 2025.
[139] European Commission (n 3).
[140] Reg (EU) 2024/1911, art 16.
[141] ibid art 17(1) and 17(6).

that the final plans can be expected by September 2027. This research can therefore not rely on a concrete restoration plan yet but instead focuses on its required contents as set out above and on its legal consequences in the light of their enforcement.

2.4.3 Public Participation

Sub-paragraph w of section 3 of Article 15 NRR obliges Member States to provide "a summary of the process for preparing and establishing the national restoration plan, including information on public participation and of how the needs of local communities and stakeholders have been considered".[142] Member States thus have to allow parties from their national public to participate in the establishment of their national restoration plans and provide the relevant information in this regard. This obligation might be relevant in the light of the applicability of the Aarhus Convention, in particular Articles 4 regarding access to environmental information, 6 regarding public participation in decisions on specific activities and 7 regarding public participation concerning plans, programmes and policies, in combination with Article 9 on the access to justice.[143] The functioning of the Aarhus Convention and its possible effects on the NRR are further addressed in the following chapters of this research.

2.5 Conclusion

The NRR aims to achieve climate targets via the recovery of biodiversity and ecosystems. Although the final version of the Regulation is to some extent attenuated towards the first proposal by the European Commission, it still includes various concrete norms for Member States regarding the restoration of nature. These norms concern the recovery of certain ecosystems and habitat types and sustainable energy. The norms are legally binding and thereby a valuable addition to other (international) nature restoration policies. They are furthermore supposed to fill gaps that have been left by the European Habitats Directive and Bird Directive.

Article 4 NRR obliges Member States to take restoration measures during specific time periods for terrestrial, coastal and freshwater ecosystems, other suitable habitat areas for these habitat types and habitats falling within the scope of the Habitats Directive and Birds Directive. Member States have the possibility to derogate from the first two types of measures under certain conditions. The Article also includes non-deterioration requirements, which towards the first

[142] ibid art 15(3)(w).
[143] Aarhus Convention (Aarhus, 25 June 1998) United Nations Treaty Series 2161/447 [2001] *entered into force* 30 October 2001 (hereafter: Aarhus Convention), arts 4, 6, 7 and 9.

proposal have been brought back from a strict obligation to an aim of preventing the habitats from significantly deterioration.

To put the norms of Article 4 (and other articles) of the NRR into practice, Article 15 specifies the contents of the restoration plans Member States have to draw up. They should specify, amongst others, the measures they will take and provide other, additional, explanations and justifications in the plans when applicable. The type of measures remains free for Member States to determine. With regard to the preparation procedure of the plans, Member States should provide public participation and information on the process.

This chapter provides an overview of the legal framework of the NRR and the specific obligations of Articles 4 and 15 that are central to this research. In the next chapter I move on to the normative framework of my research for the enforcement of the NRR's obligations as described in this chapter.

Chapter 3. European Principles of Enforcement

3.1 Introduction

The next step of this research is to provide a normative framework, to which the possible enforcement remedies can be assessed. Within the European legal order, various principles exist that regulate good (judicial) enforcement of EU norms. The remedies individuals and NGOs can appeal to in case of a violation of the Nature Restoration Regulation have to fulfil these principles.

The starting point of enforcement of European law and thus of my normative framework is the principle of national procedural autonomy, which entails that Member States are free in establishing how they provide this enforcement on their national levels, as long as EU law provisions do not provide any further binding rules on them (paragraph 3.2). The European Union has limited this autonomy by additional principles. The first of these principles indicates that EU law has primacy over national law (paragraph 3.3). Next, the principle of effective judicial protection establishes a minimum threshold for the way in which Member States should enforce EU rules (paragraph 3.4). Then, the Court of Justice of the European Union has defined the principles of equivalence and effectiveness in the *Rewe* case, which further affect the procedural autonomy (paragraph 3.5). The CJEU supplemented these *Rewe* principles in the *Greek Maize* case, in which it added the principles of proportionality and dissuasiveness to them, in the light of administrative and judicial enforcement (paragraph 3.6). Finally, the Aarhus Convention further regulates the enforcement of European environmental law on the national level (paragraph 3.7). After outlining this framework, I draw some interim conclusions regarding these European principles that are relevant for the rest of my research (paragraph 3.8).

3.2 Principle of National Procedural Autonomy

As pointed out before, national procedural autonomy is the starting point of the enforcement of EU law. The national laws of the Member States in principle determine how EU law is being enforced, unless otherwise specified within EU law.[144] Member States are obliged to apply the norms following from EU law within their national legal orders.[145] If they fail to do so, it is up to the national judge to act upon this, based on claims brought forward by the interested parties. This

[144] Ortlep and Widdershoven (n 17) 328.
[145] ibid 327.

makes every national judge to some extent a European judge as well, which has led to calling them the French expression of "*juges de droit commun*".[146] It furthermore gives every private party within the EU an important role in the enforcement of EU law.

The phrase "national *procedural* autonomy" could firstly lead to the misleading idea that Member States only enjoy autonomy concerning strictly procedural norms.[147] This is however not the case. Member States are in principle free in determining their own national norms concerning the enforcement of EU law as a whole, be it within judicial or administrative procedures or in other ways.[148] The freedom for Member States in enforcing and applying EU law in material and procedural norms is therefore also identified as the principle of national "institutional" autonomy.[149]

The phrase "national procedural *autonomy*" could secondly lead to the misleading idea that Member States can in every situation apply their national norms concerning the enforcement of EU law.[150] This is neither the case. Over the years, the CJEU has established principles through its case-law that follow up on the principle of national procedural autonomy and put limits to this principle.[151] Although the starting point remains that EU law is being enforced on the national level, before national courts based on claims by private parties, the actual enforcement is subjected to norms coming from the European level.[152] These norms apply in the national legal orders when European law is at stake, which would be the case when Member States are implementing and applying the obligations from the NRR or omit to do so.[153]

3.3 Principle of Primacy of European Law over National Law

3.3.1 Meaning of the Principle

The first important principle that applies when European law is at stake within the national legal order is the principle of primacy of European law over national law.[154] The principle cannot be

[146] ibid 327-328; Cour de Justice de l'Union Européenne, 'Cour de justice. Présentation' (*Curia Europa*) <https://curia.europa.eu/jcms/jcms/Jo2_7024/fr/> accessed 7 March 2025.
[147] S Prechal, 'Europeanisering van het nationale bestuursrecht in hoofdlijnen' in S Prechal and RJGM Widdershoven (eds), *Inleiding tot het Europees bestuursrecht* (4th edn, Ars Aequi Libri 2017) 39-40.
[148] ibid.
[149] Prechal and Widdershoven (n 18) 15.
[150] Prechal (n 147) 39-40; Prechal (n 17) 47.
[151] Prechal (n 147) 42; Verhoeven and Widdershoven (n 17) 229.
[152] Prechal (n 147) 42; Prechal (n 17) 47.
[153] Verhoeven and Widdershoven (n 17) 229.
[154] Prechal (n 17) 39.

found in one of the EU's Treaties or other legislation but follows from the CJEU's case-law.[155] The CJEU first established the principle in 1963 in the *Van Gend & Loos* case, where it determined the EU to be an independent legal order which has to be integrated in the national legal order and from which Member States and individuals derive rights and obligations.[156] From this case, it follows that Member States have accepted that the European legal order limits their sovereignty. The principle of primacy of European law over national law thus limits Member States in their freedom and autonomy of applying their own national norms.

The CJEU further developed the principle in the *Costa E.N.E.L.* case. It stated that EU law forms an "integral part of the legal systems of the Member States [...] which their courts are bound to apply".[157] According to the CJEU, the fact that Member States have given up some of their sovereignty for the benefit of the EU legal order entails that the rules following from this legal order have primacy over national rules, so that they can be effective.[158] If each Member State were to apply their own national rules over European rules, it would be impossible to put the European legal order and its goals effectively into practice. The primacy principle therefore guarantees that all European citizens are protected equally.[159] The principle applies in those areas of law where European rules are established and Member States have thus given up some of their sovereignty, amongst which is the area of environmental law.[160]

3.3.2 Effects for Member States

The principle of primacy of EU law over national law establishes that Member States have to realise the European rules within their national practice. Concretely, this means that when a national rule conflicts with a European rule, the European rule should have precedence over the national rule.[161] In the *Popławski II* case, the CJEU again repeated that "[t]he principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States".[162] According to the CJEU, from this principle follows that all Member States should "give full effect

[155] European Union, 'Primacy of EU law (precedence, supremacy)' (*Eur-lex Europa*) <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html> accessed 10 March 2025.
[156] *Van Gend & Loos* (n 21); ibid.
[157] Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] English special edition 00585.
[158] European Union (n 155).
[159] ibid.
[160] ibid.
[161] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629, paras 17 and 21; more recently, see: case C-573/17 *Daniel Adam Popławski (Popławski II)* (European Court of Justice Grand Chamber, 24 June 2019), para 58; Prechal (n 17) 39; ibid.
[162] *Popławski II* (n 161) para 53.

to the various EU provisions".[163] This means that, based on the primacy principle, Member States have to interpret national law in accordance with EU law as much as possible and allow the direct effect of certain EU provisions within their national legal orders.[164] In addition, the primacy principle requires Member States to provide compensation for damage caused by a violation of an EU law provision by the State.[165] The requirements from the primacy principle apply to all national authorities, including administrative and judicial authorities.[166] Furthermore, all European and all national rules are included in the principle, regardless of which existed first.[167] When national rules conflict with applicable EU rules, the national rules should be deemed non-applicable.[168] The national judge is directly entitled and obliged to do so.[169]

The primacy principle is thus being put into practice via an appeal to the direct effect and consistent interpretation of certain EU obligations and compensation via State liability.[170] Chapters 4 and 6 of this research address these mechanisms further. In the light of the principle of primacy of EU law over national law, it is important to already note the following rule in this regard, which the CJEU has, amongst others, established in the *Popławski II* case. According to the CJEU, the primacy principle applies to EU norms that have direct effect, which means that national norms that conflict with directly effective EU norms are non-applicable.[171] In contrast, EU norms that do not have direct effect can in principle not lead to non-applicability of a national rule.[172] In these cases, the obligation for national judges to interpret applicable national law consistently with EU law still remains.[173] What this means for regulations such as the NRR, of which not all norms are implemented in national rules, is further explained in chapters 4 and 6.

[163] ibid para 54.
[164] SW Haket and RJGM Widdershoven, 'Implementatie en doorwerking van Unierecht in het Nederlandse publiekrecht en privaatrecht' (2020) April Ars Aequi 338, 342 and 348.
[165] *Popławski II* (n 161) para 56.
[166] ibid para 94; Haket and Widdershoven (n 164) 342.
[167] *Simmenthal* (n 161) para 21; case C-106/89 *Marleasing SA v La Comercial Internacional de Allimentaction SA* [1990] ECR I-04135, para 8; *Popławski II* (n 161) para 58; Prechal (n 17) 39-40; European Union (n 155).
[168] *Simmenthal* (n 161) para 24; *Popławski II* (n 161) para 58; European Union (n 155).
[169] *Simmenthal* (n 161) para 24; *Popławski II* (n 161) para 58.
[170] Verhoeven and Jans (n 25) 63; Hedemann-Robinson (n 24) 333; Jans and Duijkersloot (n 22) 442.
[171] *Popławski II* (n 161) para 61.
[172] ibid para 62.
[173] ibid para 72.

3.4 Principle of Effective Judicial Protection

3.4.1 Meaning of the Principle

Next to the principle of primacy of EU law, a second EU principle that limits the Member States' national procedural autonomy is the principle of effective judicial protection. This fundamental right forms the core of the European framework for (judicial) enforcement of EU law.[174] The principle is laid down in Article 19(1) of the Treaty on EU (hereafter: TEU), which determines that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".[175] The principle is furthermore laid down in Article 47 of the EU Charter of Fundamental Rights (hereafter: EU Charter), which determines that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal".[176] Article 19(1) TEU covers so-called institutional requirements, while Article 47 of the EU Charter (also) covers other fundamental requirements.[177] Following from the *Portuguese Judges* case, Article 19(1) TEU "gives concrete expression to the value of the rule of law stated in Article 2 TEU".[178] This entails that Article 19(1) TEU obliges Member States to provide effective enforcement of the specific obligations following from the rule of law.[179] The main focus of the codification in Article 47 of the EU Charter is to protect individuals and to guarantee that individuals can enforce their rights following from EU law before, for example, their national courts.[180] The application of the principle of effective judicial protection, codified in Articles 19(1) TEU and 47 EU Charter thus generally works out in favour of European citizens. However, the focus on the protection of the rights and freedoms of individuals in the wording of Article 47 does not mean that the principle of effective judicial protection only applies in case of violations of such rights or freedoms following from EU law.[181] Following from the CJEU's case-law, depending on the type of legislation at hand, individuals should be able to bring a claim before the (national)

[174] Verhoeven and Widdershoven (n 17) 246.
[175] Treaty on European Union, art 19(1).
[176] Charter of Fundamental Rights of the European Union [2000] OJ C364/01 (hereafter: Charter of Fundamental Rights), art 47.
[177] S Prechal, 'Article 19 TEU And National Courts: A New Role For The Principle Of Effective Judicial Protection?' (*Review of European Administrative Law Blog* 29 November 2022) <https://realaw.blog/2022/11/29/article-19-teu-and-national-courts-a-new-role-for-the-principle-of-effective-judicial-protection-by-s-prechal/> accessed 31 March 2025.
[178] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges)* (European Court of Justice Grand Chamber 27 February 2018) para 32; ibid; M Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35, 45; Verhoeven and Widdershoven (n 17) 246.
[179] Treaty on European Union, arts 2 and 19(1); Prechal (n 177) para 2; Verhoeven and Widdershoven (n 17) 246.
[180] Prechal (n 17) 62.
[181] Prechal (n 147) 53-54.

court in case of any potential violation of their interests in general.[182] Furthermore, Article 47 of the EU Charter should be read in conjunction with Article 19 TEU to understand the full meaning of the principle. Article 19 TEU confirms the broader scope of the principle by including the obligation for Member States to provide effective remedies in all "fields covered by Union law".[183] Finally, the principle of effective judicial protection can be considered to be the overarching obligation to provide an effective legal process.[184] This obligation is further filled in by other requirements, such as the requirement to enforce EU law in general following from the *Rewe* principle of effectiveness, which is addressed in the next paragraph.[185] In other words, the principle of effective judicial protection aims to enable individuals and other parties such as NGOs to effectively enforce European law in general.

The scope of Article 19(1) TEU is broader than that of Article 47 of the EU Charter.[186] Based on Article 51(1) of the EU Charter, fundamental rights from the Charter are applicable in the Member States only when they are implementing EU law.[187] In the *Portuguese Judges* case the CJEU however determined that this implementation requirement does not apply to Article 19(1) but that this Article applies to all "the fields covered by Union law".[188] Thus, while Article 47 EU Charter applies when the case at hand falls within the scope of EU law, Article 19(1) TEU applies in all cases in which EU law could potentially be at stake. Article 19(1) therefore addresses the fulfilment of the principle of effective judicial protection by national courts in general, because these national courts must effectively apply EU law when this is at stake.[189] This makes the Article particularly important for the institutional principles following from the principle of effective judicial protection, such as the independence and the impartiality of the national judiciary.[190] That means that Article 19(1) obliges national courts and tribunals to be independent and impartial at all times.[191] For the remaining application of the principle of effective judicial protection (the somewhat more limited) Article 47 of the EU Charter remains important.[192] This fundamental right can be limited based on Article 52(1) when the limitation is (i) "provided for by law"; (ii) in "respect [of] the essence of those rights and freedoms"; (iii) "necessary"; and (iv) "genuinely meet

[182] Ibid; Ortlep and Widdershoven (n 17) 369-372.
[183] Treaty on European Union, art 19(1); ibid 50.
[184] Prechal (n 147) 57-58.
[185] ibid.
[186] Prechal (n 177) para 3.
[187] Charter of Fundamental Rights, art 51(1).
[188] *Portuguese Judges* (n 178) para 29; Prechal (n 177) para 3.
[189] Prechal (n 177) para 5; Verhoeven and Widdershoven (n 17) 246.
[190] Prechal (n 177) para 5; Verhoeven and Widdershoven (n 17) 246.
[191] Prechal (n 177) para 5.
[192] Verhoeven and Widdershoven (n 17) 246-247.

objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".[193]

Before the codification of the principle in European legislation, the CJEU introduced it in its case-law, in the *Johnston* case for the first time. The CJEU determined in this case that Member States have to take sufficiently effective measures to guarantee the rights for individuals that follow from EU law.[194] According to the CJEU, this obligation did not only apply to the specific circumstances of the *Johnston* case but is instead a "general principle of law".[195] The CJEU derived the principle from the ECHR and from "the constitutional tradition common to the Member States".[196] The codification of the principle of effective judicial protection within the TEU and EU Charter has not made the CJEU's case-law redundant. On the contrary, the CJEU's case-law still complements the codification and it might have even opened the way for further development of the principle.[197]

3.4.2 Effects for Member States

In general, the principle of effective judicial protection can be seen as a procedural norm.[198] However, it can be argued that over the years the principle has developed into a substantive principle as well.[199] Still, the principle remains to have a procedural character, as it serves as a framework that provides a general minimum standard for the way in which Member States offer judicial protection to individuals and other private parties.[200] From this procedural principle follows both a negative and a positive obligation for Member States.[201] The negative obligation entails that Member States cannot apply their national rules that conflict with the principle. The positive obligation entails that Member States have to adopt new rules or remedies in order to fulfil the requirements of effective judicial protection.

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[193] Charter of Fundamental Rights, art 52(1); ibid.
[194] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651, para 17.
[195] ibid para 18.
[196] ibid.
[197] Prechal (n 17) 65; Bonelli (n 178) 41-42.
[198] Bonelli (n 178) 36-37 and 54.
[199] ibid.
[200] ibid 38 and 54; *Johnston* (n 194) para 17; Ortlep and Widdershoven (n 17) 360-361; Prechal (n 17) 53; Prechal and Widdershoven (n 23) 83; Pernice (n 23) 382; A Ryall, *Effective Judicial Protection and the Environmental Impact Assessment Directive in Ireland* (Bloomsbury Publishing Plc 2009) 75; A de Vries and RJGM Widdershoven, 'Effective judicial protection in the EU – Towards an 'acquis' in transnational horizontal enforcement proceedings' in M Luchtman (ed), *Of Swords and Shields. Due Process and Crime Control in Times of Globalization* (Liber Amicorum prof. dr. J.A.E. Vervaele, Eleven 2023) 503; Hedemann-Robinson (n 24) 332-333.
[201] Prechal (n 17) 56-57.

The principle of effective judicial protection provides guidance in the form of some concrete actions required for Member States regarding the protection of EU law. These actions can be divided in the following three categories: (i) the admissibility before the court, defining *who* can appeal to the remedy; (ii) the norms to apply, defining *how* the remedy can be invoked based on the requirements of Article 47 of the EU Charter and on the requirements that apply specifically to the remedy at hand; and (iii) the remedy itself, defining *what* can be claimed within the concerning remedy.

The principle's first requirement entails that Member States should provide access to a court.[202] This means that if EU law is at stake, private parties should have the possibility to appeal to it before a national court. Member States are free in defining their own specific national admissibility rules, as long as individuals that are affected by EU law have the possibility to appeal to this EU law before a national court.[203] In environmental matters, generally a large group of individuals may have interest in the effective enforcement of the concerning EU legislation, which means that a lot of individuals could be admissible before the national court.[204] The admissibility in environmental cases is also regulated in the Aarhus Convention, which is further addressed in paragraph 3.7. The admissibility in environmental cases is also regulated in the Aarhus Convention, which is further addressed in paragraph 3.7. Therefore, Member States may not apply too strict relativity requirements in environmental cases.[205]

The second requirement entails that Member States guarantee that their national judicial procedures fulfil the specific procedural conditions of Article 47 of the EU Charter.[206] These conditions include "a fair and public hearing", "a reasonable time", "an independent and impartial tribunal", "the possibility of being advised, defended and represented" and the possibility of "legal aid" when this "is necessary to ensure effective access to justice".[207]

The third requirement entails that Member States must make sure that the national courts have concrete remedies available.[208] These remedies should be "effective to enforce Union law and to restore breaches of that law".[209] In principle, Member States are free in choosing which

[202] Charter of Fundamental Rights, art 47; Prechal (n 17) 54; R Ortlep and RJGM Widdershoven, 'Judicial Protection' in JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015) 333.
[203] Ortlep and Widdershoven (n 202) 375-376; Ortlep and Widdershoven (n 17) 369-370; joined cases C-87/90, C-88/90 and C-89/90 *A. Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-03757, para 24.
[204] Ortlep and Widdershoven (n 202) 377-378; Ortlep and Widdershoven (n 17) 371-372; see for example: *Janecek* (n 32).
[205] Ortlep and Widdershoven (n 202) 379.
[206] ibid 333.
[207] Charter of Fundamental Rights, art 47.
[208] Ortlep and Widdershoven (n 202) 333; Verhoeven and Widdershoven (n 17) 250.
[209] Ortlep and Widdershoven (n 202) 333.

specific remedies they provide.[210] However, the CJEU has indicated some remedies that should at least be available on the national level.[211] Here, the positive obligation from the principle of effective judicial protection could come into play, if Member States are obliged to adopt new remedies within their national legal order for the enforcement of EU law.[212] Two important examples of possible remedies that Member States should provide are the remedy of interim relief and of State liability.[213] In the *Factortame* case, the CJEU determined that national courts should have the possibility to set aside national law that is in conflict with EU law immediately in order to guarantee effective protection of EU law, for which the remedy of interim relief is necessary to be available on the national level.[214] As explained before, the CJEU introduced the remedy of State liability in the *Francovich* case and further developed this doctrine in following cases.[215] The effect of these – and other – remedies on the NRR is further addressed in chapters 4, 5 and 6 of this research.

3.5 *Rewe* Principles of Equivalence and Effectiveness

3.5.1 Meaning of the Principles

In 1976, the CJEU introduced two principles in the *Rewe* case that limit the Member States' national procedural autonomy in the third place: the principles of equivalence and effectiveness.[216] The principle of equivalence entails that national procedural conditions for the enforcement of EU law "cannot be less favourable than those relating to similar actions of a domestic nature".[217] In other words, Member States may not discriminate EU law disputes towards purely national law disputes.[218] The principle of effectiveness entails that the national procedural conditions must not "render virtually impossible the exercise of rights conferred by

[210] ibid 370.
[211] ibid 371.
[212] Verhoeven and Widdershoven (n 17) 250.
[213] Ortlep and Widdershoven (n 202) 371.
[214] Case C-213/89 *The Queen v Secretary of State of Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, paras 20-21; the CJEU based the obligation of providing the remedy of interim relief in EU law cases on the principle of effective judicial protection in: case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-02271, paras 42 and 72; also see: Ortlep and Widdershoven (n 202) 422.
[215] *Francovich* (n 30); *Brasserie du Pêcheur* (n 30); *Dillenkofer* (n 30).
[216] Prechal (n 17) 46.
[217] Case 33-76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR I-01989, para 5.
[218] Prechal (n 17) 46.

community law" or make this exercise "excessively difficult".[219] In other words, the national conditions should provide an effective application of EU law. The *Rewe* principles also apply to the remedies that exist in a Member State for the enforcement of EU law.[220]

Since the *Rewe* case was prior to the *Johnston* case, these principles existed before the principle of effective judicial protection was introduced.[221] Together, the three principles can be seen as the European framework for judicial enforcement of EU law.[222] There exists some discussion about the relation between the principle of effective judicial protection and the *Rewe* principles.[223] It can be questioned what the distinction between the principle of effectiveness and the principle of effective judicial protection would be, since the CJEU has never made this entirely clear in its case-law.[224] However, there are also strong arguments for the idea that the principle of effective judicial protection does add something to the *Rewe* principles, as the principles have different aims.[225] Where the principle of effective judicial protection aims to protect individuals in the form of a fundamental right, following from Article 47 of the EU Charter, and thereby creates an opening for new remedies that individuals can invoke, the *Rewe* principles aim in a more general way to enforce EU law in an equivalent and effective way, regardless of the involvement of individuals.[226] The *Rewe* principles can in this regard be seen as "the outer limits of the room the Member States have to manoeuvre".[227] Their application can therefore also work out in a way that is not favourable to European citizens, as opposed to the principle of effective judicial protection.[228]

3.5.2 Effects for Member States

Another difference between the principle of effective judicial protection and the *Rewe* principles can be found in the effects of the principles on Member States in practice. Where the principle of effective judicial protection imposes both negative and positive obligations on Member States, the *Rewe* principles primarily impose negative obligations on them.[229] That means that the effect

[219] *Rewe* (n 217) para 5; for the exact wording, see for example: case 199/82 *Amministrazione delle Finanze dello Strato v SpA San Giorgio* [1983] ECR I-03595, para 12; case C-129/00 *Commission of the European Communities v Italian Republic* [2003] ECR I-14637, para 86.
[220] Prechal (n 17) 47.
[221] Bonelli (n 178) 38.
[222] ibid.
[223] See for example: ibid 39; Verhoeven and Widdershoven (n 17) 255; Prechal (n 17) 61.
[224] Bonelli (n 178) 39; Verhoeven and Widdershoven (n 17) 255.
[225] Prechal (n 17) 62-64.
[226] ibid; Bonelli (n 178) 39-40.
[227] Prechal (n 17) 64.
[228] ibid 62.
[229] ibid 56-58; Verhoeven and Widdershoven (n 17) 254-255.

of the principles of equivalence and effectiveness will generally only be that Member States have to set aside their national rules that conflict with these principles, but that they are not obliged to adopt new rules or remedies.[230]

In general, it is not too hard for Member States to apply the principle of equivalence within their national practice under the CJEU's conditions.[231] This application takes place in two steps. First, the EU law case at hand should be sufficiently comparable to a solely national law case.[232] If such comparison cannot be made, the principle of equivalence does not apply. Second, the comparable EU law case should be treated sufficiently equivalent to the solely national law case.[233] While the applied conditions may not be less favourable when EU law is at stake compared to when solely national law is at stake, it is not necessary for Member States to apply the *most* favourable conditions they have to EU law cases.[234] When Member States have different rules that apply in different national situations, they are allowed to apply one of these rules to situations where EU law is at stake, even if this rule is less favourable than another rule they might have.[235] In other words, the equivalence requirement is not too strict and Member States do have some margin of discretion in its application.[236]

Member States might come across more difficulties with regard to the principle of effectiveness. This principle has primacy over the principle of equivalence, which means that even if Member States apply equal conditions to EU law disputes as to national law disputes, they can still be obliged to apply even more favourable conditions if their applied conditions are not effective enough.[237] Still, usually Member States seem to fulfil this requirement as well.[238] However, the "specific circumstances of the case" could in some instances lead to ineffectiveness if individuals cannot appeal to their European rights because of a fault of the opposing party, where the same rules applied under different circumstances would be effective.[239] In order to see whether the rules comply with the principle of effectiveness, national courts have to apply the so-called "rule of reason test".[240] This test entails a balancing exercise between the aims of the national conditions and the principle of effectiveness.[241] If the national

[230] Verhoeven and Widdershoven (n 17) 254.
[231] ibid; Prechal (n 17) 51.
[232] Prechal (n 147) 46.
[233] ibid 47.
[234] Prechal (n 17) 51.
[235] ibid; see for example: case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-04951, para 37.
[236] Prechal (n 17) 51.
[237] ibid 47-48.
[238] ibid 48; Verhoeven and Widdershoven (n 17) 254.
[239] Prechal (n 17) 49.
[240] ibid 59; Verhoeven and Widdershoven (n 17) 254.
[241] Prechal (n 17) 59.

conditions in some way limit the effectiveness of EU law, they should be based on certain national judicial principles that sufficiently justify this limitation.[242] Examples of such national judicial principles are "protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure".[243] Since the *Rewe* principle of effectiveness aims to fill in the manner of effective enforcement of EU law in practice, the possible limitation of the principle via the rule of reason test seems to be more lenient than a possible limitation of the principle of effective judicial protection.[244] The limitation of the latter is bound to Article 52(1) of the EU Charter because it concerns a fundamental right, while the former can be limited by certain national judicial principles.[245] This again shows an important distinction between both principles.

3.6 *Greek Maize* Principles of Equivalence, Effectiveness, Proportionality and Dissuasiveness

3.6.1 Meaning of the Principles

In a lot of Member States, amongst which the Netherlands, the enforcement of EU law primarily takes place on the administrative level.[246] This means that in case of a violation of EU law administrative sanctions – such as administrative fines, administrative coercions and the withdrawal of subsidies – are being imposed in the first place.[247] The CJEU determined the conditions for these administrative – and other – sanctions in the *Greek Maize* case.[248] From this case follows, again, that Member States have to ensure the effective enforcement of EU law on the national level.[249] According to the CJEU, Member States are in principle free in determining the sanctions they use for this enforcement, which is in line with the principle of national procedural autonomy.[250] However, Member States are bound to four specific conditions here: the sanctions must be equivalent, effective, proportionate and dissuasive.[251] The requirements of equivalence and effectiveness have been discussed in the previous paragraph regarding the

[242] ibid.
[243] Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599, para 14; joined cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705, para 19; ibid.
[244] Prechal (n 17) 60-61; Verhoeven and Widdershoven (n 17) 254-255.
[245] Prechal (n 17) 60-61; Verhoeven and Widdershoven (n 17) 254-255.
[246] De Moor-van Vugt and Widdershoven (n 19) 267.
[247] ibid.
[248] Case 68/88 *Commission of the European Communities v Hellenic Republic (Greek Maize)* [1989] ECR -02965; ibid 276-277.
[249] *Greek Maize* (n 248) para 23.
[250] ibid para 24.
[251] ibid paras 24-25.

Rewe principles. The proportionality condition requires the severity of the sanctions to be proportionate in the light of the severity of the EU law violation.[252] A sanction is sufficiently dissuasive when it prevents individuals from violating EU law and when it is in fact being imposed in case of such violation.[253]

3.6.2 Effects for Member States

The conditions of the *Greek Maize* case apply to the administrative and all (administrative, civil and criminal) judicial authorities that enforce EU law. National judges thus have to assess whether the sanctions used for the enforcement of EU law do indeed fulfil the requirements of equivalence, effectiveness, proportionality and dissuasiveness.[254] This judicial assessment regards both administrative enforcement in response to actions by administrative authorities and private enforcement through compensation in State liability cases.[255] So, where the enforcement of EU law often in the first place happens on the administrative level via administrative sanctions, national judges have an important role in this enforcement where they have to assess the legality of it. Both the national administrative authorities and the national judges thus have an obligation to enforce European law on the national level.[256] From this obligation can only be derogated in cases in which the enforcement is absolutely impossible or in which important general environmental interests justify a derogation.[257]

3.7 Specific Legislation in the Area of Environmental Law: The Aarhus Convention

In the last place, the EU has adopted legislation in specific areas of law that limit the national procedural autonomy of Member States.[258] One of these areas is environmental law. This becomes particularly clear from the Aarhus Convention, which is partly implemented in, amongst others, the European Aarhus Directive.[259] These legislative acts establish "access to information,

[252] De Moor-van Vugt and Widdershoven (n 19) 281.
[253] ibid.
[254] ibid 277.
[255] ibid; case C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España* (European Court of Justice Fourth Chamber, 17 December 2015), para 44; it also includes criminal enforcement, which is however less relevant for this research.
[256] De Moor-van Vugt and Widdershoven (n 19) 277.
[257] ibid 282.
[258] Verhoeven and Widdershoven (n 17) 267.
[259] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the

public participation in decision-making, and access to justice in environmental matters".[260] Not all provisions of the Aarhus Convention are implemented in European legislation.[261] However, since the EU is party to the Convention, all of its provisions are applicable within the European legal order without prior implementation.[262] As will become clear further in this research, this specific (European) legislation in the area of environmental law may in some cases limit the national procedural autonomy even more than the European principles of enforcement.

3.7.1 Right to Access to Justice

Article 9 of the Convention specifies the situations in which parties should have access to justice. The first situation, laid down in section 1, is when persons want to challenge a – in their opinion – wrongful rejection of their request to access to environmental information based on Article 4 of the Convention.[263]

The second situation, laid down in Article 9(2), is when "members of the public" with "a sufficient interest" or who are "maintaining the impairment of a right" want to challenge the legality of the provided public participation in decisions on activities specified in Annex I and activities with a possible "significant effect on the environment", as obliged in Article 6 of the Convention.[264] The meaning of "sufficient interest" is in principle up to Member States to define, as is in line with the principle of national procedural autonomy.[265] However, both the Aarhus Convention and Directive determine that NGOs "promoting environmental protection and meeting any requirements under national law" fall within this category.[266] This means that environmental NGOs are most often admissible to their national courts in cases that fall within the scope of Article 6 of the Aarhus Convention. This considerably channels Member States even further in their application of effective judicial protection for environmental matters in particular than the principle of effective judicial protection does in general. In the *Zoskupenie II* case, the

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environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156/17 (hereafter: Dir 2003/35/EC); ibid; Ortlep and Widdershoven (n 202) 380.

[260] Aarhus Convention, art 1.

[261] E Plambeck and L Squintani, 'Rechtsbescherming tegen plannen en programma's in het omgevingsrecht in het licht van het Unierecht' (2019) 67 Sociaal Economische wetgeving: Tijdschrift voor Europees en economisch recht 2, 5-6.

[262] ibid; M Eliantonio and J Richelle, 'Access to Justice in Environmental Matters in the EU Legal Order: The "Sectoral" Turn in Legislation and Its Pitfalls' (2024) 9 European Papers 261, 262.

[263] Aarhus Convention, arts 9(1) and 4(1); A Buijze and Ch Backes, *Naar een robuuste implementatie van het Verdrag van Aarhus? Een onderzoek in opdracht van het Ministerie van IenW* (Utrecht University, Centre for Water, Oceans and Sustainability Law 2024)105-106.

[264] Aarhus Convention, arts 9(2) and 6 and Annex I.

[265] Ortlep and Widdershoven (n 202) 380.

[266] Aarhus Convention, arts 9(2) and 2(5); Dir 2003/35/EC, art 15a and 2(14).

CJEU has furthermore determined that Member States should, based on Article 47 of the EU Charter in combination with Articles 9(2) and 6(1)(b) of the Aarhus Convention, provide access to justice to environmental NGOs in cases with a possible "significant effect on the environment".[267] These cases have a rather broad scope, including in principle all cases regarding environmental protection.[268] Article 9(2) gives admissible parties the right "to challenge the substantive and procedural legality" of the concerning decision.[269] This thus includes a full legality review of the decision at hand.[270] It does not seem to be allowed to limit environmental NGOs in their admissibility in such cases, for example via a relativity requirement.[271]

The third and last situation in which parties should have access to justice under the Aarhus Convention is when "members of the public" want to challenge possible violations of national environmental law, as laid down in section 3 of Article 9.[272] Environmental NGOs that fulfil the national requirements are considered to fall in the scope of "members of the public" here as well.[273] In *Deutsche Umwelthilfe II*, the CJEU has indicated that these national requirements may not be too strict because environmental NGOs protecting the public interest should be able to challenge possible violations of (European) environmental law.[274] Although States may apply some national criteria to the admissibility in the light of Article 9(3), environmental NGOs should, similar to the second situation, in principle be admissible in the third access to justice situation of the Aarhus Convention as well.[275] For both situations, it therefore seems to be in conflict with the Aarhus Convention to subject environmental NGOs to a (too strict) relativity requirement within the scope of the Convention.[276] Article 9(3) gives admissible parties the right to "access to administrative or judicial procedures".[277] In contrast to Article 9(2), a full legality review is thus not obliged here.[278]

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[267] Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Zoskupenie II)* (European Court of Justice Grand Chamber 8 November 2016), para 73.
[268] Plambeck and Squintani (n 261) 6; Buijze and Backes (n 263) 107.
[269] Aarhus Convention, art 9(2).
[270] Buijze and Backes (n 263) 114 and 117.
[271] ibid 117.
[272] Aarhus Convention, art 9(3).
[273] ibid art 2(5).
[274] Case C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland (Deutsche Umwelthilfe II)* (European Court of Justice Grand Chamber, 8 November 2022), paras 67-69; Eliantonio and Richelle (n 262) 264.
[275] Aarhus Convention, art 9(3); United Nations Economic Commission for Europe, 'The Aarhus Convention: An Implementation guide' (2nd edn, United Nations Publication 2014) 198; Buijze and Backes (n 263) 115-116 and 122.
[276] Plambeck and Squintani (n 261) 8-9; Buijze and Backes (n 263) 115-117 and 122.
[277] Aarhus Convention, art 9(3).
[278] Buijze and Backes (n 263) 114.

For all three access to justice situations States have to guarantee the existence of effective remedies.[279] In cases where this could be appropriate, one of these remedies should be an injunctive relief.[280]

3.7.2 Effects for Member States

Although the EU has not implemented Article 9(3) of the Aarhus Convention, the CJEU has offered some guidelines regarding the applicability of this Article in its case-law.[281] According to the CJEU, it is in principle up to the national court to assess whether sufficient effective judicial protection is provided by the applicable national law falling within the scope of EU law and to interpret this national law in the light of Article 9(3) of the Aarhus Convention.[282] However, this does not mean that the CJEU leaves national courts entirely free in applying Article 9(3) of the Aarhus Convention when EU law is at stake. The CJEU has made a connection between this third access to justice situation of the Aarhus Convention and the right to effective judicial protection of Article 47 of the EU Charter with regard to European environmental law.[283] From this connection follows that national courts should "interpret [their] national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention".[284] As explained above, the CJEU has even indicated that environmental NGOs cannot be denied admissibility in Article 9(3) cases regarding (European) environmental legislation by too strict rules on the national level.[285] In the *Zoskupenie II* case, it confirmed this broad admissibility for environmental NGOs with regard to Article 9(2) of the Aarhus Convention as well.[286] The CJEU thus obliges national courts to apply these provisions and channels them in this application to provide sufficient effective judicial protection of European environmental law.[287]

Article 7 of the Aarhus Convention determines that States should provide public participation in the preparation of environmental plans and programmes.[288] The definitions of "plans" and "programmes" should be interpreted in a broad way, which makes it presumably for

[279] Aarhus Convention, art 9(4).
[280] ibid.
[281] Eliantonio and Richelle (n 262) 262-263 and 267.
[282] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Zoskupenie I)* (European Court of Justice Grand Chamber 8 March 2011) paras 45 and 50-52; more recently, see: *Zoskupeni II* (n 265) para 65; *Deutsche Umwelthilfe II* (n 274) para 37.
[283] ibid paras 46-49; *Deutsche Umwelthilfe II* (n 274) para 66; Eliantonio and Richelle (n 262) 267; Jans and Vedder (n 83) 229.
[284] *Zoskupenie I* (n 282) para 50.
[285] *Deutsche Umwelthilfe II* (274) paras 67-69.
[286] *Zoskupenie II* (n 267) para 73.
[287] ibid; *Deutsche Umwelthilfe II* (274) para 66.
[288] Aarhus Convention, art 7; Buijze and Backes (n 263) 96.

the restoration plan of Article 15 NRR to fall within the scope of Article 7 of the Aarhus Convention since this Article specifically obliges Member States, amongst others, to provide in their restoration plan information on public participation in the establishment of the plan and the consideration of "the needs of local communities and stakeholders".[289] A few sections of Article 6 regarding the rights to public participation apply to this provision.[290] Some authors, for example Plambeck and Squintani, therefore argue that the access to justice protection of Article 9(2) is also applicable when environmental plans in the light of Article 7 are at hand.[291] That would mean that the broad scope of Article 9(2) including all cases regarding environmental protection and requiring a full legality review would apply to Article 7 as well.[292] According to other authors this applicability is however not so clear. For example, Buijze and Backes argue that Article 9(2) is explicitly only applicable to Article 6 and not to Article 7, aside from the possibility to "opt-in".[293] This opt-in entails that States may broaden the scope of Article 9(2) on their national level.[294] As long as such an opt-in is not provided for by national law, Article 9(2) would not apply to plans in the light of Article 7. This latter position seems to be defensible, since Article 7 is, in contrast to Article 6, not specifically mentioned in Article 9(2) and only refers to the sections of Article 6 that regard public participation requirements. However, keeping in mind the potential opt-in possibilities, there might be situations on the national level imaginable in which Article 9(2) does apply to Article 7.[295] Furthermore, the CJEU has applied Article 9(2) of the Aarhus Convention in combination with Article 47 of the EU Charter to the environmental plans falling in the scope of Article 6(3) of the Habitats Directive.[296] This case provides an example of the application of the earlier-mentioned broad scope of Article 6(1)(b) of the Convention regarding activities with a possible "significant effect on the environment".[297] In this light, there are possible situations in which environmental plans include provisions that regulate whether such Article 6(1)(b) activities are allowed, so that Article 9(2) – requiring a full legality review – does apply to these plans which are regulated in Article 7.[298] Even if section 2 would not be applicable, section 3 of Article 9 without doubt applies to Article 7.[299] This gives parties at least the possibility to be admissible to the court

[289] Reg (EU) 2024/1911, art 15(3)(w); Plambeck and Squintani (n 261) 5; Buijze and Backes (n 263) 96-97.
[290] Aarhus Convention, arts 6(3), (4) and (8) and 7; United Nations Economic Commission for Europe (n 275) 173.
[291] Aarhus Convention, arts 6, 7 and 9(2); Plambeck and Squintani (n 261) 6.
[292] Plambeck and Squintani (n 261) 6.
[293] Buijze and Backes (n 263) 123.
[294] United Nations Economic Commission for Europe (n 275) 173 and 193; Buijze and Backes (n 263) 123.
[295] United Nations Economic Commission for Europe (n 275) 173; Plambeck and Squintani (n 261) 6.
[296] *Zoskupenie II* (n 267) paras 57, 63 and 73.
[297] Buijze and Backes (n 263) 107.
[298] ibid 123-124.
[299] United Nations Economic Commission for Europe (n 275) 173; Plambeck and Squintani (n 261) 5; Buijze and Backes (n 263) 123.

when their public participation rights regarding environmental plans and programmes are concerned.[300] As explained in the previous paragraph, environmental NGOs will in this regard (almost) always be admissible.

3.8 Conclusion

From this chapter can be concluded that the starting point of national procedural autonomy for the enforcement of European law – in the sense that Member States are in principle free in defining how they will enforce EU law within their national practices – is not at all absolute. First, EU law has primacy over national law, which means that national rules should be set aside when they conflict with European rules. Member States should apply this primacy principle in their national orders via the mechanisms of direct effect and consistent interpretation of EU law.

Next, Member States have to comply with the principle of effective judicial protection, which is laid down as a fundamental right in Articles 19(1) TEU and 47 of the EU Charter. Limitation of this fundamental right is only allowed when the conditions of Article 52(1) are fulfilled. The principle of effective judicial protection imposes rules on Member States regarding the admissibility before the court, the specific norms to apply and the remedies themselves. These rules are filled in by the requirements to provide access to a court, to fulfil the procedural conditions of Article 47 of the EU Charter and possible additional conditions to make concrete remedies available, such as the remedies of interim relief and monetary compensation via State liability.

Then, national procedural rules must guarantee equivalence between disputes of EU and national law and effectiveness of EU law. In practice, Member States generally seem to comply with these *Rewe* principles, although they do have to apply the rule of reason test with regard to possible limitations of the effectiveness requirement. Still, compared to the principle of effective judicial protection, this test provides a more lenient possibility of limiting the effectiveness requirement since such limitation can be based on national judicial principles instead of on Article 52(1) of the EU Charter.

The *Greek Maize* case has added the requirements of proportionality and dissuasiveness to the *Rewe* principles. These requirements apply to both administrative authorities and the judiciary, in all legal cases. The enforcement of EU law often initially takes place on the administrative level.

[300] Aarhus Convention, arts 7 and 9(3); Plambeck and Squintani (n 261) 5; Buijze and Backes (n 263) 123; Eliantonio and Richelle (n 262) 267.

Finally, the Aarhus Convention limits Member States further in their national procedural autonomy in environmental matters. From this legislation and the corresponding case-law follows that the right of access to justice in environmental matters is quite wide, especially for NGOs.

Having provided an overview of the normative framework that serves this research, I can move on to the actual assessment of the possible remedies that exist in case of violations of the NRR's obligations as set forth in the previous chapter. In the next chapter, I first address the remedies that exist on the European level and evaluate to what extent these are in line with the principles discussed in the normative framework of this chapter.

Chapter 4. European Level

4.1 Introduction

Based on the theoretical, legal and normative frameworks that I have set forth in the previous chapters, in this chapter I move on to the evaluation of the possible remedies that individuals and NGOs can invoke on the European level when a Member State violates Articles 4 and 15 of the Nature Restoration Regulation. In this assessment, I distinguish between the categories of admissibility, the norms and the possible remedies of the different European mechanisms. This distinction has also been made with regard to the requirements following from the principle of effective judicial protection in chapter 3. The way these requirements are being filled in by each mechanism shows the possibilities individuals and NGOs have regarding that mechanism and to what extent the mechanism fulfils the European principles of enforcement.

As already briefly explained in the introduction of this research, the principle of primacy of European law over national law and the principle of effective judicial protection lead to three types of mechanisms formulated on the European level that Member States are obliged to provide in their national legal order to guarantee sufficient enforcement of EU law. In this chapter, I address these mechanisms and their requirements and characteristics within the European context. The first mechanisms I address are that of direct effect and consistent interpretation (paragraph 4.2). The third and last mechanism individuals can invoke on the European level is State liability (paragraph 4.3). For each mechanism, I address the interpretation of the different categories of admissibility, the norms and the remedies and apply them to Articles 4 and 15 of the NRR. This application leads to an interim conclusion on the question of the possible remedies individuals and NGOs have to enforce these Articles on the European level (paragraph 4.4).

4.2 Direct Effect and Consistent Interpretation

4.2.1 Mechanisms of Direct Effect and Consistent Interpretation

The first mechanism Member States have to apply in order to comply with the European principles of administrative and judicial enforcement is the mechanism of direct effect. Private parties must have the possibility to directly appeal to certain provisions following from European law on the

national level.[301] However, private parties cannot directly appeal to all EU law before their national courts because not all provisions have direct effect.[302] In principle, EU law provisions therefore need to be "sufficiently precise" and "unconditional".[303] An in-depth analysis of what these requirements entail is part of paragraph 4.2.3. Here, it is important to note that the requirements apply to provisions of every type of EU legislation, including regulations.[304] Where directives have to be implemented within national law by the Member States, regulations are in principle directly *applicable*.[305] However, that does not mean that all provisions of regulations are directly *effective* as well.[306] The Court of Justice of the European Union has recently established this, amongst others, in the *Texel* case, in which it determined that provisions of regulations only have direct effect when they are "clear, precise and unconditional".[307] In this case, the provision of the Regulation on the European Maritime and Fisheries Fund Regulation at hand could not be regarded as "unconditional", because the provision was too general and its application depended on other provisions as well.[308] Therefore, the Regulation's provision did not have direct effect.[309] In conclusion, despite the implementation difference between regulations and directives, the same requirements for norms to be directly effective apply to provisions of regulations as to provisions of directives. It is therefore possible in this research to apply the CJEU's case-law on the direct effect of directives to the NRR.

When the NRR's provisions are not sufficiently precise and unconditional, the mechanism of consistent interpretation comes into play. In these situations, the national law at hand should still be interpreted consistently with the less precise or conditional provisions of EU law.[310] Because regulations are directly applicable in the national legal order, the mechanism of consistent interpretation has a less significant role here than with regard to directives.[311] Different from provisions of directives, the first step for national courts regarding provisions of regulations is *not* to see whether the national rules can be applied consistently with the EU law provisions but

[301] Verhoeven and Jans (n 25) 63; Hedemann-Robinson (n 24) 333; Jans and Duijkersloot (n 22) 442.
[302] Rotondo (n 26) 441-442; Verhoeven and Jans (n 25) 76; Jans and Verhoeven (n 21) 89.
[303] Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR I-00053, para 25 (note that in this case the EU legislation at hand was a directive and not a regulation); Verhoeven and Jans (n 25) 76; Rotondo (n 26) 441-442; Jans and Verhoeven (n 21) 90.
[304] Ouden, Jacobs and Van den Brink (n 85) 12; Haket and Widdershoven (n 164) 348.
[305] Treaty on the Functioning of the European Union, art 288.
[306] Den Ouden, Jacobs and Van den Brink (n 85) 12-14; Rotondo (n 26) 441-442; Verhoeven and Jans (n 25) 76; Jans and Verhoeven (n 21) 89.
[307] Case C-386/18 *Coöperatieve Producentenorganisatie en Beheersgroep Texel UA v Minister van Landbouw, Natuur en Voedselkwaliteit* (European Court of Justice Second Chamber, 19 December 2019), para 61.
[308] ibid paras 63-64.
[309] Ibid para 67.
[310] Verhoeven and Jans (n 25) 65; Rotondo (n 26) 443.
[311] Jans and Verhoeven (n 21) 77; Den Ouden, Jacobs and Van den Brink (n 85) 12; Rotondo (n 26) 443.

to see whether the concerning provision has direct effect, as described above.[312] If neither the concerning provision of the regulation has direct effect nor the national law is already consistent with the provision, the second step would be for the national court to apply the requirement of consistent interpretation of national law.[313] Some regulations will already oblige Member States themselves to adopt (new) national measures in addition to the regulation for the regulation to be effective, as is also the case with the NRR.[314] As explained in chapter 2, these national measures should be interpreted consistently with the regulation.[315] Since the first versions of the national restoration plans Member States are obliged to draw up based on Article 15 NRR will be submitted by September 2026, there is no national law based on the Regulation yet.[316] Therefore, there is currently no clearly designated national law to interpret consistently with the NRR. Since the obligation of consistent interpretation does not only apply to national law directly following from the Regulation but to national law in general, there might be situations in which the Member States are obliged to interpret their national law in accordance with the NRR at this moment already.[317] This is limited by the fact that such consistent interpretation may not lead to a *contra legem* interpretation of the wording of the national law at hand.[318] An in-depth analysis of possible national law that might fall under the scope of interpretation consistently with the NRR goes beyond the scope of this research, which focuses primarily on the possible remedies for individuals and NGOs in case of a violation of the Regulation. The focus of this research will thus be primarily on the mechanism of direct effect instead of on consistent interpretation. The question whether individuals and/or NGOs could appeal directly to Articles 4 and 15 NRR before their national courts is addressed in the following paragraphs.

4.2.2 Admissibility

An important question that arises when the mechanism of direct effect (and consistent interpretation) comes into play is *who* might invoke this mechanism with regard to EU law provisions.[319] In any case, following from *Van Gend & Loos*, citizens who derive individual rights from the concerning EU law should be able to directly appeal to these rights before their national

[312] Den Ouden, Jacobs and Van den Brink (n 85) 12 and 14.
[313] ibid; *Texel* (n 307) para 66.
[314] Den Ouden, Jacobs and Van den Brink (n 85) 23-24; Rotondo (n 26) 439.
[315] *Anssi Ketelä* (n 83) paras 35-36; Rotondo (n 26) 439; Jans and Verhoeven (n 21) 91; Jans and Vedder (n 83) 160.
[316] Reg (EU) 2024/1911, art 16.
[317] Den Ouden, Jacobs and Van den Brink (n 85) 15.
[318] ibid 16.
[319] Jans and Verhoeven (n 21) 93.

court.[320] However, it has been debated to what extent other parties – whose interests are not directly protected by the provision at hand – might invoke the mechanism of direct effect as well.[321] In this regard, Jans and Verhoeven argue that individual rights and direct effect are two different concepts.[322] This means that when an EU law provision has direct effect, national private parties can in principle appeal to this provision before their national court.[323] The CJEU has confirmed this idea in the *Kraaijeveld* case. The company Kraaijeveld successfully appealed to the Environmental Impact Assessment Directive (hereafter: EIA Directive) with regard to their own economic interests, while the Directive primarily obliges to assess possible impacts of certain projects on the environment.[324] In line with the principles of national procedural autonomy and effective judicial protection, Member States may subsequently require specific rules regarding the admissibility of parties on their national level, as long as they sufficiently guarantee effective enforcement of EU law. [325] The answer to the question *who* exactly will be admissible before the national court remains rather broad on the European level and is further specified on the national level. This question is therefore further addressed in chapter 6 of this research.

In addition to the general admissibility rules with regard to the mechanism of direct effect, the Aarhus Convention entails some specific admissibility requirements within the environmental area.[326] As already explained in chapter 3, from these requirements follows that environmental NGOs are most often admissible to their national courts in cases that fall within the scope of Articles 6 and 7 of the Aarhus Convention for the legal protection offered by these Articles. Although the provision of judicial protection regarding the restoration plans is deleted from the proposal in the final version of the NRR, the Regulation's preamble does refer to the duty of "Member States to provide remedies sufficient to ensure effective judicial protection", based on Article 19(1) TEU.[327] In this context, the Regulation also specifically refers to the Aarhus Convention.[328] As outlined in chapter 3, it is likely to assume the applicability of the public participation obligation following from Article 7 of the Aarhus Convention to the restoration plan

[320] *Van Gend & Loos* (n 21).
[321] Jans and Verhoeven (n 21) 94; Rotondo (n 26) 442.
[322] Jans and Verhoeven (n 21) 94.
[323] ibid 95.
[324] Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-05403, paras 18 and 56; European Commission, 'Environmental Impact Assessment' (*Environment EC Europa*) <https://environment.ec.europa.eu/law-and-governance/environmental-assessments/environmental-impact-assessment_en> accessed 21 March 2025; ibid.
[325] *Kraaijeveld* (n 324) paras 57-58; Jans and Verhoeven (n 21) 95; Ortlep and Widdershoven (n 17) 369.
[326] Aarhus Convention, art 9; Dir 2003/35/EC, art 15(a).
[327] Reg (EU) 2024/1911 preamble, para 82; Mendelts (n 119) 670; Eliantonio and Richelle (n 262) 270 and 273.
[328] Reg (EU) 2024/1911 preamble, para 82.

of Article 15 NRR.[329] Since there is no case-law available on the applicability of the Aarhus Convention to the NRR yet and the access to justice Article has been removed from the final version of the Regulation, the exact role of the Aarhus Convention with regard to the NRR remains somewhat unclear.[330] As explained in chapter 3, the applicability of Article 7 at least leads to the right to access to justice for environmental NGOs in cases that concern their public participation rights regarding environmental plans and programmes, such as the restoration plan of Article 15 NRR.[331] Furthermore, there might be possible situations in which a full legality review of this restoration plan could be required by the Aarhus Convention.[332] This possibility follows for example from the *Zoskupenie II* case, also addressed in chapter 3.[333] Although the Habitats Directive does not include an access to justice provision either, in this case the CJEU applied Article 9(2) of the Aarhus Convention in combination with Article 47 of the EU Charter to the environmental plans falling within the scope of Article 6(3) of this Directive, because the plans regulated whether activities with a possible "significant effect on the environment" in the light of Article 6(1)(b) of the Aarhus Convention were allowed.[334] If this judgment could be analogously applied to the NRR, the rights to access to justice regarding environmental plans that environmental NGOs can derive from the Aarhus Convention would also apply to the restoration plan of Article 15 NRR. Whether such a restoration plan would in fact regulate Article 6(1)(b) activities is not clear yet and should be further analysed when the national restoration plans are submitted.

4.2.3 Norms

4.2.3.1 Sufficiently Precise and Unconditional Provisions

The next question is *how* and *when* the mechanism of direct effect can be invoked. As already briefly mentioned in paragraph 4.2.1, there are two main requirements for an EU law provision to have direct effect: it must be "sufficiently precise" and "unconditional".[335] These requirements do not apply to a European legislative instrument in its entirety but to each of its provisions

[329] Aarhus Convention, art 7; Reg (EU) 2024/1911, art 15(3)(w).
[330] Reg (EU) 2024/1911, preamble, para 82; Mendelts (n 119) 670; Eliantonio and Richelle (n 262) 273-274.
[331] Aarhus Convention, arts 7 and 9(3); United Nations Economic Commission for Europe (n 275) 173; Plambeck and Squintani (n 261) 5 and 7; Buijze and Backes (n 263) 123.
[332] See for example: Buijze and Backes (n 263) 123-124.
[333] ibid 107.
[334] *Zoskupenie II* (n 267) paras 57, 63 and 73.
[335] *Becker* (n 303) para 25; Verhoeven and Jans (n 25) 76; Rotondo (n 26) 441-442; Jans and Verhoeven (n 21) 90.

individually.[336] The CJEU confirmed the requirements with regard to regulations in the earlier-mentioned *Texel* case.[337] A provision is sufficiently precise when its wording does not leave Member States to choose between different options within its application.[338] It is important to note that if a provision does leave multiple options and the Member State has chosen one of these options, the conditions underlying this option still can have direct effect – providing they are sufficiently precise and unconditional – although the choice for the option itself does not have direct effect.[339] A provision is unconditional when Member States or the European institutions do not have to implement any further rules on the national level for its application.[340] In other words, for an EU law provision to have direct effect, in principle no discretion may be left to Member States within its application.[341] National courts are not allowed to interfere with such margin of appreciation because they would then be interfering with the legislator's power.[342]

However, the requirement that States may not have any discretion in order for a provision to have direct effect is somewhat attenuated over the years.[343] In the *VNO* case and the earlier-mentioned *Kraaijeveld* case, the CJEU has extended the mechanism.[344] From these cases follows that if Member States have to some extent discretion in applying an EU law provision, national courts must still assess whether "a national implementing measure falls outside the limits of the margin of discretion left to the Member States".[345] Later, in the *Cockle Fishery* case, the CJEU determined that national courts can even apply this so-called "legality review" when the Member State has not taken any national implementing measures.[346] Recently, in the *Drebers* case, the CJEU again confirmed the obligation of national judges to assess whether Member States have exceeded their discretion within the application of EU law.[347] Thus, even if a regulation requires Member States to take additional national measures, thereby leaving some form of discretion to them, its provisions can still be sufficiently precise and unconditional regarding the limits of this

[336] Jans and Verhoeven (n 21) 91.
[337] *Texel* (n 307) para 61.
[338] Verhoeven and Jans (n 25) 76; Haket and Widdershoven (n 164) 348; Den Ouden, Jacobs and Van den Brink (n 85) 14-15.
[339] Case C-243/23 *Belgische Staat/Federale Overheidsdienst Financiën v L BV (Drebers)* (European Court of Justice Second Chamber, 12 September 2024), para 90.
[340] Haket and Widdershoven (n 164) 348; Den Ouden, Jacobs and Van den Brink (n 85) 14-15.
[341] Jans and Verhoeven (n 21) 90; Rotondo (n 26) 442.
[342] Jans and Verhoeven (n 21) 91.
[343] ibid 95; Rotondo (n 26) 442.
[344] Case 51-76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen (VNO)* [1977] ECR 00113; *Kraaijeveld* (n 324).
[345] *VNO* (n 344) para 30; *Kraaijeveld* (n 324) para 60.
[346] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Cockle Fishery)* [2004] ECR I-07405, para 66; Jans and Verhoeven (n 21) 96.
[347] *Drebers* (n 339) para 93.

discretion and consequently insofar have direct effect.[348] In conclusion, the requirement for direct effect can be explained in the sense that the EU law provision must be "justiciable" so that national courts are able to directly apply them.[349] Here, the judicial power of the national court comes forward, next to the earlier-mentioned legislative power: following from the principles of primacy of EU law over national law, effective judicial protection and the *Rewe* principles, national courts must have enough powers to effectively enforce EU law provisions.[350] Whether an EU law provision has direct effect has to be assessed by national courts on the national level for each provision individually, based on the European conditions. Furthermore, if the national court doubts the possible direct effect of an EU law provision, it should ask a preliminary question about this to the CJEU.[351]

4.2.3.2 Possible Direct Effect of Articles 4 and 15 of the Nature Restoration Regulation

Article 4 NRR determines the quantity of the areas from Annex I and additional suitable areas for which Member States have to take measures – namely 30%, 60% and 90% to 100% for respectively the years 2030, 2040 and 2050.[352] The measures Member States have to take for the areas that fall within the scope of the Habitats Directive are not subjected to specific percentages and timeframes.[353] The targets that Member States should achieve with all three types of measures are formulated in terms of a "good condition" of the habitats and "an increasing trend towards sufficient quality and quantity".[354] Although the Article does set a clear deadline for 2050 and interim deadlines for 2030 and 2040 regarding the *quantity* of areas from Annex I and additional suitable areas for which measures should be taken, it does not include deadlines for when the *targets* should be met. In addition, although the Regulation specifies the conditions for when areas are in good condition or when they have reached a sufficient quality and quantity, it does leave discretion for the implementation of the measures that should achieve these targets and for determining whether these measures would be sufficient.[355] On the first sight, this seems to leave a lot of room for Member States to further specify the measures they will take in national implementation instruments.[356] Provisions of European environmental legislation that require

[348] Rotondo (n 26) 442.
[349] Jans and Verhoeven (n 21) 92; Haket and Widdershoven (n 164) 348.
[350] Jans and Verhoeven (n 21) 92-93.
[351] Treaty on the Functioning of the European Union, art 267; J Langer and J Krommendijk, 'De verwijzingsplicht van de hoogste rechters in Nederland en de Cilfit-controverse: prejudicieel verwijzen of niet?' (2019) June Ars Aequi 469, 469.
[352] Reg (EU) 2024/1911, art 4(1) and 4(4).
[353] ibid art 4(7).
[354] ibid art 4(17).
[355] Lees and Pedersen (n 87) 94-95; Grabbe and others (n 116) 2.
[356] Mendelts (n 117) 667.

such national implementation generally cannot be considered unconditionally and thus have no direct effect.[357] The legality review introduced in *VNO* and *Kraaijeveld* might however increase the direct effect possibilities of Article 4 NRR. Although the "good condition", "favourable reference area" and "sufficient quality and quantity" may not have to be achieved before a specific deadline, there might be situations imaginable in which certain measures have to be taken in order to at least improve the habitats, based on ecological research.[358] The national courts would then, in line with the *VNO* and *Kraaijeveld* cases, have to conduct a legality review and assess whether Member States have stayed within the limits of their discretion.[359] In such situations the provision of Article 4 will be sufficiently precise and unconditional, since there will be no discretion left for Member States to take *less* measures. It would in other words be possible to derive certain minimum measures with direct effect from Article 4. Which measures these would be depends on the ecological situations of the habitats in the different Member States. In chapter 6, this possible direct effect is applied to the Dutch State by means of a case study.

Next to the obligations to take measures, the non-deterioration requirements from Article 4 NRR on the first sight also seem to leave some latitude for Member States.[360] This follows from the Article's formulation that the measures should "aim" for "a continuous improvement" and for "preventing significant deterioration".[361] These obligations are not so precise and unconditional and thus leave discretion to the Member States in applying Article 4 of the NRR and in implementing their national measures.[362] However, the same line of reasoning regarding the targets of Article 4 could also apply to the non-deterioration requirements of this Article. There are situations imaginable in which certain measures are necessary to achieve at least some continuous improvement and to prevent any significant deterioration. In such situations courts have to apply the legality review of the *VNO* and *Kraaijeveld* cases and it would be possible for the non-deterioration requirements to have direct effect regarding some minimum measures.

Article 4 NRR finally provides the possibility to derogate from the obligation to take measures, under certain conditions.[363] The administrative authority has discretion in deciding whether he uses this possibility. Therefore, this derogation provision itself does not have direct effect.[364] The national court can however assess whether the national authority stayed within the

[357] Jans and Vedder (n 83) 189.
[358] See for example: Arcadis, 'Natuurdoelanalyse Veluwe (57). Eindconcept provincie Gelderland' (Arcadis, 5 June 2023) 41, 46 and 94; also see paragraph 6.3.4.3 for further information and application of this source.
[359] *VNO* (n 344) para 30; *Kraaijeveld* (n 324) para 60.
[360] Mendelts (n 117) 666-667; Cliquet and others (n 87) 4.
[361] Reg (EU) 2024/1911, art 4(11)-(12).
[362] Mendelts (n 117) 667; Hering and others (n 15) 1250.
[363] Reg (EU) 2024/1911, art 4(2) and (5).
[364] Jans and Vedder (n 83) 192.

limitations when applying such a derogation, again in line with the *VNO* and *Kraaijeveld* cases.[365] Furthermore, in line with the *Drebers* case, if the Member State chooses to use the possibility to derogate, the conditions underlying this derogation could be directly effective.[366] The derogation conditions from Article 4 require Member States to provide a justification for the derogation, to adopt measures for a different, lower, percentage of the areas and to maintain or reach the favourable conservation status for the areas.[367] Since these conditions do not leave room for further choices to Member States, individuals and NGOs could be able to directly appeal to them if a Member State uses the possibility to derogate but fails to comply with the conditions.

Where the wording of Article 4 does not seem to be sufficiently precise and unconditional for the Article to have direct effect in general – aside from the possible extreme situations outlined above – this might be different for Article 15 NRR on the restoration plan. In this regard, a comparison can be made between this Article's obligation to draw up a restoration plan and Article 23 of the Air Quality Directive. Similar to Article 15 NRR, Article 23 of the Air Quality Directive obliges Member States to draw up plans for certain areas in order to achieve specific air quality targets.[368] In the earlier-mentioned *Janecek* case, the CJEU declared this obligation to be "clear" and "straightforward", which makes it sufficiently precise and unconditional for individuals to directly appeal to the provision before their national courts.[369] The CJEU did however determine that Member States have discretion with regard to the *content* of these plans.[370] Member States are required to implement national legal instruments for the air quality plans, which makes the provision conditional and therefore in principle lack direct effect.[371] If we translate this to the NRR, it would mean that the clear and straightforward obligation from Article 15 to draw up restoration plans would be sufficiently precise and unconditional and thus have direct effect.[372] The content of the restoration plan on the other hand leaves discretion to Member States as well and in principle does not seem to be directly effective. Again, this could be different in certain extreme situations. Measures that are absolutely necessary to take regarding the

[365] ibid.
[366] *Drebers* (n 339) para 90.
[367] Reg (EU) 2024/1911, art 4(2) and (5).
[368] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L 152/1 (hereafter: Dir 2008/50/EC), art 23(1).
[369] *Janecek* (n 28) paras 35-36 and 38; note that at the time of this case, the Air Quality Directive in force was the Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L 296/55 and the concerning provision was Article 7(3) of that Directive; Jans and Vedder (n 83) 194-195.
[370] *Janecek* (n 28) paras 44-46.
[371] Jans and Vedder (n 83) 189.
[372] Reg (EU) 2024/1911, arts 14(1) and 15(1).

targets and non-deterioration of Article 4 could further specify the content for the restoration plan of Article 15 NRR as well.

4.2.4 Remedies

When an EU law provision has direct effect and national law is in conflict with this provision, there are three possible consequences. As explained before, these consequences apply to individual EU law provisions, not to a European legislative instrument in its entirety.[373] The content of the provision determines the exact legal consequence of the direct effect within the Member State.[374]

4.2.4.1 Setting Aside the National Rule

Firstly, Member States should set aside the national rule conflicting with the directly effective EU rule and apply the EU rule instead.[375] This is the most common and primary consequence of the mechanism of direct effect. It entails that Member States should act as if European law has been correctly implemented in their national legal orders and that they should thus apply this European law consequently, regardless of the (inconsistent) national law at hand.[376] It furthermore entails that Member States may not adopt new national rules that are inconsistent with the EU law provision and that Member States should instead adopt measures to act in line with this provision.[377] If Member States violate directly effective provisions of Articles 4 and 15 NRR, they should thus set aside the national rules that are in conflict. The exact way in which Member States express these consequences is part of their national procedural autonomy.[378] Member States are in principle only prohibited to apply the conflicting national rules when the concerning EU law provision is applicable.[379] However, in situations regarding nature restoration measures for the areas falling within the scope of the NRR, the NRR will presumably always be applicable, which means that conflicting national rules may no longer be applied.

[373] Jans and Verhoeven (n 21) 91; Jans and Vedder (n 83) 192.
[374] Jans and Verhoeven (n 21) 91-92; Jans and Vedder (n 83) 210.
[375] Verhoeven and Jans (n 25) 63 and 110; Jans and Vedder (n 83) 207-208.
[376] Verhoeven and Jans (n 25) 76.
[377] ibid 110.
[378] ibid 111.
[379] *Simmenthal* (n 161) para 24; *Popławski II* (n 161) para 58; European Union (n 155); ibid.

4.2.4.2 Commands and Injunctions

Secondly, there are directly effective European provisions based on which the national judge can impose a specific command or injunction on the Member State.[380] This becomes clear, for example, from the earlier-mentioned *Janecek* case, from which follows that individuals should be able to claim such an action plan in the light of the Air Quality Directive from their Member States, when they fail to provide such a plan.[381] In earlier case-law, the CJEU had already applied the obligation for national authorities to take all measures needed to enforce directly effective EU law provisions to the EIA Directive.[382] In the *Wells* case, the CJEU determined that if no environmental impact assessment had been made for a project while this assessment was in fact obliged by the EIA Directive, sufficient remedies to fix this failure should be provided.[383] Such remedies should be determined by the national courts and may include the revocation or suspension of the project.[384] The CJEU has further established this line of reasoning in subsequent case-law. In the *ClientEarth* case, the CJEU repeated the possibility for individuals to command an action plan of Member States based on the Air Quality Directive via the mechanism of direct effect.[385] Based on the principle of effective judicial protection, the national court should be able to take all necessary measures needed to enforce directly effective EU law provisions, such as the provisions of the Air Quality Directive, including an order to the national authority to draw up an air quality plan based on this Directive.[386] In principle, the CJEU determined that the concrete content of the action plan is up to the Member States to decide, so that individuals cannot claim specific measures for the plans.[387] Following from the earlier-mentioned *Kraaijeveld* case, the national courts still have to apply the legality review and assess for these specific measures whether the Member States stayed within the limits of their discretion when an individual asks them to do so.[388] The CJEU referred to the possibility for individuals to claim an air quality plan again in the *JP* case, while the applicant appealed to the mechanism of State liability and the question of direct effect was not even at hand.[389]

Based on this case-law, the CJEU seems to hint towards the remedy of a specific command or injunction within the mechanism of direct effect as a judicial remedy regarding the

[380] See for example: *Janecek* (n 28); *ClientEarth* (n 28); *JP* (n 31); Jans and Vedder (n 83) 209.
[381] *Janecek* (n 28) paras 35-39.
[382] *Wells* (n 54) para 65.
[383] ibid para 68.
[384] ibid para 69.
[385] *ClientEarth* (n 28) para 56.
[386] ibid para 58.
[387] ibid para 45.
[388] ibid para 46.
[389] *JP* (n 31) paras 59-60.

obligation of drawing up these types of plans. If we apply this case-law to Articles 4 and 15 NRR, it means that individuals can in principle command Member States to adopt a national restoration plan and that national courts can assess whether the States stayed within the limits of their discretion regarding the content of this plan. The content of the plan might to some extent even be filled in in "extreme cases" in which certain measures have to be taken in order to achieve the obligations from Article 4, as explained in paragraph 4.2.3.2.

4.2.4.3 Judicial Execution of Verdicts

Lastly, in some situations the national judge can or even should execute his judgment himself, when the national authority has failed to do so.[390] In the *Torubarov* case of 2019, the CJEU determined that under certain circumstances – in this case it concerned an asylum situation – the national judge should have this power in order to comply with the principle of effective judicial protection laid down in Article 47 of the EU Charter.[391] This relates to the earlier *Toma* case of 2016, in which the CJEU determined that in order to fulfil the requirement of access to justice, following from the principle of effective judicial protection, binding judgments should be executed.[392] According to the CJEU (and the European Court of Human Rights), the execution of judgments is an important part of the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights.[393] In *Torubarov*, the CJEU came to the conclusion that the national rule at hand violated Article 47 of the EU Charter, which corresponds with Article 6 ECHR.[394] The CJEU specifically indicated "that Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law", from which can be concluded that the Article is directly effective and extra rules on effective judicial protection of additional European legislation are not necessary in order to establish the possibility of judicial execution of verdicts.[395] *Torubarov* concerned the application of international protection based on the Hungarian Law on the right to asylum.[396] The national asylum authority rejected Torubarov's application three times, of which two were after the rejection by the Hungarian national court had

[390] See for example: Verhoeven and Widdershoven (n 17) 250-251.
[391] Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* (European Court of Justice Grand Chamber 29 July 2019), paras 73-74.
[392] Case C-205/15 *Direcția Generală Regională a Finanțelor Publice Brașov v Vasile Toma en Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (European Court of Justice Second Chamber 30 June 2016), paras 40 and 43; in the *Torubarov* case the CJEU explicitly refers to this ruling of the *Toma* case: ibid para 57.
[393] *Toma* (n 392) para 43.
[394] *Torubarov* (n 391) paras 72-74.
[395] ibid para 56.
[396] ibid para 24.

been annulled.[397] Under Hungarian law, the national court could not change an administrative decision regarding international protection.[398] The applicable EU Directive on international protection however did oblige Member States to ensure an effective remedy before a judicial body against such decisions.[399] Accordingly, the CJEU determined that national courts should in fact have the power to change these decisions to guarantee the individual's rights based on Article 47 of the EU Charter and to provide sufficient execution of binding verdicts.[400] Examples of such execution could for example be the imposition of a penalty payment on the administrative authority in case of non-compliance with the judicial verdict or even the imposition of coercive detention.[401]

The CJEU introduced the remedy of judicial execution of verdicts rather recently in the *Torubarov* case. The possibility of such remedies is therefore still in development within the CJEU's case-law and it would be too forward to draw firm conclusions based on it for this research. However, the CJEU made the general statement first in the *Toma* case and later again in the *Torubarov* case that the execution of a verdict is a necessary condition to guarantee the right to an effective remedy, regardless of the specific content of the judgement and that "the execution of a judgment must [...] be regarded as an integral part of the 'trial'". [402] In *Torubarov* the CJEU added to this the general rule that the national judge should have the power to take a decision that is different from the decision made by the administrative authority if this is necessary to enforce an directly effective EU law provision.[403] From the general wording of these rules, we may conclude that the mechanism of judicial execution of verdicts is not just reserved for asylum cases like the *Torubarov* case but should also be applied to other cases in which a directly effective EU law provision is at stake, such as environmental cases. This idea is confirmed by the *Deutsche Umwelthilfe* case, in which the CJEU applied the mechanism to an environmental matter shortly after the *Torubarov* case.[404] In this case, the German federal state Bavaria refused to comply with directly effective provisions of the Air Quality Directive to draw up sufficient action plans, even though the German court had imposed multiple fines on the state.[405]

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[397] ibid paras 25-31.
[398] ibid paras 20 and 33.
[399] ibid para 51.
[400] ibid para 74.
[401] Verhoeven and Widdershoven (n 17) 251; see in this regard for example the decision of the Dutch Council of State to declare the temporary Dutch law on the suspension of fines in asylum matters: ABRvS 30 November 2022 ECLI:NL:RVS:2022:3353 *AB* 2023/60; case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern (Deutsche Umwelthilfe I)* (European Court of Justice Grand Chamber, 19 December 2019) para 52.
[402] *Toma* (n 392) para 43; *Torubarov* (n 391) para 57.
[403] *Torubarov* (n 391) para 73.
[404] *Deutsche Umwelthilfe I* (n 401) para 35.
[405] ibid paras 16-19.

The question was therefore whether the remedy of coercive detention should be used against persons within the authority of Bavaria.[406] The CJEU repeated its rule from *Torubarov*, stating that the national court should have the power to execute a verdict in order to comply with Article 47 of the EU Charter.[407] In this light, the national court is according to the CJEU required to apply the instrument coercive detention in case of non-compliance with a directly effective EU law provision – such as the provisions of the Air Quality Directive at hand – as long as the conditions of Article 52(1) of the EU Charter are fulfilled.[408] These conditions need to be fulfilled in order to legitimately justify the limitation of the right to liberty as laid down in Article 6 of the Charter.[409] Interestingly, the CJEU also explicitly referred to the mechanism of State liability in case of damage of individuals caused by a violation of EU law by a Member State, while three years later, it would rule in the *JP* case that a violation of the Air Quality Directive did not fulfil the conditions of State liability.[410]

For Articles 4 and 15 NRR the analogous application of the CJEU's ruling in the *Torubarov* and the *Deutsche Umwelthilfe* cases would mean the following. Insofar the obligations to take measures to fulfil the targets and the non-deterioration requirements of Article 4 have direct effect, national courts should execute judgments regarding these provisions themselves, if the national authority fails to do so. If national authorities would still fail to comply with the obligation to draw up a restoration plan based on Article 15 NRR or to include – in extreme situations – the measures that are absolutely necessary to take in order to achieve the targets obliged by Article 4 NRR after they are commanded to do so, the national court should impose further remedies to guarantee the execution of this plan. Based on the national procedural autonomy, national courts are free in determining the specific remedies they apply in these cases, such as the imposition of a penalty payment or coercive detention on the administrative authority.[411] Examples of such remedies (under Dutch law) are addressed in chapter 6 of this research.

[406] ibid para 28.
[407] ibid para 35.
[408] ibid para 52.
[409] ibid para 44.
[410] ibid para 54; *JP* (n 31).
[411] Verhoeven and Widdershoven (n 17) 251; *Deutsche Umwelthilfe I* (n 401) para 52.

4.3 European State Liability Doctrine

4.3.1 European Mechanism of State Liability

Next to the mechanisms of direct effect and consistent interpretation, the third limb that can be distinguished from the European enforcement principles is the mechanism of State liability. As mentioned in chapter 1 of this research, the CJEU introduced this doctrine in the *Francovich* case and further developed it in cases such as *Brasserie du Pêcheur and Factortame* and *Dillenkofer*, based on the principles of effectiveness and effective judicial protection.[412] In the earlier-mentioned *Texel* case, the CJEU explicitly stated the possibility to apply the mechanism of State liability in a case in which a provision of a Regulation was violated.[413]

While direct effect, consistent interpretation and State liability are all types of the application of European law within the national legal orders, there is an important difference between the first two and the last.[414] Where direct effect and consistent interpretation play a role from the beginning and during the entire application process of the European law at hand, State liability plays a role after the (wrongful) application of this European law.[415] The mechanisms of direct effect and State liability are two on itself standing mechanisms of the enforcement of EU law.[416] It is possible that a Member State violates a provision that has direct effect, to which provision an individual can directly appeal before their national court and at the same time ask for compensation for the damage caused by the violation.[417] It is also possible that a provision has direct effect but a violation thereof cannot lead to State liability or vice versa.[418]

The European State liability doctrine is a form of minimum harmonisation.[419] This became clear in *Brasserie du Pêcheur*, where the CJEU stated that liability is at least established when the EU's conditions for liability are fulfilled, "although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law".[420] That means that the national State liability doctrines of Member States can offer more protection to individuals claiming compensation, even when EU law is at stake.

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[412] *Francovich* (n 30) para 32; *Brasserie du Pêcheur* (n 30) para 52; *Dillenkofer* (n 30); Jans and Duijkersloot (n 22) 439.
[413] *Texel* (n 307) para 66.
[414] Duijkersloot, Widdershoven and Jans (n 22) 433.
[415] ibid.
[416] ibid 437.
[417] Jans and Duijkersloot (n 22) 442.
[418] Duijkersloot, Widdershoven and Jans (n 22) 443; Jans and Vedder (n 83) 222; SW Haket, 'JP: Neemt het Hof van Justitie rechten van particulieren serieus?' (2023) 5/6 Nederlands tijdschrift voor Europees recht 109 (note) 109.
[419] Duijkersloot, Widdershoven and Jans (n 22) 442.
[420] *Brasserie du Pêcheur* (n 30) para 66.

4.3.2 Admissibility

The question of who could appeal to the mechanism of State liability is inherent to one of the three material conditions for a successful appeal to State liability. These material conditions are addressed in paragraph 4.3.3 below, but because of its relevance for the admissibility the "*Schutznorm*" or "relativity requirement" is already briefly highlighted in this paragraph. State liability can only be accepted when the violated provision intends to confer rights on individuals.[421] From this condition follows that the group of possible admissible parties in State liability cases are "individuals". This may concern private persons or other legal persons.[422] When these parties fulfil the relativity requirement forms a material question regarding the grounds of the claim and is therefore explained more in-depth in the next paragraph. In the light of the admissibility, it is relevant to remark this group of private persons and parties as possible admissible parties.

The relativity requirement entails that there should be a clear connection between the violation by the Member State and a personal right of the claimant. Since NGOs usually do not enjoy such personal, individual rights, they are most likely not admissible in a State liability case under the European doctrine.[423] The unsuitability of this European State liability doctrine for NGOs to base a claim on in environmental cases – such as possible cases regarding the NRR – also becomes clear from the nature of the possible remedies within the doctrine. This is addressed further in paragraph 4.3.4.

4.3.3 Norms

The question to what extent the European State liability doctrine could be a suitable mechanism in case of violations of for example Articles 4 and 15 of the NRR by a Member State firstly depends on the question whether such violations could establish State liability. The CJEU clearly formulated the following three conditions for State liability in the *Dillenkofer* case: (i) the violated norm intends to confer rights on individuals; (ii) the violation is sufficiently serious; and (iii) there is a direct causal link between the violation and the damage of the injured party.[424] The fulfilment of these three conditions is sufficient to establish liability for the violation of an EU law provision

[421] *Francovich* (n 30) para 40; Jans and Duijkersloot (n 22) 451; Duijkersloot, Widdershoven and Jans (n 22) 443.
[422] Duijkersloot, Widdershoven and Jans (n 22) 443; see for an example of an admissible legal person: case C-445/06 *Danske Slagterier v Bundesrepublik Deutschland* [2009] ECR I-02119, para 11.
[423] Hedemann-Robinson (n 24) 358.
[424] *Dillenkofer* (n 30) para 21; Jans and Duijkersloot (n 22) 44.

by a Member State.[425] The European conditions for State liability are influenced by the national State liability doctrines of the Member States. Based on Article 340, second paragraph TFEU the non-contractual liability of EU institutions should be "in accordance with the general principles common to the laws of the Member States".[426] This requirement can be analogously applied to the European State liability doctrine, since the same conditions apply to both liability doctrines.[427] In *Brasserie du Pêcheur*, the CJEU specifically linked both doctrines to each other by referring to the Treaty basis of the non-contractual liability of EU institutions in relation to State liability.[428]

4.3.3.1 Intending to Confer Rights on Individuals

With regard to the first condition, the relativity requirement, some inconsistency can be distinguished within the CJEU's case-law.[429] In a lot of State liability cases, it will be clear whether the violated norm is intended to confer rights on individuals, for example when the violated norm relates directly to an individual's payment or contract or on the other hand when the norm solely addresses the relation between Member States and EU institutions.[430] In some cases however, the fulfilment of the relativity requirement will be less clear, for example when the protection of individuals' rights is not the main focus of a provision but a side-effect.[431] In these cases, the somewhat inconsistent application by the CJEU becomes apparent, where it sometimes applies the requirement in a strict way – for example in *Peter Paul* – and sometimes in a more lenient way – for example in *Danske Slagterier* and *Leth*.[432] With regard to European environmental law in general, it seems as if the relativity requirement is quite hard to fulfil.[433] The reason behind this is

[425] Duijkersloot, Widdershoven and Jans (n 22) 440.
[426] Treaty on the Functioning of the European Union, art 340.
[427] *Brasserie du Pêcheur* (n 30) para 53; P Craig and G de Búrca, *EU Law. Texts, Cases and Materials* (7th edn, Oxford University Press 2020) 294; Duijkersloot, Widdershoven and Jans (n 22) 433; W van Gerven, 'Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (1994) 1 Maastricht Journal of European and Comparative law 6, 35; I Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests' in SW Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 378-379; Jans and Vedder (n 83) 219.
[428] *Brasserie du Pêcheur* (n 30) para 53 (note that in this case the applicable article was Article 215 of the Treaty Establishing the European Community instead of Article 340 of the Treaty on the Functioning of the European Union).
[429] Jans and Duijkersloot (n 22) 453.
[430] ibid 453-454; Duijkersloot, Widdershoven and Jans (n 22) 444; see for example: *Francovich* (n 30); *Dillenkofer* (n 30); case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-03325.
[431] Jans and Duijkersloot (n 22) 455; Duijkersloot, Widdershoven and Jans (n 22) 444.
[432] Jans and Duijkersloot (n 22) 455-458; Duijkersloot, Widdershoven and Jans (n 22) 443-446; Haket (n 418) 111; case C-222/02 *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland* [2004] ECR I-09425; *Danske Slagterier* (n 422); case C-420/11 *Jutta Leth v Republik Österreich, Land Niederösterreich* (European Court of Justice Fourth Chamber, 14 March 2013).
[433] See for example: Jans and Vedder (n 83) 223; Hedemann-Robinson (n 24) 348.

that most environmental law has a general aim of protecting the environment or the public in a broad sense, instead of the aim to protect specific individuals.[434] The EIA Directive seems to be an exception, since it addresses the environmental effects of public and private projects and includes "the public" in this assessment as well.[435] In the *Leth* case for example, the CJEU established that the EIA Directive does protect the rights of individuals when their monetary damage is a direct consequence of the environmental effects that fall within the scope of this Directive.[436] The CJEU confirmed the possibility for individuals to claim compensation in case of a violation of the EIA Directive by a Member State in the *Wells* case.[437]

However, Articles 4 and 15 of the NRR seem to protect the environment in general rather than individuals, similar to for example the Habitats and Birds Directives which focus on the protection and improvement of certain habitats and the biodiversity of certain species.[438] The focus of the obliged measures and targets in Article 4 NRR is on the restoration of certain terrestrial, coastal and freshwater habitats and the focus of Article 15 is on establishing a plan to make the obligations of Article 4 (and other articles) effective. It is therefore likely that the CJEU would assess the possible relativity of these provisions in State liability cases in a similar way as the provisions of the Air Quality Directive, which also aims "to avoid, prevent or reduce harmful effects on human health and the environment as a whole".[439] An important case regarding this Directive in which the CJEU indeed chose for a strict application of the relativity requirement is the *JP* case.[440] In this case, JP claimed compensation for his damage caused by air pollution as a consequence of the French State violating the Air Quality Directive.[441] According to the CJEU, the concerning Articles 13 and 23 of the Air Quality Directive did not intend to confer rights on individuals.[442] Although the obligation to draw up action plans following from this Directive has direct effect,[443] the CJEU determined in the *JP* case that the Air Quality Directive does not aim to protect individuals specifically but the human health and environment in general.[444] From this

[434] Jans and Vedder (n 83) 223; Hedemann-Robinson (n 24) 348.
[435] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1, arts 1(1) and 6(2); Hedemann-Robinson (n 24) 349.
[436] *Leth* (n 432) para 36.
[437] *Wells* (n 54) para 69; Ryall (n 200) 185.
[438] Dir 92/43/EEC, art 2; Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20/7, art 1; C van Dam, *Aansprakelijkheidsrecht* (3rd edn, Boom Juridisch 2020) 407-408.
[439] Dir 2008/50/EC, art 1(1).
[440] *JP* (n 31).
[441] ibid para 29.
[442] ibid para 56.
[443] *Janecek* (n 28) paras 35-36 and 38; Jans and Vedder (n 83) 223.
[444] *JP* (n 31) para 55; Jans and Vedder (n 83) 223; Haket (n 418) 110.

case-law, it can be concluded that according to the CJEU these types of (environmental) EU legislation are easier to enforce via the mechanism of direct effect than via State liability.[445] In some specific instances, mainly in the case of pecuniary damage, there might be a possibility that the possible side-effects that improper application of the NRR's rules would have for individuals are enough to establish individual rights, similar to the EIA Directive. Since the NRR does not seem to include individuals in any of its obligations, the idea that these possible side-effects are not protected directly enough by Articles 4 and 15 NRR to establish the conferment of rights on individuals is however more likely, in line with the CJEU's case-law on the Air Quality Directive.

4.3.3.2 Sufficiently Serious Violation

The application of the second State liability condition of a sufficiently serious violation depends on the discretion Member States have in applying the concerning EU law provision.[446] When they have no discretion, the sole violation of the provision already establishes a sufficiently serious violation. When Member States do have discretion, they should have violated the limits of this discretion "manifestly and gravely" in order for the violation to be sufficiently serious.[447] This depends on whether the Member State could have in good faith believed that it did not violate EU law with its action.[448] Furthermore, factors like the intentional or involuntary causation of damage and the excusability of the violation play a role in determining whether the violation is manifest and grave.[449] Violations are in any case sufficiently serious when the violation is already established by the CJEU in a preliminary procedure or by settled case-law and the Member State still does not make an end to it.[450] The question whether Member States have discretion is in some cases hard to determine.[451] The degree of clarity of the concerning provision should indicate this.[452] When the degree of discretion is not entirely clear, the "good faith yardstick" can be applied as well.[453]

Regarding European environmental legislation in general, it is hard to determine what type of violation is sufficiently serious.[454] With regard to Article 15, a violation could be established

[445] Jans and Vedder (n 83) 224.
[446] *Dillenkofer* (n 30) para 25; Duijkersloot, Widdershoven and Jans (n 22) 441; Jans and Duijkersloot (n 22) 447.
[447] *Dillenkofer* (n 30) para 25; Duijkersloot, Widdershoven and Jans (n 22) 441; Jans and Duijkersloot (n 22) 447.
[448] Duijkersloot, Widdershoven and Jans (n 22) 441; Jans and Duijkersloot (n 22) 449.
[449] Duijkersloot, Widdershoven and Jans (n 22) 441; Jans and Duijkersloot (n 22) 447.
[450] Duijkersloot, Widdershoven and Jans (n 22) 441.
[451] ibid 442.
[452] ibid; Jans and Duijkersloot (n 22) 447.
[453] Duijkersloot, Widdershoven and Jans (n 22) 442.
[454] Hedemann-Robinson (n 24) 354.

when a Member States neglects to draw up a restoration plan, as this obligation follows quite clearly from the Regulation.[455] If the general obligation to draw up this plan indeed – as argued in paragraph 4.2.3.2 – leaves little to no discretion to Member States, the mere violation of the obligation would lead to a sufficiently serious violation of EU law.[456] In the *Papier Mettler* case, the CJEU for example determined with regard to the Packaging and Packaging Waste Directive that the obligation following from this Directive for Member States not to prohibit packaging that is in line with the Directive does not leave discretion to the Member States so that the mere violation of this obligation would lead to a sufficiently serious violation on which State liability could be established.[457] With regard to Article 4 NRR, the first question here would be when the Article would be violated in the first place. Since discretion is left to Member States in determining sufficient measures that would achieve the targets of "good condition" and "sufficient quality and quantity", it could be hard to prove that a Member State violated these obligations.[458] A similar challenge occurs with regard to the content of the restoration plan in Article 15 NRR, since this content is very much up to Member States to fill in. Situations in which it is clear that the Member State has taken insufficient measures to at least improve the concerning habitats or to prevent them from significant deterioration could in line with the *Papier Mettler* case very well lead to a sufficiently serious breach of these Articles, especially when the CJEU eventually addresses this in its case-law. In situations in which Member States have more discretion, it might be hard to determine when Articles 4 and 15 are manifestly and gravely violated. This could be specified by either the CJEU or the national court. For example, as becomes clear in chapter 6, the Dutch State liability doctrine applies a less strict norm regarding the sufficient serious breach than the European doctrine.[459]

4.3.3.3 Direct Causal Link

The third and final condition requires a causal link between the violation and the damage of the injured party. This causality should be "sufficiently direct".[460] The CJEU in principle leaves it up to the national courts to assess whether this condition is fulfilled, as it explicitly stated in *Brasserie du Pêcheur*.[461] However, in some cases the CJEU has addressed the causality question itself as

[455] Reg (EU) 2024/1911, arts 14(1) and 15(1); Jans and Vedder (n 83) 220.
[456] *Dillenkofer* (n 30) para 25; Duijkersloot, Widdershoven and Jans (n 22) 441; Jans and Duijkersloot (n 22) 447; Jans and Vedder (n 83) 221.
[457] *Papier Mettler* (n 54) paras 78-79 and 89.
[458] Reg (EU) 2024/1911, art 4(17).
[459] HR 18 September 2015 ECLI:NL:HR:2015:2722 *NJB* 2015/1684 (*De Staat der Nederlanden v Habing*), para 3.5.2; Van Dam (n 438) 409.
[460] Duijkersloot, Widdershoven and Jans (n 22) 448; Jans and Duijkersloot (n 22) 460-461.
[461] *Brasserie du Pêcheur* (n 30) para 65.

well.[462] An important example of such a case is the earlier-mentioned *Leth* case. Where, as pointed out above, the CJEU applied the relativity requirement in a lenient way in this case, it connected stricter criterions to the causality requirement.[463] According to the CJEU, the question whether there exists a causal link depends on the nature of the violated EU law provision.[464] Since the violated EIA Directive in *Leth* "does not lay down the substantive rules" but only "prescribes an assessment of the environmental impact of a public or private project", it was according to the CJEU likely that Leth's damage was not directly caused by the Member State's violation of the Directive, but could have occurred anyways.[465] From this case it could be concluded that the CJEU only establishes a direct causal link when the violated EU law provision includes substantive rules.[466]

The *Leth* case highlights an important challenge in proving causality in environmental cases: the so-called "multiple source" cases.[467] In these cases, there are multiple possible reasons that could have caused the damage, which makes it hard to prove direct causality between the violation and the damage.[468] This problem often occurs in environmental cases, which are characterised by a lack of scientific evidence in the causation of damage.[469] If we look at Articles 4 and 15 of the NRR, the question whether causality could be established would be very much dependent on the specific case at hand. There are situations imaginable in which the violation of the substantive rules of Article 4 NRR directly lead to damage of individuals, for example when the individual lives in or near a habitat that falls under the scope of the NRR. However, it is also likely that the challenge of the multiple sources cases will lead to problems with regard to the NRR because damage to nature and the environment is usually not easily connected to one cause. The successfulness of the fulfilment of the causality requirement will therefore very much depend on the strictness of the application of this requirement within the national legal orders of Member States. In that light, in the *Leth* case the CJEU pointed again to the possibility for Member States to apply more generous rules regarding State liability in general and regarding the causality requirement in particular.[470]

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[462] Duijkersloot, Widdershoven and Jans (n 22) 448; Jans and Duijkersloot (n 22) 461.
[463] *Leth* (n 432) para 46.
[464] ibid.
[465] ibid; Jans and Duijkersloot (n 22) 463.
[466] Duijkersloot, Widdershoven and Jans (n 22) 448.
[467] Hedemann-Robinson (n 24) 355; E Bauw and EHP Brans, *Milieuprivaatrecht (Monografieën Privaatrecht nr. 21)* (Wolters Kluwer 2023) para 6.2.3.
[468] Hedemann-Robinson (n 24) 355; Bauw and Brans (n 467) para 6.2.3.
[469] Hedemann-Robinson (n 24) 355; Bauw and Brans (n 467) para 6.2.3.
[470] *Leth* (n 432) para 47.

4.3.4 Remedies

There seem to be quite some obstacles that could occur in the establishment of State liability in case of a violation of Articles 4 and 15 of the NRR on the European level.[471] Even if the liability conditions could be fulfilled, the second step would be to assess the suitability of the possible remedies individuals could claim. When all three conditions of paragraph 4.3.3 are fulfilled, the concerning Member State is liable towards the concerning individual. The consequence of this State liability is that the individual is entitled to make a claim to monetary compensation for their damage.[472] The extent of the compensation is in principle up to Member States to determine.[473] This is in line with the principle of procedural autonomy and matches the character of minimum harmonisation of the European State liability doctrine. Of course, Member States should take into account the European enforcement principles, in particular the principles of effectiveness and equivalence, here as well.[474] The CJEU's general rule for the determination of the compensation is that it should "ensure the effective protection for [the individuals'] rights".[475] Here, the principle of effective judicial protection comes up again. Next to monetary compensation, no other clear types of remedies follow from the CJEU's case-law on State liability.[476] For example, European State liability cannot give cause for an injunctive relief.[477]

This remedy of monetary compensation is only suitable to a certain extent in cases regarding Articles 4 and 15 NRR. Of course, such compensation for individuals who have been negatively affected in their financial means by the damage offers a good and suitable solution. However, in cases of environmental damage a command to stop the violation causing the damage and to restore the physical damage that has already been done is often what is actually necessary.[478] Given the focus of the NRR on the restoration of, for example, terrestrial, coastal and freshwater ecosystems, such commands would be likely to be suitable in case of a violation of this Regulation as well. Furthermore, the possible monetary compensation is closely connected to the needs of the individual.[479] Damage should be translated to individual loss in

[471] Jans and Vedder (n 83) 227.
[472] *Francovich* (n 30) para 35; Duijkersloot, Widdershoven and Jans (n 22) 449; Hedemann-Robinson (n 24) 357.
[473] *Brasserie du Pêcheur* (n 30) para 83; Duijkersloot, Widdershoven and Jans (n 22) 449; Jans and Duijkersloot (n 22) 464.
[474] *Brasserie du Pêcheur* (n 30) para 83; Duijkersloot, Widdershoven and Jans (n 22) 449; Jans and Duijkersloot (n 22) 464.
[475] *Brasserie du Pêcheur* (n 30) para 82.
[476] Duijkersloot, Widdershoven and Jans (n 22) 449; Jans and Duijkersloot (n 22) 464.
[477] Duijkersloot, Widdershoven and Jans (n 22) 449; Hedemann-Robinson (n 24) 357-358.
[478] Hedemann-Robinson (n 24) 357.
[479] ibid 357-358.

order to be compensated.[480] This individual character of the remedy increases the obstacles for NGOs in making a successful claim regarding more general environmental damage under the European State liability doctrine, while environmental NGOs are founded, amongst others, to enforce environmental rules in the interest of the public and therefore suited parties for making such claims.[481]

The strict connection to monetary compensation in an individual case thus challenges the European State liability doctrine as a suitable mechanism for damage caused by violations of Articles 4 and 15 of the NRR.[482] However, it should be noted that the remedy of an injunctive relief is possible under the mechanism of direct effect in situations where the national judge can impose a specific command on the Member State, as explained in paragraph 4.2.4.2.[483] On the European level the mechanism of direct effect therefore seems to be more suitable in cases of environmental damage. That might be a reason for the CJEU to hint towards this possibility in the *JP* case on the Air Quality Directive. Given the minimum harmonised character of the European State liability doctrine, Member States are allowed to provide other remedies on the national level, as long as they fulfil the European enforcement principles.

4.4 Conclusion

The European level provides different mechanisms that could possibly contribute to the enforcement of Articles 4 and 15 of the NRR. The question is to what extent these mechanisms lead to sufficient remedies which individuals and NGOs can invoke in line with the European enforcement principles. First, Article 4 NRR could have direct effect in extreme situations in which there are specific measures that have to be taken in order to achieve an improvement of a habitat or to prevent significant deterioration. For other situations, Article 4 seems to leave too much discretion to Member States to be directly effective. National courts should then still assess whether Member States stayed within the limits of this discretion. The general obligation of Article 15 NRR for Member States to draw up restoration plans could be sufficiently precise and unconditional and thus have direct effect. This would be in line with the CJEU's case-law in cases like *Janecek*, *ClientEarth*, *JP* and *Wells*. However, since the content of these plans again leaves much discretion to Member States, the provisions on this content will probably not have direct effect, apart from the situations in which specific measures are absolutely necessary. The

[480] ibid.
[481] Ibid 358.
[482] ibid 357-358.
[483] Duijkersloot, Widdershoven and Jans (n 22) 449.

obligation for a Member State to draw up restoration plans should in some cases be supplemented by direct execution of such a verdict by the national court itself, for example by imposing a penalty payment or even coercive detention. Articles 7 and 9 of the Aarhus Convention could add additional possibilities regarding the access to a court in cases regarding Article 15 NRR, but the applicability of the Aarhus Convention to the NRR is not entirely clear yet. If this would be the case however, parties with sufficient interest and environmental NGOs in particular should under certain circumstances also be able to claim remedies like an injunctive relief in case of a violation of Article 15 NRR in combination with the Aarhus Convention.

Second, the mechanism of State liability might not be a very suitable mechanism to enforce European environmental law, including Articles 4 and 15 of the NRR. The European State liability conditions are hard to fulfil in relation to these Articles, because they do not aim to confer rights on individuals, their discretion makes it hard to establish a sufficient serious violation and causation difficulties such as the multiple sources problem are likely to occur in these types of cases. Even if the conditions could be fulfilled, the remedies that the European State liability doctrine provides will often not be suitable. In case of natural damage, parties often would want to claim an injunctive relief instead of monetary compensation. The mechanism's focus on the individual party furthermore limits the role of environmental NGOs. However, since the mechanism is minimum harmonisation, these obstacles could prove to be less of a problem on the national level.

In conclusion, the possible remedies for individuals and NGOs on the European level in case of a violation of Articles 4 and 15 of the NRR seem to be quite limited. It will probably only be possible to claim a general restoration plan, maybe with concrete measures in some specific, extreme circumstances. Claiming monetary compensation will also be very hard under the European conditions, while – although an injunctive relief might often be more suitable in case of natural damage – individuals could under specific circumstances become victims of monetary damage caused by environmental damage. These limited possibilities to invoke remedies on the European level questions whether the available mechanisms fulfil the European enforcement principles. In particular, they seem to be at odds with the principle of effective judicial protection of Article 47 of the EU Charter and Article 19(1) TEU and the *Rewe* principle of effectiveness, which require effective remedies for individuals and NGOs to enforce EU law and end and restore violations of EU law in general. The next chapter shows to what extent the ECHR's mechanisms could overcome these gaps left by the European mechanisms.

Chapter 5. European Convention on Human Rights Level

5.1 Introduction

Now that it is clear that the mechanisms that are available on the European level might not provide sufficient remedies for individuals and NGOs to invoke in case of a violation of Articles 4 and 15 of the Nature Restoration Regulation, the next question is whether the European Convention on Human Rights requires sufficient remedies in the light of the European principles of enforcement as set forth in the normative framework.

The ECHR does not include a specific environmental human right.[484] However, Article 2 on the right to life and Article 8 on the right to respect for private and family life are being invoked often by individuals and NGOs before the European Court on Human Rights with regard to possible environmental negligence by State Parties to the Convention.[485] If such negligence would lead to both a violation of the NRR and of these or other ECHR articles, the mechanisms providing remedies for the enforcement of the ECHR could also contribute to the enforcement of the NRR. The first remedy individuals and NGOs can receive in case of a possible violation of ECHR rights is just satisfaction. The second remedy includes that the ECtHR may indicate or impose consequential orders on a State to guarantee sufficient execution of its judgments. I first address the possible admissible applicants and the existing norms for claims before the ECtHR and apply these to Articles 4 and 15 of the NRR (paragraph 5.2). I then address how the possible remedies of just satisfaction and consequential orders should be interpreted and how they can be applied to Articles 4 and 15 of the NRR (paragraph 5.3). Based on this evaluation I draw an interim conclusion on the question to what extent the possible remedies of the ECHR for the enforcement of Articles 4 and 15 NRR fulfil the European enforcement principles (paragraph 5.4).

[484] Heri (n 33) 927; Hedemann-Robinson (n 24) 351.
[485] Heri (n 33) 926.

5.2 Claims before the European Court of Human Rights

5.2.1 Mechanisms of Just Satisfaction and Consequential Orders

It is in principle up to the State Parties to provide the enforcement of ECHR rights and the execution of judgments by the ECtHR.[486] Article 19 of the Convention introduces an exception to this starting point by establishing the ECtHR with the function to guarantee the State Parties' compliance with the Convention.[487] Article 34 of the Convention gives individuals and NGOs the right to make an individual or collective claim before the Court against a State party.[488] This right is considered a "fundamental [guarantee] of the effectiveness of the Convention system of human rights protection".[489]

In addition to the State Parties' execution of the ECtHR's judgments, the Court can provide two types of remedies itself. In the first place, the ECtHR can offer just satisfaction based on Article 41 of the Convention to individuals and NGOs when the concerning State fails to adequately compensate the damage of individuals or NGOs caused by an ECHR violation.[490] In the second place, the ECtHR can provide so-called "consequential orders" in specific cases.[491] This remedy follows from Article 46, which gives the Court the possibility to indicate the concrete measures States should take in order to "help" them comply with the Court's judgments.[492] Although States are in principle free to determine in what way they end these human rights violations, there are situations in which they might need assistance in this according to the ECtHR, which justifies further intervention by the ECtHR itself.[493]

In evaluating the suitability of the mechanism of a claim before the ECtHR in providing an effective remedy in case of a violation of Articles 4 and 15 NRR, I firstly assess whether individuals and/or NGOs could be admissible and secondly whether they could fulfil the conditions for a successful claim.

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[486] European Convention on Human Rights, arts 13 and 46; Keller, Heri and Piskóty (n 33) 2.
[487] European Convention on Human Rights, art 19.
[488] ibid art 34.
[489] *Mamatkulov and Askarov v Turkey* App Nos 46827/99 and 46951/99 ECHR 2005-I (ECtHR, 4 February 2005), para 100; Council of Europe (n 39) para 12.
[490] European Convention on Human Rights art 41; Keller, Heri and Piskóty (n 33) 2.
[491] European Convention on Human Rights, art 46; Keller, Heri and Piskóty (n 33) 17.
[492] European Convention on Human Rights, art 46(5); Council of Europe (n 45) para 12; Keller, Heri and Piskóty (n 33) 17.
[493] European Convention on Human Rights, art 46(1) and (5); Council of Europe (n 45) paras 3-5; Keller, Heri and Piskóty (n 33) 3.

5.2.2 Admissibility

The admissibility criteria for claims before the ECtHR are listed in Article 35 of the Convention. These criteria are closely connected to the norms that apply to these claims. In this paragraph I focus on the question of *who* might invoke this mechanism and in the next paragraph I discuss the applicable norms for *how* and *when* the mechanism can be invoked. It is important to note that, in the terminology of the ECHR, non-compliance with these latter norms could also lead to "inadmissibility".

The question of *who* could start a claim before the ECtHR is laid down in Article 34 of the Convention, which regulates the issue of "individual applicants".[494] There are two requirements for becoming an individual applicant in the light of this provision.[495] First, the provision lists three categories of possible applicants, into one of which the applicant should fall. These three categories are the following: (i) (physical) persons; (ii) NGOs; and (iii) groups of individuals. Second, the provision requires applicants to have a so-called "victim status".[496] In principle, applicants should be "directly affected" by the possible human rights violation at hand.[497] In other words, an "*actio popularis*" is not possible before the ECtHR.[498] Both individual measures and broader legislation can directly affect an individual.[499] Applicants may also have an indirect victim status, if, for example, their close family member who was the direct victim has died before bringing their claim before the Court.[500] Finally, applicants may have a potential victim status if they have "reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur".[501]

With regard to environmental and climate claims, the different categories of possible applicants are subjected to different requirements regarding the condition of having a victim status.[502] In the *KlimaSeniorinnen* case, both an environmental NGO and individual persons that were members of this NGO filed a claim before the ECtHR against Switzerland based on Articles 2 and 8 ECHR, regarding the damage the NGO's members suffered because of the consequences of climate change.[503] The ECtHR declared the NGO admissible but the individual persons

[494] European Convention on Human Rights, art 34.
[495] Council of Europe (n 39) para 14.
[496] ibid.
[497] *Tănase v Moldova* App no 7/08 (ECtHR, 27 April 2010), para 104; ibid para 28.
[498] *Tănase* (n 497), para 104.
[499] ibid.
[500] Council of Europe (n 39) paras 31-32.
[501] ibid paras 47-48.
[502] See for example: Martins Pereira (n 32) 582-583.
[503] *KlimaSeniorinnen* (n 55) paras 10-22.

inadmissible in this case, based on the fulfilment of the victim status criteria.[504] According to the ECtHR, individual applicants in climate change cases have to prove that they were "personally and directly affected by the impugned failures" of the concerning State.[505] In order to fulfil this requirement, these failures must: (i) significantly affect the applicant; and (ii) lead to a "pressing need to ensure the applicant's individual protection".[506] According to the Court it is very hard to comply with these criteria.[507] The Court also stated that in environmental cases in general individual applicants must prove that they are personally affected by the environmental damage and that the existence of "general damage" is insufficient.[508] From this case-law it can be concluded that it would be very hard for individuals to be admissible before the ECtHR for possible violations of Articles 4 and 15 of the NRR in combination with a human rights violation.[509] Since Articles 4 and 15 aim to protect the environment in general rather than people individually, it will presumably be impossible for individuals to prove that a violation of these general measures has personally affected them and has led to a need for their personal protection.

In *KlimaSeniorinnen*, the environmental NGO was subjected to less strict criteria than the individual applicants.[510] In the earlier *Yusufeli İlçesini* case, the ECtHR had established for environmental cases in general that NGOs could not have a victim status themselves with regard to, amongst others, Articles 2 and 8 ECHR.[511] In *KlimaSeniorinnen* however, the Court indicated that "special considerations" could still lead to a victim status for an NGO acting on behalf of its members.[512] The Court specifically mentioned that the very strict admissibility criteria that apply to individuals in environmental and climate cases do not apply to NGOs.[513] It acknowledged the important role of NGOs in addressing the tremendous problem of climate change.[514] Furthermore, the ECtHR considered the admissibility of environmental NGOs in environmental and climate cases in line with the broad admissibility possibilities following from the Aarhus Convention for environmental NGOs in such cases.[515] The Court drew a connection between the admissibility of NGOs in climate and environmental cases, in which it seems to apply the less strict admissibility criteria for NGOs in case of the "special considerations" to both climate and

[504] ibid paras 526 and 535.
[505] ibid para 487.
[506] ibid.
[507] ibid para 488; Council of Europe (n 39) para 29.
[508] *KlimaSeniorinnen* (n 55) para 472.
[509] See for example: Martins Pereira (n 32) 585.
[510] ibid 583.
[511] *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v Turkey* App No 37857/14 (ECtHR, 7 December 2012), para 41; *KlimaSeniorinnen* (n 55) para 474.
[512] *KlimaSeniorinnen* (n 55) paras 475-476.
[513] ibid.
[514] ibid para 499.
[515] ibid para 501.

environmental cases.[516] A violation of Articles 4 and 15 NRR might therefore fall within this scope as well.[517] Since the Aarhus Convention aims to guarantee public participation in environmental matters and the ECHR aims to protect human rights, the ECtHR did determine a possible impact of the broad admissibility possibilities for NGOs following from the Aarhus Convention, but also recognised the importance of the conditions before the ECtHR, which still apply in such cases.[518] The NGOs should therefore be qualified to represent the concerning individuals in their environmental and/or climate damage.[519] As discussed in chapters 3 and 4, the Aarhus Convention would presumably provide broad access to courts for environmental NGOs in cases concerning Articles 4 and 15 NRR, at least when their public participation rights regarding the restoration plan are concerned and potentially in broader situations.[520] The ECtHR has confirmed these public participation rights in the context of the ECHR in general in the *KlimaSeniorinnen* case by applying these rights to situations regarding "any imminent threat to human health or the environment".[521] NGOs might thus fulfil the admissibility requirements before the ECtHR more easily than individuals in environmental cases. However, since they should in such cases be representing concerning individuals, they should still fulfil the conditions for a successful claim before the ECtHR, which are addressed in the next paragraph.

5.2.3 Norms

The question of *how* and *when* an applicant may invoke the mechanism of just satisfaction is laid down in Article 35 of the Convention, which regulate the procedural conditions,[522] and in Article 41 of the Convention, which regulates the material conditions. Since not all procedural conditions are relevant for the assessment of a specific NRR claim, I focus on the norms that could be a challenge in cases before the ECtHR regarding the NRR. These include the conditions of a human rights violation, the exhaustion of all domestic remedies and a direct causal link between the violation and the damage of the applicant.

[516] ibid para 491.
[517] For an example of a case in which an NGO was admissible and which concerned possible natural damage, see: *Gorraiz Lizarraga and Others v Spain* App No 62543/00 ECHR 2004-III (ECtHR, 27 April 2004), paras 36-39.
[518] *KlimaSeniorinnen* (n 55) para 501.
[519] ibid para 502.
[520] Aarhus Convention, arts 6, 7 and 9(2)-(3); United Nations Economic Commission for Europe (n 275) 173; Plambeck and Squintani (n 261) 5 and 7; Buijze and Backes (n 263) 123-124.
[521] *KlimaSeniorinnen* (n 55) para 538.
[522] Council of Europe (n 39) paras 106-428.

5.2.3.1 Human Rights Violation

First, Article 41 requires that "there has been a violation of the Convention or the Protocols thereto".[523] The existence of a human rights violation is, of course, a very important condition for a successful case before the ECtHR.[524] The ECtHR has already determined the existence of the violation of a human right in multiple environmental cases.[525] When States do not take sufficient environmental measures while they (should) know that there is a "real and immediate risk" of endangering someone's life, they might violate Article 2 on the right to life.[526] This Article can in this regard put the positive obligations on States to take measures to prevent environmental hazards.[527] For example, the ECtHR established Article 2 violations in *Öneryıldız v. Turkey* and *Budayeva and Others v. Russia* because the concerning States failed to take the necessary and sufficient measures to protect individuals from "dangerous industrial activities" and from mudslides.[528] The environmental hazards should lead to "life-threatening" circumstances in order for Article 2 to be applicable.[529] Next to Article 2, States might violate Article 8 on the right to respect for private and family life when they do not sufficiently protect people from "environmental pollution and natural disasters".[530] For Article 8 to apply, life-threatening circumstances are not required, but the applicant's family and private life should be "clearly affected", which threshold is somewhat lower than that of Article 2.[531] Article 8 can put a positive obligation on States to take measures to prevent environmental hazards as well.[532] For example, the Court found violations of Article 8 in *Brincat and Others v. Malta*, *Dzemyuk v. Ukraine* and *KlimaSeniorinnen* because the concerning States failed to take sufficient measures to protect the applicants from the dangers of being exposed to asbestos, illegally placed a cemetery close to the applicant's home which could have caused the pollution of the drinking water in that area and failed to take sufficient measures for the reduction of greenhouse gas emissions.[533]

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[523] European Convention on Human Rights, art 41; President of the European Court of Human Rights, 'Practice Directions. Just Satisfaction Claims' (*ECHR COE* 2007) <https://www.echr.coe.int/documents/d/echr/pd_satisfaction_claims_eng> last updated 9 June 2022, para 2.
[524] See for example: Martins Pereira (n 32) 579.
[525] Heri (n 33) 932-933.
[526] ibid 932.
[527] EC Gijselaar and BA Kuiper, 'KlimaSeniorinnen: eenzijdige dialoog in de meergelaagde rechtsorde' (2024) 62 Overheid en Privaatrecht (Wolters Kluwer), para 4.4.6.
[528] *Öneryıldız* (n 55) paras 71, 101, 109-110 and 118; *Budayeva and Others v. Russia* App Nos 15339/02 and others (ECtHR, 20 March 2008, extracts), para 158.
[529] *Brincat and Others v. Malta* App Nos 60908/11 and others (ECtHR, 24 July 2014), para 84.
[530] Heri (n 33) 933.
[531] *Brincat* (n 529) para 85.
[532] ibid para 102; *KlimaSeniorinnen* (n 55) para 548; Gijselaar and Kuiper (n 527) para 4.4.
[533] *Brincat* (n 529) paras 104 and 116-117; *Dzemyuk v. Ukraine* App No 42488/02 (ECtHR, 4 September 2014), paras 82-83 and 92; *KlimaSeniorinnen* (n 55) paras 573-574.

However, all this case-law concerned situations in which damage occurred to the direct living environment of the concerning individuals, having concrete effects on the lives of these individuals. The ECtHR has not established a human rights violation in a case that concerned the protection of nature. Damage to nature is the issue of Articles 4 and 15 NRR, since these Articles focus on the restoration of terrestrial, coastal and freshwater ecosystems and not so much on specific living environments of individuals. That means that the habitat in which a State has failed to take the required measures to restore and protect nature must coincide with the living environment of potential applicants and that these applicants should prove that the lack of measures has (also) led to personal damage. Such situations seem to be hardly imaginable. This idea is confirmed by the case of *Athanassoglou and Others v. Switzerland*, in which a nuclear power plant was situated in the living area of the applicants.[534] According to the Court, there was no sufficient connection between this nuclear plant and a violation of the individuals' rights.[535] *Flamenbaum and Others v. France* concerned the extension of an airport in a natural area hosting lots of flora and fauna.[536] According to the ECtHR, the environmental nuisance this airport caused in the natural area did not lead to enough damage for the individuals living in this area in order to establish a violation of Article 8 ECHR.[537] France did not take insufficient measures to limit the nuisance.[538] These cases suggest that, even when people are living in the natural area which is subjected to environmental damage, it is hard to connect natural damage to the violation of human rights. In cases of possible violations of Articles 4 and 15 NRR, applicants would in addition even have to prove that a lack of restoration measures taken by the State has led to such natural and individual damage at the same time, which seems to be a very high threshold that is unlikely to be reached.

Still, there might be situations imaginable in which the failure to take adequate measures to restore nature would lead to a risk to the health or life of individuals, which could potentially establish a human rights violation. After all, the ECtHR is currently developing the applicability of the ECHR rights to environmental and climate issues without the existence of a specific environmental human right.[539] Where this development has already led to such applicability in environmental cases as addressed above, it might also open the door to the applicability of human rights in nature restoration matters in the future. This hypothesis could be substantiated

[534] *Athanassoglou and Others v Switzerland* App No 27644/95 ECHR 2000-IV (ECtHR, 6 April 2000).
[535] ibid para 54.
[536] *Flamenbaum and Others v France* App Nos 3675/04 and 23264/04 (ECtHR, 13 December 2012).
[537] ibid para 152.
[538] ibid paras 153-154.
[539] Council of Europe, 'Factsheet. Environment and the European Convention on Human Rights' (*ECHR COE*) <https://www.echr.coe.int/documents/d/echr/FS_Environment_ENG> accessed 19 May 2025, 1.

by the case of *Gorraiz Lizarraga and Others v. Spain*, which concerned the risk of floodings in a few nature reserves and villages because of a scheduled dam construction.[540] The dam construction could lead to a risk to natural damage and a risk to damage to a living environment at the same time. Although the Court did not find a *violation* of Article 6 ECHR on the right to a fair trial and Article 8 ECHR on the right to private and family life in this case,[541] it did recognise the possibility of the protection of the nature in general and the individual rights in question to coincide.[542] Because of the interrelation between both risks, the Court established that the individuals should be granted the right to a fair trial within the public proceedings regarding the general environmental protection.[543] It must be noted that this example regards a confluence of the natural and individual damage and not an individual human rights violation directly caused by damage to nature. Still, this reasoning could potentially slightly open a door for individuals and/or NGOs to appeal to human rights protection in case of a violation of Articles 4 and 15 NRR as well. However, this would highly depend on the specific habitats in which the Member States will have to take the measures. Since these habitats still have to be indicated by the Member States themselves, not a lot can be said about that yet. At least it should concern habitats that are situated close enough to living environments of individuals – as was the case in the *Gorraiz Lizarraga* case – so that the lack of sufficient measures by the State can lead to damage in both areas. Such situations yet remain hypothetical and are in my opinion not likely to occur regularly. Furthermore, there would in such cases still not be a causation between the natural or environmental damage and the human rights violation, but merely a coincidental correlation. It will therefore presumably be hard to establish a human rights violation in connection to a violation of Articles 4 and 15 NRR.

5.2.3.2 Exhaustion of All Domestic Remedies

Next, Article 35 of the Convention requires that "all domestic remedies have been exhausted" for a claim before the ECtHR to be successful and Article 41 provides the possibility for the ECtHR to award just satisfaction if the concerning State "allows only partial reparation to be made".[544] This condition is based on the starting point that State Parties provide the enforcement of the ECHR rights.[545] If the domestic remedies do not provide sufficient effective enforcement, the ECtHR may

[540] *Gorraiz Lizarraga* (n 517).
[541] ibid paras 72-75.
[542] ibid paras 45-46.
[543] ibid paras 47-48.
[544] European Convention on Human Rights, arts 35 (1) and 41; President of the European Court of Human Rights (n 523) para 2.
[545] European Convention on Human Rights, art 13; Council of Europe (n 39) para 110.

step in. Whether this is the case depends on, amongst others, "the applicant's complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case".[546] Since European law has to be integrated in the national legal orders of EU Member States, the remedies following from European law also fall within the scope of "domestic remedies" in the light of Article 35 ECHR.[547]

In case of a possible violation of Articles 4 and 15 of the NRR, the question thus arises whether the European remedies are sufficient or whether a possible claim could be brought before the ECtHR as well.[548] Since there is no case-law on the NRR yet, neither on the European nor on the ECHR level, currently no hard conclusions can be drawn on this matter. Although we have seen in the previous chapter that the effectiveness of the European remedies on the European level can be questioned, this effectiveness is for a great part also dependent on the enforcement on the national level. In this regard, it is important to mention again that the enforcement of the ECHR rights also for a great part takes place on the national level.[549] In cases in which no effective enforcement can be provided on either the European or the national level, the ECtHR may have competence.[550]

5.2.3.3 Direct Causal Link

A last important condition for a successful claim before the ECtHR regarding Articles 4 and 15 NRR is the causality requirement. The Rules of the Court require claims to be foreseen of "itemised particulars".[551] Part of these itemised particulars is the requirement that there should be a direct causal link between the violation and the damage of the applicant, which may not be "merely tenuous or speculative".[552] From this requirement also follows the condition that the

[546] *Lopes de Sousa Fernandes v Portugal* App no 56080/13 (ECtHR 19 December 2017), para 134; Council of Europe (n 39) para 111.
[547] *Van Gend & Loos* (n 21); *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* App No 45036/98 ECHR 2005-VI (ECtHR 30 June 2005), para 155; Martins Pereira (n 32) 587.
[548] See for example: Martins Pereira (n 32) 579.
[549] European Convention on Human Rights, art 13; Council of Europe (n 45) para 110.
[550] In *Bosphorus* (n 547) paras 154-157, the ECtHR furthermore determined that the ECtHR has competence in a case when European law is in conflict with ECHR rights. In the context of the NRR that would mean that (provisions of) the NRR itself would have to be in conflict with certain ECHR rights, instead of a violation thereof by a Member State. Since this research focuses on possible remedies for individuals and/or NGOs in case of a violation of the NRR, an analysis of the NRR infringing the ECHR itself goes beyond the scope of the research.
[551] Registry of the Court, 'Rules of Court' (*ECHR COE* 2025) <https://www.echr.coe.int/documents/d/echr/Rules_Court_ENG> last updated 28 April 2025, Rule 60(2).
[552] President of the European Court of Human Rights (n 523) para 9; Keller, Heri and Piskóty (n 33) 3.

applicant must have suffered any damage in the first place.[553] The different types of loss that might qualify as damage are addressed in paragraph 5.3, regarding the possible remedies before the ECtHR. As already explained in chapter 4, it is often a challenge for applicants to prove such direct causality in environmental cases, because the damage often has multiple possible causes.[554] This challenge also applies to Articles 4 and 15 of the NRR, since damage to nature and the environment is usually not easily connected to one cause. However, it seems as if the ECtHR may have provided some leeway in its case-law regarding the causality in environmental cases.[555] Because of its rather casuistic character, it is hard to indicate a clear line in this case-law.[556] Still, the ECtHR has made clear (in general, not only in environmental matters) that the so-called "but for" or "*conditio sine qua non*" norm is not always required, but that a causal link could also be established if the State has failed "to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm".[557] In such cases, the fact that the State could have known that taking measures would have prevented or lessened the damage of the individual can be enough to prove causality.[558] A breach of the positive obligations States derive from, for example, Articles 2 and 8 of the Convention to take environmental measures and damage occurring consequently can in that regard be sufficient to establish a causal link.[559]

At the same time, the ECtHR has also rejected environmental claims based on a lack of a causal link.[560] For example, in the earlier-mentioned *Brincat* case, the Court indicated a possible existence of causality between the violation of the State to take sufficient measures and the damage caused by the exposure to asbestos, but rejected the claim because of a lack of substantiation thereof.[561] In *Vilnes and Others v. Norway*, the Court found that the damage caused by the decompression sickness of the applicant could have also occurred if the established violation of Article 8 by the State had not taken place.[562] Here, the problem of multiple possible sources becomes visible again. In other words, although applicants are not required to prove a strict *conditio sine qua non* norm, they still should provide enough evidence for the fact that it is likely that the human rights violation could have caused the damage.[563] Furthermore, the causal link needs to exist between the ECHR violation of the State and the personal damage of

[553] President of the European Court of Human Rights (n 523) para 9.
[554] Hedemann-Robinson (n 24) 355; Bauw and Brans (n 467) para 6.2.3.
[555] Heri (n 33) 932.
[556] ibid.
[557] *O'Keeffe v Ireland* App No 35810/09 (ECtHR, 28 January 2024, extracts), para 149.
[558] Heri (n 33) 932.
[559] See for example: *Öneryıldız* (n 55) para 135.
[560] Keller, Heri and Piskóty (n 33) 14.
[561] *Brincat* (n 529) para 150.
[562] *Vilnes and Others v. Norway* App Nos 52806/09 and 22703/10 (ECtHR, 5 December 2013), para 270.
[563] ibid.

the individual.[564] This increases the difficulty for cases regarding Articles 4 and 15 NRR, in which the damage will generally consist of damage to nature. Whether applicants will succeed to provide the evidence for such personal damage in relation to possible violations of Articles 4 and 15 of the NRR will be very much dependent on the specific case at hand, but it will presumably be a great challenge in a lot of cases.

5.3 Remedies

From the previous paragraph can be concluded that individuals and NGOs will probably experience a lot of difficulties when they bring a claim regarding Articles 4 and 15 NRR before the ECtHR. In the theoretical situation in which the conditions for such a claim could be fulfilled, the second step is to assess whether the ECHR requires suitable remedies. Next to the starting point of the execution of the ECtHR's judgments by the State Parties, the Court can in two ways have an impact on these remedies, namely via just satisfaction and consequential orders.

5.3.1 Just Satisfaction

When all the admissibility requirements and other conditions are fulfilled and the ECtHR finds a violation of a human right, it may award just satisfaction for pecuniary damages and non-pecuniary damages.[565] This just satisfaction has the nature of monetary compensation, which should compensate for actual damage and may not be merely symbolic.[566] If based on the context of the case the Court considers it unnecessary to allocate monetary compensation, it is free not to do so.[567] In these cases, it could instead solely declare the violation by the State to be existent and consider that declaration as a sufficient remedy.[568] This depends on the context of the case and happens, for example, when specific measures are more suitable than providing compensation.[569]

[564] President of the European Court of Human Rights (n 523) para 9.
[565] European Convention on Human Rights, art 41; President of the European Court of Human Rights (n 523) para 5; the ECtHR may also award compensation for costs and expenses, but since this regards compensation for legal assistance and other costs related to the proceedings, the category is less relevant for this research.
[566] President of the European Court of Human Rights (n 523) paras 1-2.
[567] ibid para 4.
[568] ibid; Keller, Heri and Piskóty (n 33) 4.
[569] President of the European Court of Human Rights (n 523) para 4.

5.3.1.1 Pecuniary Compensation

In general, the Court seems to use this discretionary power often in environmental cases in which the applicant asks for pecuniary compensation for damage that already has been suffered and for damage that is expected to be suffered in the future.[570] For example, in the cases of *Öneryıldız v. Turkey*, *Budayeva and Others v. Russia* and *Brincat and Others v. Malta*, the Court did not grant the applicants (full) compensation for their pecuniary damage, although it did – as explained in paragraph 5.2.3.1 – establish a human rights violation.[571] In *Öneryıldız*, the Court only provided a small compensation for some lost property and established that the declaration of the human rights violation was sufficient for the rest.[572] In *Budayeva*, the Court did not grant any compensation for the pecuniary damage, without explaining why.[573] In *Brincat*, the Court found that the claims regarding the pecuniary damage had not been substantiated sufficiently in order to provide compensation.[574] Although the reasons for rejecting the claims differ – and are sometimes even unclear – it seems as if the ECtHR finds that the context of environmental cases often does not provide for sufficient grounds to grant just satisfaction for pecuniary damage. This is therefore also likely to apply to cases regarding a violation of Articles 4 and 15 NRR, if such a violation could even establish a human rights violation in the first place. Provided that there is a human rights violation, in order for pecuniary compensation to be awarded there should be damage to, for example, property that is clearly caused by the State's violation and that cannot be fixed by taking other measures. This will be particularly difficult with regard to the NRR, since a violation of Articles 4 and 15 will consist of a failure of taking the required nature restoration measures.

5.3.1.2 Non-pecuniary Compensation

In all three cases mentioned above, while no(t much) compensation for pecuniary damages was awarded, the ECtHR did provide non-pecuniary compensation for mental or physical suffering that cannot be determined exactly in terms of money.[575] In all these cases, the Court determined that the fact that the State had violated the applicants' human rights justified granting just satisfaction for their non-pecuniary damage. In environmental cases, this damage often has the

[570] Keller, Heri and Piskóty (n 33) 12-14; President of the European Court of Human Rights (n 523) para 8.
[571] *Öneryıldız* (n 55) para 169; *Budayeva* (n 528) para 205; *Brincat* (n 529) para 150.
[572] *Öneryıldız* (n 55) paras 169-170.
[573] *Budayeva* (n 528) paras 203-205.
[574] *Brincat* (n 529) para 150.
[575] *Öneryıldız* (n 55) para 171; *Budayeva* (n 528) para 205; *Brincat* (n 529) para 151; Keller, Heri and Piskóty (n 33) 14-16; President of the European Court of Human Rights (n 523) paras 10-11.

form of psychological distress for applicants who live near a hazardous environment.[576] In principle, NGOs can also receive compensation for non-pecuniary damage in environmental cases, although this possibility is still under development.[577] Translated to possible violations of Articles 4 and 15 NRR, in order to receive non-pecuniary compensation the applicant would have to prove that the lack of measures taken by the State has caused psychological distress. However, since the measures obliged by Articles 4 and 15 NRR primarily focus on the restoration of terrestrial, coastal and freshwater ecosystems and not so much on the living environment of individuals, this could presumably be hard to prove.

5.3.1.3 Suitability of Monetary Compensation

In addition to the question whether the ECtHR may find it necessary to provide just satisfaction in case of a violation of the NRR, the question also arises to what extent this remedy is suitable for cases concerning Articles 4 and 15 of the NRR. Just satisfaction only offers the possibility of monetary compensation. As explained in chapter 4, with regard to the European mechanism of State liability, such monetary compensation is only suitable to a certain extent. While it is desirable to compensate individuals (or NGOs) whose financial situation has been negatively affected by the damage, environmental damage more often asks for measures to be taken to end the violation and restore the damage that has been done already.[578] The focus of Article 4 NRR on the restoration of terrestrial, coastal and freshwater ecosystems confirms this alternative remedial approach to be suitable in case of a possible violation of this Article as well. The ECtHR could in this regard reject a claim for just satisfaction considering that other types of measures would be more sufficient as a remedy than providing compensation.[579]

5.3.2 Consequential Orders

Next to awarding just satisfaction, the ECtHR can in some cases indicate the specific measures for a State to take.[580] Based on Article 46, the Court can indicate individual measures to terminate a human rights violation in a specific case and general measures to prevent similar human rights violations from happening in the future.[581] In *Panorama Ltd and Miličić v. Bosnia and Herzegovina*,

[576] Keller, Heri and Piskóty (n 33) 15.
[577] ibid 16.
[578] Hedemann-Robinson (n 24) 357-358; Keller, Heri and Piskóty (n 33) 20-21.
[579] President of the European Court of Human Rights (n 523) para 4.
[580] European Convention on Human Rights, art 46(1) and (5); Council of Europe (n 45) para 4; Keller, Heri and Piskóty (n 33) 3.
[581] Council of Europe (n 45) paras 15, 17 and 19; Keller, Heri and Piskóty (n 33) 3.

the Court determined that the right to a fair trial following from Article 6 of the Convention "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party".[582] This corresponds with the line of reasoning of the Court of Justice of the European Union in *Torubarov* and *Deutsche Umwelthilfe* regarding the possibility of the judicial execution of verdicts, as addressed in chapter 4.[583] In *Suso Musa v. Malta*, the ECtHR stated that although "[i]n principle it is not for the Court to determine what may be the appropriate measures of redress for a respondent State to perform in accordance with its obligations under Article 46 of the Convention [...], to [help] the respondent State to fulfil [these] obligations, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist".[584] The aim of this indication is to make the process of terminating the human rights violation more efficient and effective.[585] If the Court would use the remedy of consequential orders in cases in which there is a violation of Articles 4 and 15 NRR to oblige States to take specific measures, this could lead to an end and restoration of the natural damage, which would be more suitable compared to the monetary remedy of just satisfaction. However, the satisfactory applicability of consequential orders for claims regarding a violation of Articles 4 and 15 NRR can be questioned for two reasons.

5.3.2.1 Reluctant Application

First, the ECtHR seems to be very reluctant in providing these measures in general, out of respect for the States' autonomy, and in environmental cases in particular.[586] For example, in *Giacomelli v. Italy*, the Court rejected the applicant's request for a termination of the violating action by Italy for the reason that "its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose [...] the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention".[587] From this statement follows that the Court values the State Parties' autonomy and would only indicate specific measures when it really deems this necessary.

[582] *Panorama Ltd and Miličić v. Bosnia and Herzegovina* App Nos 69997/10 and 74793/11 (ECtHR, 25 July 2017), para 62.
[583] *Torubarov* (n 391); *Deutsche Umwelthilfe I* (n 401).
[584] *Suso Musa v. Malta* App No 42337/12 (ECtHR, 23 July 2013), para 120.
[585] Council of Europe (n 45) para 16; Keller, Heri and Piskóty (n 33) 17.
[586] President of the European Court of Human Rights (n 523) para 28; Keller, Heri and Piskóty (n 33) 17-19.
[587] *Giacomelli v Italy* App No 59909/00 ECHR 2006-XII (ECtHR, 2 November 2006), para 102.

5.3.2.2 Indication of Measures Versus Injunction

Second, even if the ECtHR would accept the remedy of consequential orders in a claim regarding a violation of Article 4 and/or 15 NRR, this would in principle only consist of an indication of the measures the concerning State would have to take and not of a hard obligation.[588] There are examples of cases in which the Court determined that only one specific measure could sufficiently enforce the Court's judgment and thus that the concerning State did not have any discretion in choosing other measures.[589] *Del Río Prada v. Spain* provides such an example, in which the Court determined that the only way to end the human rights violation at hand was to release the applicant from prison as soon as possible.[590] In *Georgiou v. Greece*, the Court established that Greece could only end the violation of Article 6 which consisted of a lack of assessing the applicant's request for the use of the European mechanism of a preliminary procedure before the CJEU by reopening the proceedings before the national court, in order to conduct this assessment.[591] In such cases the indication of individual measures becomes very similar to an injunctive relief. Such specific measures, if they can be determined in the first place, mostly apply to individual measures. In other cases, this remedy cannot be qualified as a real injunction, but rather as a more lenient form of guidance for the State that violated an ECHR right. The Court usually leaves States more discretion with regard to general measures.[592] For example, in *Cordella and Others v. Italy*, one of the few environmental cases in which the ECtHR did provide consequential orders, the Court obliged Italy to take general measures to bring the air pollution from factory emissions to an end.[593] Even though the applicants did ask the Court to specify these general measures, the Court assessed this to fall outside of its competence and instead only indicated that the State should take measures that were necessary to protect the environment in this regard.[594] The wider discretion in case of general measures can be explained by the fact that by obliging general measures, the ECtHR intervenes more in the political domain of the concerning State.[595] This is especially true with regard to general environmental measures, since environmental matters are seen as "politically sensitive".[596] At the same time, general measures are also more suitable than individual measures in environmental cases, as environmental

[588] Council of Europe (n 45) para 13.
[589] ibid para 17; Keller, Heri and Piskóty (n 33) 3.
[590] *Del Río Prada v Spain* App No 42750/09 (ECtHR, 21 October 2013), para 139.
[591] *Georgiou v Greece* App No 57378/18 (ECtHR, 14 March 2023), paras 32-33.
[592] Council of Europe (n 45) para 19; Keller, Heri and Piskóty (n 33) 3.
[593] *Cordella and Others v Italy* App Nos 54414/13 and 54264/15 (ECtHR, 24 January 2019), legal summary; Keller, Heri and Piskóty (n 33) 17-18.
[594] *Cordella* (n 593) legal summary; Keller, Heri and Piskóty (n 33) 17-18.
[595] Keller, Heri and Piskóty (n 33) 18-19.
[596] ibid 19; Heri (n 33) 927; Martins Pereira (n 32) 583.

damage is often not located in one specific location but rather includes a more global problem.[597] This also applies to Articles 4 and 15 NRR, since the measures that have to be taken for the restoration of terrestrial, coastal and freshwater ecosystems aim at a large range of areas. Unless there is a specific situation in which a State violates a human right by not taking adequate restoration measures based on Articles 4 and 15 and the State could only take one specific measure in order to end this violation, possible consequential orders regarding the NRR would presumably not consist of more than general indications by the ECtHR.

It is therefore questionable to what extent a satisfactory application of the remedy of consequential orders would be available for possible violations of these Articles. The ECtHR will most likely not provide hard obligations in these cases easily. Any general measures that it might provide will presumably still leave a lot of discretion to the States, which raises the question what their added value will be to the indication of the measures as described in the NRR itself, which also leave much discretion to the Member States. However, the fact that at this moment, from the currently existing case-law on this topic, consequential orders do not seem to be a very useful remedy for possible violations of Articles 4 and 15 NRR does not mean that this will not change in the future. The importance of environmental cases and the large number of possible victims could lead to a development in the Court's case-law in this context.[598] It would not be the first time for the Court to limit the States' discretion in politically sensitive matters for the "greater good" of addressing a large-scale problem.[599]

5.4 Conclusion

On the ECHR level, individuals and NGOs might in theory invoke two remedies to possibly contribute to the enforcement of Articles 4 and 15 of the NRR. The question is to what extent these remedies are sufficient in the light of the European enforcement principles. First, it will be hard for individuals to even be admissible to bring a claim before the ECtHR in such cases because the violation of the general measures with a focus on nature restoration will probably not have a negative effect on individuals personally. NGOs might be more likely to be admissible before the ECtHR because of the more lenient admissibility criteria in climate and environmental cases. The applicability of the Aarhus Convention could increase the access to justice possibilities of NGOs, although the ECHR's conditions for a successful claim would still apply to them as well.

[597] Keller, Heri and Piskóty (n 33) 19.
[598] ibid.
[599] See for example: *Greens and M.T. v the United Kingdom* App Nos 60041/08 and 60054/08 (ECtHR, 23 November 2010, extracts), para 105, which concerned the right to vote for prisoners; ibid.

Next, although the ECtHR has often established human rights violations in case of a lack of sufficient environmental measures, it can be questioned whether the violation of Articles 4 and 15 NRR can result in human rights violations as well. Since these Articles do not focus on individuals' living environments, habitats in which the State should have taken measures based on the NRR should have to coincide with these living environments in which the lack of measures has caused damage to individuals. Furthermore, the ECtHR will only award these claims if the European level does not provide sufficient remedies. Similar to the European State liability mechanism, causation difficulties are likely to arise here as well. In some cases, the Court has lowered the threshold for proving causality in environmental cases, but at the same time it has also indicated that there should be enough evidence for a clear relation between the human rights violation and the environmental damage.

Finally, even if the above-mentioned conditions could be fulfilled, the suitability of both possible remedies before the ECtHR should be debated. First, the chances of a just satisfaction award for pecuniary damage are not high. These chances could be higher for non-pecuniary damage, although the focus of Articles 4 and 15 NRR on general nature restoration instead of specific living environments will likely become an obstacle here again. Furthermore, even if just satisfaction would be awarded, the monetary remedy of just satisfaction will often not be suitable for these claims, similar to the monetary remedy of the European State liability mechanism addressed in chapter 4.

Second, the ECtHR has been very reluctant in awarding consequential orders for environmental matters thus far. The general measures that could in theory contribute to the enforcement of Articles 4 and 15 NRR would still leave a lot of discretion to States, thereby not adding much to the Articles themselves. A development in the ECtHR's case-law on this matter would thus be necessary in order for this remedy to be useful in NRR cases.

In conclusion, the possible added value of the ECHR remedies to the enforcement of Articles 4 and 15 of the NRR seems to be rather limited. In cases before the ECtHR regarding these Articles serious admissibility problems would occur and the conditions for a successful claim would be very hard to fulfil. Remedies will not easily be awarded and there remains a lack of an essential hard injunctive relief within the possible remedies. It can therefore be concluded that the possible remedies on the ECHR level might not be sufficient to resolve the existing tension regarding the principle of effective judicial protection and the *Rewe* principle of effectiveness as identified in chapter 4. However, it should be noted that it is also possible to invoke the human rights from the ECHR on the national level. This leads to the question to what extent the existing mechanisms on the national level could contribute to the enforcement of Articles 4 and 15 NRR. This question is addressed in the next chapter, in which the Dutch State is used as a case study.

Chapter 6. Dutch national Level

6.1 Introduction

From the previous chapter, we can conclude that individuals and NGOs can presumably not (solely) rely on the remedies that are available before the European Court of Human Rights to overcome all gaps that are left by the possibilities of the remedies on the European level in enforcing Articles 4 and 15 of the Nature Restoration Regulation. Of course, following from the fact that the European Union is an independent legal order which should be integrated in the national legal orders of the Member States, the enforcement of (material) EU law for a great part takes place on the national level.[600] In addition, the human rights included in the European Convention on Human Rights should also be enforced on the national level. In this chapter I therefore assess to what extent the available remedies on the national level fulfil the European enforcement principles as set forth in the normative framework in case of a violation of Articles 4 and 15 NRR. For this national assessment I have chosen the Dutch legal system as a case study, as explained in the introduction of this research.

The European mechanisms of direct effect and consistent interpretation as explained and assessed in chapter 4 of this research apply in an overarching way in the national legal order. That means that the national court with competence in a specific case in which European law is at stake should apply these mechanisms, regardless of the type of the court.[601] The first mechanism Dutch individuals and NGOs might be able to use to enforce Articles 4 and 15 NRR takes place on the administrative level before administrative authorities and the administrative court (paragraph 6.2). If Dutch individuals and NGOs are not admissible to the administrative court, they can invoke the national mechanism of State liability before the civil court (paragraph 6.3). For both mechanisms, I evaluate the admissibility, the norms and the possible remedies and apply them to Articles 4 and 15 NRR. This leads to an interim conclusion on the question to what extent these national mechanisms contribute to the effective enforcement of these Articles by individuals and NGOs (paragraph 6.4).

[600] *Van Gend & Loos* (n 21).
[601] Verhoeven and Jans (n 25) 109-110.

6.2 Administrative Enforcement

6.2.1 Mechanism of Administrative Enforcement

Member States are obliged to effectively enforce European law.[602] As explained in chapter 3, in the Netherlands this enforcement primarily takes place on the administrative level.[603] In the first place, it is up to national administrative authorities to operationalise and enforce EU law. With regard to the operationalisation of Articles 4 and 15 NRR, the Dutch administrative authorities should draw up a national restoration plan including measures for the restoration of terrestrial, coastal and freshwater ecosystems. When national authorities have discretion in the application of EU law, they are obliged to fill in this discretion in a way that is consistent with this EU law.[604] The Dutch administrative authorities are thus obliged to fill in the discretion regarding the type of restoration measures they take consistently with the NRR. Once Articles 4 and 15 are operationalised by the adoption of the restoration plan, the administrative authorities should provide the effective enforcement of the Regulation. Within this enforcement, administrative authorities have to comply with the European *Greek Maize* principles of equivalence, effectiveness, proportionality and dissuasiveness.[605] The Dutch administrative system generally fulfils the principle of equivalence easily.[606] The harmonised (procedural) administrative law in the Dutch General Administrative Law Act ("Algemene wet bestuursrecht") (hereafter: GALA) has never led to a violation of this principle yet.[607]

In the second place, the national administrative court also has an obligation to enforce European law and therefore should assess the application and enforcement of European law by the national administrative authorities.[608] Before the administrative court, this assessment usually takes place *in concreto*.[609] This means that the court assesses whether a specific decision made by an administrative authority is in line with the (directly effective) EU law.[610] Another possibility is assessment *in abstracto* or so-called "indirect assessment" ("*exceptieve toetsing*"), which entails that the administrative court when assessing an appeal against an individual

[602] De Moor-van Vugt and Widdershoven (n 19) 277.
[603] ibid 267.
[604] Verhoeven and Jans (n 25) 108.
[605] *Greek Maize* (n 248) paras 24-25; De Moor-van Vugt and Widdershoven (n 19) 277.
[606] Verhoeven and Widdershoven (n 17) 254.
[607] ibid.
[608] Verhoeven and Jans (n 25) 116; De Moor-van Vugt and Widdershoven (n 19) 277.
[609] See for example: Verhoeven and Jans (n 25) 118; Plambeck and Squintani (n 261) 10; WJM Voermans, 'Besturen met regels, volgens de regels' in WJM Voermans, RJB Schutgens and ACM Meuwese (eds), *Algemene regels in het bestuursrecht. Preadviezen* (VAR Vereniging voor Bestuursrecht, Boom Juridisch 2017) 13-14.
[610] Verhoeven and Jans (n 25) 118.

decision, indirectly examines whether the general rule on which the individual decision is based is consistent with the (directly effective) EU law.[611] From the *Unibet* case follows that such indirect assessment is in line with the principle of effective judicial protection laid down in Article 47 of the EU Charter. A direct appeal to the national law implementing or enforcing EU law is not needed if the consistency of the national law with the EU law provision can be assessed in another, indirect way, in accordance with the *Rewe* principles of equivalence and effectiveness.[612] The possibility of indirect assessment of national law implementing or enforcing EU law fulfils the principle of effective judicial protection.[613] The Dutch administrative court applies both the assessment *in concreto* and the assessment *in abstracto* to decisions, depending on the grounds brought forward by the applicant in the case at hand.[614] When a Dutch individual or NGO wants to challenge a decision before the administrative court, it is subjected to certain admissibility and (other) procedural norms.[615] These norms are addressed in the following paragraphs.

6.2.2 Admissibility

As explained in chapter 4, the question *who* will be admissible to invoke (directly effective) European law before the national court depends on the procedural norms on the national level.[616] In order to comply with the principle of effective judicial protection and the *Rewe* principles of equivalence and effectiveness, Member States should guarantee that individuals are admissible before the national court in cases in which they can derive rights from EU law.[617] Which individuals can derive rights from EU law varies per legislative instrument.[618] With regard to environmental legislation this scope seems to be quite wide.[619] The Court of Justice of the European Union determined for example in the *TA Luft* and *Janecek* cases that the legislation at hand included a wide scope of admissible individuals, especially when the legislation aims to protect the public health.[620] In the *Cockle Fishery* case the CJEU stated that, in the light of the principle of

[611] ibid.
[612] *Unibet* (n 214) paras 40-41, 47.
[613] ibid para 65.
[614] Verhoeven and Jans (n 25) 118-122.
[615] AT Marseille and HD Tolsma (eds), *Bestuursrecht. Deel 2. Rechtsbescherming tegen de overheid* (7th edn, Boom Juridisch 2019) 119.
[616] *Kraaijeveld* (n 324), paras 57-58; Jans and Verhoeven (n 21) 95; Ortlep and Widdershoven (n 17) 369.
[617] Ortlep and Widdershoven (n 17) 360, 369 and 372; see for example: case C-174/02 *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën* [2005] ECR I-00085, para 18.
[618] Ortlep and Widdershoven (n 17) 369-370.
[619] ibid 371.
[620] Case C-361/88 *Commission v Federal Republic of Germany* (*TA Luft*) [1991] ECR I-02567, para 16; *Janecek* (n 28) paras 38-39.

effectiveness, individuals should be able to invoke Article 6(2) and (3) of the Habitats Directive before the national court if they are concerned by these provisions.[621] However, since these provisions aim to protect nature and not directly to protect individuals, the question is when individuals would qualify as "concerned" persons.[622] On the Dutch national level, this question depends on three provisions, of which two are included in the GALA and one in the Aarhus Convention.

6.2.2.1 Interested Parties

In Dutch administrative law, only "interested parties" within the meaning of Article 1:2 GALA are admissible before the national administrative court.[623] Interested parties are parties whose interests are directly concerned within the decision made by the administrative authority.[624] Such interests should be personal, objective, current and sufficiently certain and directly affected.[625] NGOs (and other legal persons) can also rely on the collective interests they stand for.[626] These interests may be "general" and are therefore broader than individual interests.[627] The general interests should correspond with the general interest protected by the violated rule.[628] Next to concerned interests, parties must have a so-called "procedural interest" in order to be admissible, which entails that the outcome of the procedure should concern them.[629]

6.2.2.2 Relativity Requirement

Article 8:69a GALA furthermore determines that the administrative court will not annul a decision when the rule or principle invoked does not intend to protect the individual's interest.[630] This rule can be qualified as a relativity requirement regarding the individual's interest.[631] It requires a connection between the individual and the rule on which the appeal is based.[632] In other words, rules that do not aim to protect the individual cannot qualify as a basis for appeal and thus neither

[621] *Cockle Fishery* (n 346) para 66.
[622] Ortlep and Widdershoven (n 17) 372-373.
[623] Dutch General Administrative Law Act 1992 ("Algemene wet bestuursrecht") (hereafter: Dutch General Administrative Law Act), art 8:1.
[624] ibid art 1:2(1).
[625] Marseille and Tolsma (n 615) 120.
[626] Dutch General Administrative Law Act, art 1:2(3).
[627] Marseille and Tolsma (n 615) 120.
[628] ibid 253.
[629] ibid 120.
[630] Dutch General Administrative Law Act, art 8:69a.
[631] Ortlep and Widdershoven (n 17) 368.
[632] Marseille and Tolsma (n 615) 249.

as a basis for administrative judicial assessment.[633] This relativity requirement applies in addition to and does not change the interests requirement of Article 1:2 GALA.[634] In theory, it should be defined as a material norm that regulates the possible annulment of a decision.[635] In practice however, it can be considered an admissibility norm, since non-compliance with the norm can lead to inadmissibility of the grounds brought forward by the applicant in advance.[636]

The Dutch Council of State – one of the highest Dutch administrative courts – applies the relativity requirement in environmental cases based on the specific context of the case.[637] It is therefore possible that environmental provisions which in principle aim to protect the general interest also protect the individual's interest in a specific situation, for example when it concerns individuals that live near the environmental situation at hand.[638] With regard to nature protection provisions, the Council of State has introduced a so-called "interdependence correction" ("*verwevenheidscorrectie*") which entails that, even though these provisions aim to protect the nature in general, individual interests can under certain circumstances be so intertwined with these general interests that the relativity requirement is still fulfilled.[639] Translated to Articles 4 and 15 NRR, it would be possible that a decision at the same time negatively affects habitats that have to be protected based on Article 4 NRR and the individuals' living environment. A lack of such confluence would lead to obstacles for individuals fulfilling the relativity requirement in cases concerning Articles 4 and 15 NRR. Environmental NGOs could in such cases fulfil the relativity requirement more easily, since they are founded, amongst others, to enforce environmental rules in the interest of the public, which makes the interest to protect nature inherent to their existence.[640]

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[633] ibid.
[634] ibid 250.
[635] RJGM Widdershoven, 'Conclusie inzake het beroep van: de besloten vennootschap Praxis Vastgoed B.V. en de besloten vennootschap Praxis Doe-het-zelf Center B.V. tegen het besluit van 3 februari 2014 van de raad van de gemeente Zwolle tot vaststelling van het bestemmingsplan "Blaloweg en Katwolderweg (voormalig Shell-terrein en omgeving)"' (Raad van State, 201402641/5/R1, 2 December 2015), paras 3.3-3.4.
[636] ibid para 3.4.
[637] ibid para 3.10.
[638] ibid paras 3.10-3.11.
[639] ABRvS 13 July 2011 ECLI:NL:RVS:2011:BR1412 *NJB* 2011/1593 (*Vereniging Het Guldenbos and Others v de raad van de gemeente Hoorn*), para 2.7.9; ibid para 3.12; Marseille and Tolsma (n 615) 251.
[640] Hedemann-Robinson (n 24) 358; see for example: ABRvS 9 February 2005 ECLI:NL:RVS:2005:AS5471 *JM* 2005/42 (*Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Kokkelvissers)*).

6.2.2.3 Requirements from the Aarhus Convention

Finally, Article 9 of the Aarhus Convention influences the admissibility of individuals and NGOs before the national court in environmental cases.[641] As explained in chapter 3, environmental NGOs are most often admissible to their national courts in cases that fall within the scope of Articles 6 and 7 of this Convention, regarding public participation in decisions and in environmental plans and programmes.[642] Especially Article 7 regarding the environmental plans and programmes is relevant with regard to Articles 4 and 15 NRR. As explained in chapter 3, NGOs will presumably often be admissible in cases before the national administrative court concerning their public participation rights regarding the restoration plan of Article 15 NRR.[643] They may furthermore be admissible in cases requiring a full legality review of the restoration plan when the plan is considered to be an additional "opt-in" to the protection of Article 9(2) of the Aarhus Convention, provided for by national law or when it regulates activities with a possible "significant effect on the environment" in the light of Article 6(1)(b) of the Aarhus Convention.[644] Whether the restoration plan from Article 15 NRR would in fact regulate such activities still remains to be seen. If Article 9(2) of the Aarhus Convention would apply to the restoration plan of Article 15 NRR, it would be prohibited to subject environmental NGOs to a relativity requirement in such cases.[645] If only Article 9(3) of the Aarhus Convention would apply to the restoration plan of Article 15 NRR, subjecting environmental NGOs to a relativity requirement could be allowed if it would not be applied too strictly.[646] The Dutch administrative court still applies the relativity requirement from Article 8:69a GALA, as addressed in the previous paragraph, to environmental NGOs in all cases, in which it assesses whether the NGO actually invokes the interests it aims to protect based on its statutes.[647] According to the Dutch Council of State, this application is not in conflict with the Aarhus Convention.[648] Since this assessment means that environmental NGOs are most often admissible in environmental cases in practice, the requirement does not seem to be too strict

[641] Ortlep and Widdershoven (n 17) 375-376.
[642] Aarhus Convention, arts 6, 7 and 9(2)-(3); United Nations Economic Commission for Europe (n 275) 173.
[643] Aarhus Convention, arts 7 and 9(3); Plambeck and Squintani (n 261) 5 and 7; Buijze and Backes (n 263) 123.
[644] Aarhus Convention, arts 6(1)(b), 7 and 9(2); *Zoskupenie II* (n 267) paras 57, 63 and 73; United Nations Economic Commission for Europe (n 275) 173; Plambeck and Squintani (n 261) 5 and 7; Buijze and Backes (n 263) 123-124.
[645] Plambeck and Squintani (n 261) 8-9; Buijze and Backes (n 263) 115-117; according tot he Aarhus Compliance Committee, environmental NGOs should even be admissible regarding all norms and not only regarding environmental norms, so that subjecting environmental NGOs to a relativity requirement is prohibited in general. It goes beyond the scope of this research to provide an in-depth analysis of this view by the Aarhus Compliance Committee.
[646] Plambeck and Squintani (n 261) 8-9; Buijze and Backes (n 263) 122.
[647] Buijze and Backes (n 263) 117-118.
[648] ibid.

regarding Article 9(3) of the Aarhus Convention. It is however questionable whether it may also be applied if Article 9(2) of the Convention would be applicable as well.[649] Important remarks in this regard are that the applicability of Article 9(2) to Articles 4 and 15 of the NRR is not at all certain and environmental NGOs often seem to be admissible in environmental cases before the Dutch administrative court. Therefore, applying the relativity requirement to the NRR might not lead to many problems regarding the Aarhus admissibility requirements in practice.

Next to the relativity requirement, the GALA includes another limitation of the admissibility before the administrative court. Article 6:13 GALA rejects parties from being admissible before the administrative court if they did not bring forward their observations during this preparatory procedure while they reasonably should have done so.[650] In the *Varkens in Nood* case the CJEU examined this Dutch "uniform public preparatory procedure" in environmental activities.[651] The CJEU firstly determined that when Member States provide broader participation rights for environmental matters on the national level than on the EU level, they should also provide judicial access regarding these matters for the concerned parties, based on Article 9(2) and (3) of the Aarhus Convention.[652] Secondly, the CJEU established that a "participatory phase of the decision-making procedure" may not affect the admissibility of an NGO in cases that fall within the scope of the Aarhus Convention.[653] Although certain requirements for the decision-making procedure may be in line with Article 47 of the EU Charter (considering they fulfil Article 52(1) of the Charter as well), this is irrelevant where these requirements limit the effectiveness of Article 9(2) and (3) of the Aarhus Convention.[654] As a consequence of the *Varkens in Nood* case, the requirement to bring forward observations within the participatory phase of the decision-making procedure as precondition for appeal to the administrative court has been repealed in the Netherlands for all environmental cases, regardless of whether they fall within the scope of the Aarhus Convention or not.[655] In this light, the participation requirements of the Aarhus Convention are interpreted in a broad way on the Dutch national level. It is important to note that the repeal of the precondition applies to the interested parties.[656] The observation procedure thus still applies to parties without an individual interest.[657]

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[649] ibid 118-121.
[650] Dutch General Administrative Law Act, art 6:13; Case C-826/18 *Stichting Varkens in Nood, Stichting Dierenrecht, Stichting Leefbaar Buitengebied v College van burgemeester en wethouders van de gemeente Echt-Susteren* [2021] OJ C72/3 para 13.
[651] *Varkens in Nood* (n 650) para 11.
[652] ibid paras 48-52.
[653] ibid paras 54 and 58-59.
[654] ibid paras 65-67.
[655] Verhoeven and Widdershoven (n 17) 268.
[656] Aarhus Convention, art 9(2); Dutch General Administrative Law Act, arts 8:1 and 1:2.
[657] See for more information on this participatory phase: Marseille and Tolsma (n 615) para 6.3.6.

6.2.3 Norms

Next to the admissibility requirements, claims made by interested parties before the Dutch administrative court must fulfil three main conditions.[658] First, the appeal should be made to an appealable decision made by an administrative authority.[659] Second, in cases in which the earlier-mentioned uniform public preparatory procedure does not apply, the interested party should first have made an objection to the decision before the concerning administrative authority.[660] As explained in the previous paragraph, the CJEU determined that environmental NGOs may not be subjected to a participatory phase in the decision-making procedure in environmental cases.[661] If this procedure does not apply, the Dutch administrative law requires applicants to make an objection to the decision before the administrative authority prior to appealing before the court. This requirement is neither in conflict with the European principle of effective judicial protection nor with the admissibility rights from the Aarhus Convention.[662] The authority can revise the decision and change it if it agrees with the objection.[663] It is important to note that this objection does not (temporarily) suspend the execution of the decision, unless a legal provision provides for such an automatic suspension.[664] The same applies to an appeal made before the administrative court.[665] Third, both the objection before the authority and the appeal before the court should be made within six weeks.[666] This last condition is quite straightforward and therefore does not need much further explanation.

6.2.3.1 Restoration Plan as an Appealable Decision

With regard to the first condition, Article 8:1 of the GALA determines that interested parties can appeal to a decision before the administrative court.[667] Article 1:3 qualifies a decision as a written public legal act, made by an administrative authority.[668] Administrative authorities are persons or

[658] There are also some more procedural conditions, including the content of the appeal and the payment of judicial fees; see for more information: Marseille and Tolsma (n 615) chapter 4.
[659] Dutch General Administrative Law Act, arts 8:1 and 1:3(1).
[660] ibid art 6:13; Marseille and Tolsma (n 615) 145.
[661] *Varkens in Nood* (n 650) paras 54 and 58-59.
[662] Case C-73/16 *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy* (European Court of Justice Second Chamber, 27 September 2017) paras 75-76; Buijze and Backes (n 263) 108.
[663] Dutch General Administrative Law Act, art 7:11.
[664] ibid art 6:16.
[665] ibid.
[666] Ibid art 6:7; see for more information on this requirement: Marseille and Tolsma (n 615) para 4.4.
[667] Dutch General Administrative Law Act, art 8:1.
[668] ibid art 1:3(1).

entities with authority received from public law or public authority received otherwise.[669] Decisions can either have an individual character in a concrete case or a general scope.[670] In principle, only decisions with an individual character can be subjected to an appeal before the administrative court.[671] The rejection of a request to make a certain individual decision is also qualified as an individual decision.[672] The situations in which administrative authorities refuse to make a decision or do not make a decision in time are qualified as decisions as well.[673]

If individuals and NGOs want to make an appeal before the Dutch administrative court to the national restoration plan including, amongst others, restoration measures for terrestrial, coastal and freshwater ecosystems based on Articles 4 and 15 of the NRR, this plan should have to qualify as a decision with an individual character in the sense of Article 1:3.[674] This condition will presumably lead to obstacles for Dutch individuals and NGOs. Settled case-law of the Dutch Council of State shows that plans in the meaning of Article 15 NRR usually do not qualify as appealable decisions.[675] This case-law concerns the plans for the improvement of the air quality Member States have to draw up based on the Air Quality Directive. In 2010 the Council determined in two cases concerning the air quality that the plans from the Air Quality Directive cannot be considered "decisions" in the sense of Article 1:3 GALA because they require further implementation and execution by national administrative authorities.[676] Therefore, the plans themselves do not intend to have legal effects and cannot be qualified as appealable decisions with individual character.[677] According to the Council, legal protection before an administrative court was not required nor possible in these cases and the applicants had to go to the civil court instead.[678] In 2020, the Council again confirmed that parties cannot appeal to such plans before

[669] ibid art 1:1(1).
[670] ibid art 1:3(2); see for example: A Klap and T Groenewegen, *Kernbegrippen van de Algemene wet bestuursrecht. Bestuursorgaan, besluit en belanghebbende* (2nd edn, Ars Aequi Libri 2019) 17; LA Kjellevold Hoegee, *Rechtsbescherming tegen bestuurshandelingen in Nederland, Noorwegen en Zweden. Een wetenschappelijke proeve op het gebied van de Rechtsgeleerdheid* (Staat en Recht nr 2, Kluwer 2011) para 4.4.2.
[671] Dutch General Administrative Law Act, art 8:3; Marseille and Tolsma (n 615) 105-106.
[672] Dutch General Administrative Law Act, art 1:3(2); Marseille and Tolsma (n 615) 97-98.
[673] Dutch General Administrative Law Act, art 6:2; Marseille and Tolsma (n 615) 99.
[674] Dutch General Administrative Law Act, arts 1:2, 1:3(1)-(2), 8:1 and 8:69a.
[675] Ortlep and Widdershoven (n 17) 364-365; see for example: ABRvS 31 March 2010 ECLI:NL:RVS:2010:BL9651 *BR* 2010/95 (*Vereniging Stationsweg and Others v College van burgemeester en wethouders van Velsen*), paras 2.4.3-2.4.4; ABRvS 4 August 2010 ECLI:NL:RVS:2010:BN3158 *AB* 2011/43 (*Bewonersvereniging Johannes Geradtsweg v College van burgemeester en wethouders van Hilversum*), para 2.5.1; ABRvS 13 May 2020 ECLI:NL:RVS:2020:1217 *BR* 2020/68, para 4.1.
[676] *Vereniging Stationsweg* (n 675) para 2.4.3; *Bewonersvereniging Johannes Geradtsweg* (n 675) para 2.5.1.
[677] *Vereniging Stationsweg* (n 675) paras 2.4.3-2.4.4; *Bewonersvereniging Johannes Geradtsweg* (n 675) para 2.5.1.
[678] *Vereniging Stationsweg* (n 675) para 2.5.1; *Bewonersvereniging Johannes Geradtsweg* (n 675) para 2.5.1.

an administrative court.[679] As argued in chapter 4 of this research, the plans from the Air Quality Directive can be compared to the restoration plans Member States have to draw up based on Article 15 NRR. Therefore, individuals and NGOs will presumably not be able to directly appeal to this restoration plan before the Dutch administrative court either, since it remains too abstract to qualify as an appealable decision.[680]

6.2.3.2 Indirect Assessment of the Restoration Plan

As explained in paragraph 6.2.1, the court assesses decisions both *in concreto* and *in abstracto*.[681] Thus, where a direct appeal to the restoration plan of Article 15 is not possible before the Dutch administrative court because the plan does not qualify as an appealable decision, the plan might still be assessed *in abstracto* by the administrative court. Although we know from the *Unibet* case that this indirect assessment is in principle in line with the principle of effective judicial protection, the question is to what extent indirect assessment can also provide effective enforcement of environmental EU law in practice, and of Articles 4 and 15 NRR in particular. In the first place, an indirect assessment might not seem suitable regarding environmental plans in general. This has to do with the individual nature of this type of review. Following from the *Privacy First* case, indirect assessments are intended for individual cases, in which an individual can request a decision and may appeal to this decision or the rejection of their request.[682] The scope of environmental plans often exceeds such individual situations.[683] The small group of possible interested parties that may invoke an indirect assessment would therefore be too little regarding environmental matters.

The second question is to what extent an indirect assessment of the restoration plan of Article 15 NRR in particular would be possible and suitable in practice. Indirect assessment is possible when an administrative authority takes a decision that executes or enforces the restoration plan to which individuals and/or NGOs can appeal. The national restoration plan from Article 15 NRR should therefore include (binding) provisions based on which administrative authorities might take decisions.[684] Since the first draft of the restoration plan will be submitted by September 2026, it is at this moment still unclear whether the plan would include such

[679] ABRvS 13 May 2020 (n 675) para 4.1.
[680] See for example: Plambeck and Squintani (n 261) 10.
[681] Verhoeven and Jans (n 25) 118-122.
[682] HR 22 May 2015 ECLI:NL:HR:2015:1296 *NJ* 2016/262 (*De Staat der Nederlanden v Stichting Privacy First and others*), paras 3.3.2-3.3.3.
[683] Plambeck and Squintani (n 261) 7.
[684] Verhoeven and Jans (n 25) 118.

provisions.[685] Only if this would be the case, there might be a possibility for individuals and NGOs to appeal to a decision that executes or enforces the restoration plan or to trigger such a decision. Examples of these decisions could then be (the request for) a permit or an enforcement request regarding the measures included in the plan or the measures that should have been included in the plan. To what extent the consequences of an indirect assessment of the restoration plan could provide suitable remedies is addressed in paragraph 6.2.4.1.

6.2.3.3 Other Appealable Decisions Concerning Articles 4 and 15 of the Nature Restoration Regulation

Lastly, it might be possible that national administrative authorities take specific decisions infringing directly effective provisions of Articles 4 and/or 15 NRR, which may concern individuals or NGOs, or reject requests made by individuals or NGOs for the enforcement of such directly effective provisions. Since such decisions would qualify as appealable decisions before the administrative court, individuals and NGOs might be able to claim effective enforcement of the Regulation via this path. In this context, the Dutch Council of State ruled, based on an appeal made by two NGOs, that a granted permit for mechanical cockle fishery in the Dutch Wadden Sea infringed Article 6(3) of the Habitats Directive.[686] In the same line, NGOs (or individuals) could appeal against permits that infringe Articles 4 and/or 15 NRR, insofar these Articles have direct effect. Based on Articles 4 and 15 of the NRR, the Dutch State has to draw up a restoration plan which includes, amongst others, restoration measures for terrestrial, coastal and freshwater ecosystems. The Dutch State is to a great extent free in determining these measures. The most important guidelines from the NRR are that the measures lead to a "good condition" of the areas determined in Annex I NRR, a "favourable reference area" for additional suitable areas and a "sufficient quality and quantity" for habitats that fall in the scope of the Habitats and Birds Directives, that the habitats should show a "continuous improvement" and that there should be an aim not to "significantly deteriorate" the improved habitats again and the current habitats further.[687] In chapter 4, the possibilities of the direct effect of Articles 4 and 15 of the NRR on the European level have been discussed. There, I argued that the discretion for the implementation of the national restoration plan left for Member States for the measures that should be included in this plan in general hinder the provisions from having direct effect.[688] However, at the same time there might be possible situations in which specific measures are certainly necessary to take in

[685] Reg (EU) 2024/1911, art 16.
[686] *Kokkelvissers* (n 640) para 2.6.
[687] Reg (EU) 2024/1911, art 4(17), (11) and (12).
[688] Mendelts (n 117) 667; Jans and Vedder (n 83) 189.

order to, at some point, achieve the targets of Article 4.[689] The same applies to specific necessary measures in order to show continuous improvement and the non-deterioration requirements. In other words, although Articles 4 and 15 NRR might not include directly effective provisions that can be invoked by individuals and NGOs to enforce all types of measures, they could be directly effective with regard to some specific minimum measures. The national court should then apply the *Kraaijeveld* legality review as explained in chapter 4 to assess whether the Dutch State has stayed within its margin of discretion or whether it has infringed Articles 4 and/or 15 NRR.[690]

A permit that might infringe a directly effective provision of these Articles could for example be a permit for intensive farming – which is one of the greatest nitrogen emission sources in the Netherlands – that would lead to a lot of nitrogen emissions in habitats protected by Article 4 that fall outside of the scope of Article 6 of the Habitats Directive, which has already been implemented in national law.[691] If these nitrogen emissions are of such nature that the "good condition" or "continuous improvement" of the habitats cannot be achieved or that they will most certainly significantly deteriorate, the obligations following from Articles 4 and 15 NRR could have direct effect. Individuals and NGOs with concerned interests may then bring a claim against the permit before the Dutch administrative court. If individuals live nearby the farm, their interests could intertwine with general interests of nature protection so that the relativity requirement would be fulfilled as well.[692] Environmental NGOs protecting the environment would presumable fulfil the relativity requirement even more easily in such cases.[693] These individuals and NGOs may furthermore request the effective enforcement of these directly effective provisions and appeal to a possible rejection of such a request.[694] The remedies they can receive for successful claims are addressed in the following paragraph.

6.2.4 Remedies

As explained in chapter 4, two different types of remedies exist when national law conflicts with a directly effective European law provision: the national rule should be set aside and – in some situations – the national court can impose a specific command or injunction on the Member

[689] See for example: Arcadis (n 358) 41, 46 and 94; also see paragraph 6.3.4.3 for further information and application of this source.
[690] *Kraaijeveld* (n 324) para 60; see for example: Arcadis (n 358) 41 and 46; also see paragraph 6.3.4.3 for further information and application of this source.
[691] Dutch Environmental Law Act 2016 ("Omgevingswet") (hereafter: Dutch Environmental Law Act), art 2.18(1)(g); Dir 92/43/EEC, art 6.
[692] *Vereniging Het Guldenbos* (n 639) para 2.7.9; Widdershoven (n 635) para 3.12; Marseille and Tolsma (n 615) 251-252.
[693] Hedemann-Robinson (n 24) 358; see for example: *Kokkelvissers* (n 640).
[694] Dutch General Administrative Law Act, art 1:3(2)-(3).

State.[695] These remedies give to a certain extent guidance for the existing remedies in case of a successful claim before the Dutch (administrative) court. Following from the principle of national procedural autonomy, the exact remedies that are used after setting aside the conflicting national rules are specified on the national level.[696] The existing remedies before the Dutch administrative court include the annulment of a decision or a national legal provision, the obligation for an administrative authority to take a new decision in accordance with the instructions by the court, the determination of an enforcement decision by the court itself, interim relief and the compensation for damage caused by a decision.[697] Before addressing these different remedies, the distinction between the consequences of an assessment *in concreto* and an assessment *in abstracto* should be pointed out.

6.2.4.1 Assessment in Concreto and in Abstracto

With regard to the *in concreto* assessment, Article 8:72 GALA determines that the court annuls a decision partly or in its entirety when it deems the claim successful, for example when it is in conflict with a directly effective EU law provision.[698] When the court conducts an indirect assessment and finds *in abstracto* that the national legal provision on which the decision is based conflicts with European law, it will declare (part of) the provision non-binding insofar it conflicts with European law, which leads to annulment of the decision at hand as well.[699] *In concreto* assessment thus only affects the concrete decision at hand, while the consequences of the *in abstracto* assessment go further and also affect possible other or future decisions.[700]

As explained in paragraph 6.2.3.2, it remains unclear for now whether the national restoration plan of Article 15 NRR could be assessed *in abstracto* by the Dutch administrative court. Even if such indirect assessment would be possible, the question remains whether this type of assessment would be suitable. As explained, the consequence of an assessment *in abstracto* from which follows that a national provision conflicts with a (directly effective) European law provision is that the national provision should be set aside insofar it conflicts with European law.[701] However, if the national restoration plan drawn up by the Dutch State is in conflict with the obligations from Articles 4 and 15 NRR, this would presumably mean that the

[695] Verhoeven and Jans (n 25) 63 and 110; Jans and Vedder (n 83) 207-209; see for example: *Janecek* (n 28); *ClientEarth* (n 28); *JP* (n 31).
[696] Verhoeven and Jans (n 25) 111.
[697] Dutch General Administrative Law Act, arts 8:72 and 8:88(1).
[698] Dutch General Administrative Law Act, art 8:72; Verhoeven and Jans (n 25) 111 and 118; Marseille and Tolsma (n 615) 290.
[699] Verhoeven and Jans (n 25) 118-119; Plambeck and Squintani (n 261) 10.
[700] Verhoeven and Jans (n 25) 119-121.
[701] ibid 118-119; Plambeck and Squintani (n 261)10.

measures included in the plan are insufficient, for example because they cannot lead to certain habitats achieving the targets of "good condition", "favourable reference area" and "sufficient quality and quantity" or because they will lead to significant deterioration of these habitats.[702] The suitable outcome of a judicial review would then not be to set (part of) the plan aside but to change or supplement the plan in order to comply with the NRR's obligations. The administrative court can in principle not impose such positive obligations as a consequence of an indirect assessment, since there are limitations to the extent in which the court may intervene in the task of the legislator.[703] Although these limitations are not entirely definite (yet), the court seems to be reluctant in attaching more consequences to an indirect assessment next to setting aside the conflicting national rule.[704] Setting aside (part of) the plan might be relevant in two situations. First, it would lead to the obligation for the administrative authority to draw up a new plan, which provides the possibility for a restoration plan that does include the necessary measures. Second, if the plan includes the power for national authorities to make an exception in applying, implementing or enforcing the established restoration measures, setting aside this provision would also contribute to the effective enforcement of the NRR. However, there should then be an extreme situation at hand in which such a power would lead to a conflict with Articles 4 and 15 NRR, which is not easily imaginable. In conclusion, an indirect assessment might in theory provide possibilities for individuals and NGOs to appeal to the national restoration plan of Article 15 NRR and to raise potential issues regarding the plan, but it will presumably be difficult to receive suitable remedies in case of an infringement of the Article via this mechanism. Furthermore, as explained in paragraph 6.2.3.2, it should still be awaited to what extent it is possible to apply the mechanism to the restoration plan in the first place.

6.2.4.2 Consequences of the Annulment of a Decision

Based on the foregoing, a successful assessment of Article 15 NRR's restoration plan in its entirety before the Dutch administrative court does not seem very likely, not via a direct appeal and maybe with a lot of difficulty via an indirect assessment. That leaves individuals and NGOs before the administrative court for the most part with an assessment *in concreto*, as addressed in paragraph 6.2.3.3. They should then appeal to a specific, individual decision in which their interests intertwine with the interest to protect nature, such as a permit for intensive farming in

[702] See for example: Arcadis (n 358) 41, 46 and 94; also see paragraph 6.3.4.3 for further information and application of this source.
[703] See for example: RJB Schutgens, 'Rechtsbescherming tegen algemene regels. Tijd om de Awb te voltooien' in WJM Voermans, RJB Schutgens and ACM Meuwese (eds), *Algemene regels in het bestuursrecht. Preadviezen* (VAR Vereniging voor Bestuursrecht, Boom Juridisch 2017)129-132.
[704] ibid.

an NRR habitat. In the case concerning the permit for cockle fishery, the Council of State annulled the decision conflicting with the Habitats Directive.[705] This annulment solely applied to the permit at hand which makes this case an example of *in concreto* assessment by the Council.[706]

When a Dutch administrative court decides to annul a decision, it could also sustain the legal consequences of the decision, let the administrative authority take a new decision in accordance with its instructions, determine a new enforcement decision itself or grant interim relief.[707] The possibility for the court to determine a decision itself is in line with the mechanism of judicial execution of verdicts that is currently developing on the European level, as explained in chapter 4.[708] The Dutch administrative court can, for example, withdraw a decision or oblige the administrative authority to take a new decision under certain conditions or act in a certain way.[709] In order to make the concerning administrative authority comply with the court's decision, the court can also impose a penalty payment on the authority.[710] Based on the *Torubarov* and *Deutsche Umwelthilfe* cases that are addressed in chapter 4, the Dutch court is even obliged to use this remedy when it is necessary for the execution of the verdict.[711] In the Dutch administrative legal order, the starting point is that the court provides "final settlement" as much as possible.[712] When the administrative court imposes a penalty payment on the authority, it is even obliged to fully determine the case itself, which corresponds with this European obligation and the right to a fair trial.[713] Next to determining a decision itself, the Dutch administrative court can grant interim relief in cases in which it has annulled a decision if that would be necessary in the specific case.[714] Such an interim relief can be granted in case of "immediate urgency", based on the interests concerned.[715] As explained in chapter 3, the CJEU determined in the *Factortame* case that this remedy is necessary to be available on the national level in order to guarantee effective protection of EU law when national law conflicts with the EU law at stake.[716]

In addition to the remedies outlined above, the Dutch administrative court can provide compensation for damage caused by decisions based on Article 8:88 GALA, which is in line with

[705] *Kokkelvissers* (n 640), para 3.
[706] Verhoeven and Jans (n 25) 118.
[707] Dutch General Administrative Law Act, art 8:72(3)-(5); Marseille and Tolsma (n 615) 292-293.
[708] Verhoeven and Widdershoven (n 17) 251.
[709] Marseille and Tolsma (n 615) 294, 296 and 301-302.
[710] Dutch General Administrative Law Act, art 8:72(6); Marseille and Tolsma (n 615) 304; Verhoeven and Widdershoven (n 17) 251; see for example: ABRvS 30 November 2022 (n 401).
[711] *Torubarov* (n 391) paras 73-74; *Deutsche Umwelthilfe I* (n 401) para 52.
[712] Dutch General Administrative Law Act, art 8:41a; Marseille and Tolsma (n 615) 288-289.
[713] Marseille and Tolsma (n 615) 304.
[714] Dutch General Administrative Law Act, arts 8:72(5) and 8:81(1); Marseille and Tolsma (n 615) 298.
[715] Dutch General Administrative Law Act, art 8:81(1).
[716] *Factortame* (n 214) paras 20-21; *Unibet* (n 214), paras 42 and 72; also see: Ortlep and Widdershoven (n 202) 422.

the European State liability doctrine.[717] This compensation can be awarded for unlawful decisions, non-timely decisions or other unlawful acts by an administrative authority.[718] The administrative court is competent to award compensation up to € 25.000.[719] The civil court is qualified for higher amounts of compensation.[720] The conditions for compensation are the following: (i) unlawfulness; (ii) relativity; (iii) causality; and (iv) damage.[721] These conditions correspond with the Dutch conditions for State liability.[722] Therefore, the possibilities of claiming compensation before the Dutch civil court and the conditions for such compensation are further addressed in paragraph 6.3.

6.2.5 Uncertainty of Appealable Decisions Concerning Articles 4 and 15 of the Nature Restoration Regulation

Given the rather abstract character of the restoration plan following from Articles 4 and 15 NRR, it remains quite unclear whether individual appealable decisions for an indirect assessment would really come forward from this plan. In addition, other possible appealable decisions infringing these Articles that could be assessed *in concreto* before the Dutch administrative court would be very much dependent on a coincidental confluence of circumstances in which an administrative authority would grant a permit, reject an enforcement request or take another decision that would be in conflict with these Articles. Given the large problem of intensive farming in the Netherlands, this might be an area in which such decisions would appear often. However, even then the remedies before the administrative court would only be available for such concrete individual decisions and not, as explained in the previous paragraphs, for the restoration plan in its entirety, which limits the scope of such decisions within the enforcement of the NRR. This means that the administrative court would still not be able to, for example, determine the measures regarding the restoration of terrestrial, coastal and freshwater ecosystems to be included in the Dutch restoration plan. In other words, the chances of individuals and NGOs to enforce Articles 4 and 15 before the Dutch administrative court are to some extent limited.

Still, the Dutch State should, like every other Member State, provide effective (judicial) protection of EU law.[723] In the Dutch legal order, parties can bring a claim against government

[717] Dutch General Administrative Law Act, art 8:88(1); Marseille and Tolsma (n 615) 321-322.
[718] Dutch General Administrative Law Act, art 8:88(1).
[719] ibid art 8:89(2).
[720] Van Dam (n 438) 421.
[721] Marseille and Tolsma (n 615) 321-322.
[722] ibid.
[723] Charter of Fundamental Rights, art 47; Treaty on European Union, art 19(1); *Johnston* (n 194) paras 17-18.

action before the civil court if the administrative court does not have competence in a specific case.[724] In the cases regarding the air quality plans addressed in paragraph 6.2.3.1, the Dutch Council of State thus stated that, since the administrative court did not have competence regarding these non-appealable decisions, the civil court would be the competent court in these cases.[725] According to the Council, this competence division is not contrary to the principle of effective judicial protection and the principle of effectiveness.[726] The fact that a claim before the civil court might be more expensive and include a higher burden of proof does not make such a claim insufficient to fulfil this principle.[727] Furthermore, the legal protection required by the Aarhus Convention may be offered by any court, independently of the type of legal area.[728] Therefore, if the civil court does provide legal access regarding these plans, the Aarhus Convention would not be infringed either. With regard to possible violations of Articles 4 and 15 NRR, Dutch individuals and NGOs might therefore have higher chances before the civil court. These chances are addressed in the next paragraph.

6.3 Dutch State Liability Doctrine

6.3.1 Dutch Mechanism of State Liability

Claims by individuals or NGOs before the Dutch civil court against the Dutch State almost always consist of liability claims.[729] Since this type of claim is also the relevant claim in the light of this research, the focus of this paragraph will be on the Dutch State liability doctrine. As explained in chapter 4, the European conditions for State liability are minimum harmonisation.[730] In case of a State liability claim based on a violation of Articles 4 and 15 NRR (or on other EU law) the Dutch civil court should therefore provide at least as much protection and effective remedies for individuals and NGOs as provided by the European doctrine.[731] In addition to the – somewhat limited – possibilities on the European level, the national level could provide more judicial

[724] Dutch General Administrative Law Act, art 8:71; Ortlep and Widdershoven (n 17) 364; Marseille and Tolsma (n 615) 373.
[725] *Vereniging Stationsweg* (n 675) para 2.5.1; *Bewonersvereniging Johannes Geradtsweg* (n 675) para 2.5.1; ABRvS 13 May 2020 (n 675) para 4.1.
[726] *Vereniging Stationsweg* (n 675) para 2.5.1; *Bewonersvereniging Johannes Geradtsweg* (n 675) para 2.5.1.
[727] ABRvS 13 May 2020 (n 675) para 4.1.
[728] Plambeck and Squintani (n 261) 4.
[729] Dutch Civil Code, art 6:162; Marseille and Tolsma (n 615) 377; other types of claims are also possible but are made less often.
[730] Duijkersloot, Widdershoven and Jans (n 22) 442; Van Dam (n 438) 411.
[731] Van Dam (n 438) 410-411.

protection and effective remedies.[732] According to Plambeck and Squintani, the chances of a successful appeal to an environmental plan before the Dutch civil court are not very high.[733] They identify problems regarding the admissibility before the civil court and the State liability norms in such cases, which they consider to be in conflict with Articles 7 and 9 of the Aarhus Convention.[734] In my opinion however, there are possibilities for potential claimants, at least for NGOs, to successfully appeal to environmental plans such as the restoration plan of Article 15 NRR before the Dutch civil court. The recent *Greenpeace* case has for example shown that a claim before this court can be successful if the Dutch State has taken insufficient measures to protect nature and the environment.[735] I will substantiate my thesis by analysing whether a violation of Articles 4 and 15 NRR will fulfil the State liability conditions on the national level and whether the available remedies on the national level are satisfactory.

Since the general Dutch liability provision is established in the civil code, it is in principle applicable to disputes between private parties. However, since there is no specific provision for State liability included anywhere in Dutch law, Article 6:162 of the Dutch Civil Code ("Burgerlijk Wetboek") (hereafter: CC) also applies to State liability cases.[736] Within the Dutch (State) liability doctrine we can distinguish between two phases: the phase of the establishment and the phase of the scope. In the first phase, the conditions for when a party can be held liable are addressed.[737] These conditions include the admissibility and other requirements, which I explain in paragraphs 6.3.2 and 6.3.3.[738] In the second phase, the scope of the damage caused by the established liability for which a remedy should be provided is addressed.[739] I address the second phase in the light of the possible remedies following from State liability in paragraph 6.3.4.

6.3.2 Admissibility

The question of *who* might bring a claim against the Dutch State before the civil court is in principle fairly easy to answer. It depends on the following two sub-questions: (i) is the claimant a natural or legal person; and (ii) can the claimant receive the same outcome of their claim in an administrative procedure?[740] The first question is quite evident, since otherwise there could not

[732] See for example: Jans and Vedder (n 83) 227.
[733] Plambeck and Squintani (n 261) 11-16.
[734] ibid.
[735] *Greenpeace* (n 49).
[736] Van Dam (n 438) 378.
[737] ibid 446.
[738] Dutch Civil Code, arts 6:162(1)-(3) and 6:163.
[739] Van Dam (n 438) 446-447.
[740] Marseille and Tolsma (n 615) 381.

be a civil procedure.[741] The Dutch liability doctrine in principle protects persons and their property which requires the claimant to be a (legal) person in order to be admissible.[742] When an individual or NGO wants to bring a claim against the Dutch State for a possible violation of Articles 4 and 15 NRR before the civil court, this first step will not be an obstacle, since they are either natural persons or legal persons in the sense of Article 2:3 CC.[743]

The second question is already addressed in paragraph 6.2. Within the Dutch legal order, individuals should in the first place go to the administrative court with a claim against the government, if this is possible.[744] If it is still possible to object to the decision before the administrative authority or to appeal to this decision before the administrative court, the individual will not be admissible before the civil court with their claim.[745] If the administrative court has made a decision in a case concerning the claim at hand or if the individual has failed to comply with the requirement of the six weeks period to submit an objection or claim, the individual will technically be admissible before the civil court, but the civil court will reject their claim.[746]

Finally, the admissibility requirements of the Aarhus Convention concerning the (public participation) rights regarding environmental plans such as the restoration plan of Article 15 NRR for environmental NGOs apply to the civil procedure as well.[747] Since it follows from paragraph 6.2 that it is still uncertain to what extent claimants appealing to this restoration plan in its entirety will receive effective and suitable remedies before the Dutch administrative court, it is even more important for the civil court to provide access for such claims to comply with the Aarhus requirements.

In conclusion, individuals and NGOs will in principle be admissible before the Dutch civil court if they are not admissible before the administrative court.[748] However, as Plambeck and Squintani have pointed out, there have also been cases regarding environmental plans in which the Dutch civil court declared (some of) the claimants non-admissible because the administrative court would have competence, even though the cases did not include an

[741] ibid.
[742] Van Dam (n 438) 59.
[743] Dutch Civil Code, art 2:3; NGOs will most often have the legal form of a foundation, see for example: Ondernemersplein, 'Wat is een ngo en hoe start u er een?' (*Ondernemersplein overheid* 7 December 2022) <https://ondernemersplein.overheid.nl/bedrijf-starten/startsituaties/wat-is-een-ngo-en-hoe-start-u-er-een/> accessed 24 April 2025.
[744] Marseille and Tolsma (n 615) 381.
[745] ibid 385.
[746] ibid.
[747] Plambeck and Squintani (n 261) 4.
[748] Plambeck and Squintani (n 261) 12.

appealable decision (yet).[749] For example, in the *Vereniging Milieudefensie and Stichting Adem in Rotterdam* case, the civil court reasoned that it would be possible for the claimants to bring their case before the administrative court for an indirect assessment of the plan via a potential appealable decision.[750] However, as explained in paragraph 6.2.4.1, such an indirect assessment does not seem to provide the most suitable remedy for environmental plans in general and for Article 15 NRR's restoration plan in particular. It can therefore be questioned whether this case-law is in line with the European principle of effective judicial protection and the admissibility requirements regarding the (public participation) rights of environmental NGOs following from the Aarhus Convention.[751] According to the Dutch civil court, the inadmissible claimants would be admissible before the administrative court "within a foreseeable time period" and claimants to whom this did not apply were admissible before the civil court.[752] The uncertainty regarding the possibility to indirectly assess the restoration plan of Article 15 NRR outlined in paragraph 6.2.4.1 however provides an example of how this line of reasoning by the court could be at odds with the principle of effective judicial protection. Since it would very well be possible that the indirect assessment would take some time, not lead to the desirable remedy or not even take place at all, individuals and NGOs could be left empty-handed.[753] Only if they would in practice really be admissible to either the administrative or the civil court, the principle of effective judicial protection and the Aarhus requirements for admissibility could still be fulfilled on the Dutch national level. The fact that it does not become clear from the court's case-law what a "foreseeable time period" includes leaves some loose ends regarding the admissibility of individuals and NGOs in cases concerning environmental plans.[754] This line of case-law has not been fully developed yet. In contrast, the interim relief procedure of the *Vereniging Milieudefensie and Stichting Adem in Rotterdam* case shows that NGOs promoting the environmental interests of the plan at hand could also rather easily be admissible since such environmental plans are not

[749] ibid; see for example: Rb Den Haag 12 October 2016 ECLI:NL:RBDHA:2016:14947 *NJF* 2017/61 (*Stichting Comité N65 Ondergronds Helvoirt and others v De Staat der Nederlanden (Ministerie van Infrastructuur en Milieu)*), paras 5.17 and 5.19; Rb Den Haag 27 December 2017 ECLI:NL:RBDHA:2017:15380 *AB* 2018/115 (*Vereniging Milieudefensie, stichting Adem in Rotterdam and others v De Staat der Nederlanden (Ministerie van Infrastructuur en Milieu)*), paras 4.53-4.58; in this latter case, (part of) the claimants were admissible for some of their claims

[750] *Vereniging Milieudefensie and stichting Adem in Rotterdam* (n 749) paras 4.18-4.21

[751] GA van der Veen and ChW Backes, '*Vereniging Milieudefensie and others v De Staat der Nederlanden (Ministerie van Infrastructuur en Milieu)*' (2018) 115 AB Rechtspraak Bestuursrecht 749 (note), 776-777; Schutgens (n 703) 98-99; Plambeck and Squintani (n 261) 12; also see: *Zoskupenie II* (n 267) paras 72-73.

[752] *Vereniging Milieudefensie and Stichting Adem in Rotterdam* (n 749) paras 4.33, 4.58, 4.65 and 4.67.

[753] For example also see: Schutgens (n 703) 100-102, regarding *Privacy First* (n 682).

[754] Van der Veen and Backes (n 751) 776-777; Plambeck and Squintani (n 261) 12.

appealable before the administrative court.[755] This yet inconclusive case-law might currently lead to some legal uncertainty for individuals and NGOs that want to appeal to Articles 4 and 15 NRR. Still, in my opinion it also shows that the door to such admissibility is not completely closed. Clear and effective case-law on the national level would therefore be desirable to further open this door.

6.3.3 Norms

The Dutch civil courts have proven to be rather progressive in establishing (State) liability in environmental and climate cases.[756] Article 6:162 CC includes five conditions for a successful (State) liability claim. There should be: (i) unlawfulness; (ii) accountability; (iii) relativity; (iv) causality; and (v) damage.[757] The damage of the last condition could either consist of damage that has already occurred or of future damage.[758] Within the first liability phase, the fact that there is damage suffices for the establishment of the liability. Dutch law does not include an exact definition of "damage" but leaves the possible categories open.[759] The scope of the damage is part of the second liability phase and is therefore addressed in the light of the possible remedies in paragraph 6.3.4.

6.3.3.1 Unlawfulness

The first condition corresponds with the European condition of a sufficiently serious violation.[760] Generally, a violation of an EU law provision by a Member State leads to an unlawfulness under Dutch State liability law.[761] The question is then of course when a violation of Articles 4 and 15 NRR could be established. Section 2 of Article 6:162 lists three grounds for the unlawfulness: (i) an infringement of a right; (ii) an act or omission in conflict with a legal obligation; and (iii) an act or omission in conflict with the unwritten duty of care.[762] The first category requires an

[755] Rb Den Haag 7 September 2017 ECLI:NL:RBDHA:2017:10171 *AB* 2017/335 (*Vereniging Milieudefensie and Stichting Adem in Rotterdam v De Staat der Nederlanden (Ministerie van Infrastructuur en Milieu)*) (interim relief), paras 4.1-4-2.
[756] Van Dam (n 438) 382; Engelhard and others (n 49) 29-34; S van Deursen, '*Stichting Greenpeace Nederland v De Staat der Nederlanden*' (2025) 3 Jurisprudentie Aansprakelijkheid 368 (note) 413; ChW Backes and ER de Jong, '*Stichting Greenpeace Nederland v De Staat der Nederlanden*' (2025) 36 Milieu en Recht 372 (note) 384; see for example: HR *Urgenda* (n 56); *Greenpeace* (n 49).
[757] Dutch Civil Code, arts 6:162 and 6:163.
[758] CH Sieburgh, *Asser 6-IV. Verbintenissenrecht. De verbintenis uit de wet* (Wolters Kluwer 2023) para 151-154.
[759] Van Dam (n 438) 448.
[760] *Dillenkofer* (n 30), para 21.
[761] *Staat/Habing* (n 459) paras 3.4.2-3.4.3; Van Dam (n 438) 409; Plambeck and Squintani (n 261) 14.
[762] Dutch Civil Code, art 6:162(2).

infringement of a *subjective* right.[763] The right to a liveable environment could be considered as such a subjective right.[764] However, the category of the infringement of a right is not used often as a ground for unlawfulness.[765] In practice, the party who caused the damage should have infringed a very specific right of the claimant that also serves as a social norm.[766] The claimant's right should be "exclusively" violated, in contrast to other parties.[767] The violation therefore has to be a very specific situation, which is not likely to occur in cases of natural or environmental damage in the light of the NRR.

The second category includes all acts and omissions that are in conflict with legal obligations and prohibitions.[768] Such legal norms can be national legal provisions or international legal provisions, such as EU law provisions or ECHR rights.[769] Especially in State liability cases these international legal norms are relevant, since these norms apply (not solely but) primarily to States.[770] A clear violation of Articles 4 and 15 NRR would lead to an unlawfulness in the meaning of Article 6:162(1) CC. In this context, the Dutch court determined in the recent *Greenpeace* case that the failure of the State to bring an end to the deterioration of certain Natura 2000 habitats and the failure to achieve the nitrogen goals before 2025 and (most likely) 2030 violated the Habitats Directive and led to an unlawfulness.[771] Article 4 of the NRR includes a similar non-deterioration requirement, of which the violation might therefore also lead to an unlawfulness. Although the NRR's non-deterioration requirement is formulated more as an aim, acts or omissions by the State that would clearly lead to significant deterioration of habitats that fall within the scope of the NRR and outside the scope of Article 6 of the Habitats Directive could in the same line as the *Greenpeace* case be determined as unlawful. Appealable decisions that have been annulled by the administrative court are also considered to be unlawful, while appealable decisions that have not been annulled by the administrative court should be considered lawful (the so-called "*formele rechtskracht*").[772] As explained in paragraph 6.2, there will often not be an appealable decision in cases regarding the restoration plan of Article 15 NRR in its entirety, which means that it is up to the civil court to assess the unlawfulness otherwise.[773]

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[763] Van Dam (n 438) 113; Sieburgh (n 758) para 46.
[764] Sieburgh (n 758) para 46.
[765] Van Dam (n 438) 113.
[766] ibid 118.
[767] ibid 119; Sieburgh (n 758) para 47.
[768] Sieburgh (n 758) para 44.
[769] ibid; Van Dam (n 438) 104 and 386.
[770] Van Dam (n 438) 386.
[771] *Greenpeace* (n 49) paras 5.45-5.46 and 5.53; Dir 92/43/EEC, art 6(2), implemented in: Dutch Environmental Law Act, art 2.18; Backes and De Jong (n 756) 385.
[772] Marseille and Tolsma (n 615) 390.
[773] ibid 378.

This could be different in cases in which a specific decision at hand infringes the NRR. The category of a conflict with a legal obligation lastly includes unwritten law, or so-called "soft law".[774] Soft law can in this regard be used for the interpretation of written legal norms.[775]

The last category includes norms that are considered "societal norms".[776] This unwritten duty of care can be seen as a "residual category", which can be invoked if there is no violation of a subjective right or legal norm. Next to a direct violation of EU law, the *Greenpeace* case also shows how European environmental law can fill in the Dutch unlawfulness category of societal norms.[777] In this case, the violation of the Habitats Directive due to an inadequate nitrogen policy led to a violation of the unwritten duty of care, according to the court.[778] In the same line, the NRR could also fill in this duty of care in habitats that fall within the scope of the NRR and outside the scope of Article 6 of the Habitats Directive. The emission of nitrogen will presumably also hinder the restoration of terrestrial, coastal and freshwater ecosystems and deteriorate habitats within these ecosystems.

Finally, unlawfulness could be established via an appeal to the ECHR, for example Articles 2 and 8. This happened for example in the *Urgenda* case, where the highest Dutch Court ruled that the Dutch State had violated these Articles by adopting an inadequate policy regarding greenhouse gas emissions.[779] A human rights violation might strengthen the establishment of an unlawfulness regarding a violation of Articles 4 and 15 NRR. The *Urgenda* case shows an example of a rather broad application of Articles 2 and 8 ECHR.[780] The recent *KlimaSeniorinnen* case might even expand this application further for NGOs with regard to the admissibility before the court in environmental and climate cases.[781] However, with regard to the applicability of ECHR rights individuals and NGOs will presumably come across similar obstacles as described in chapter 5. It will be a lot more difficult to prove a human rights violation with regard to a nature protection issue than with regard to a climate or environmental issue taking place in a living environment. The *Urgenda* judgment can therefore not easily be analogously applied to cases concerning Articles 4 and 15 NRR. If a human rights violation were to occur in such cases, the State should primarily provide its own remedies, which are addressed in paragraph 6.3.4, and in some cases

[774] Van Dam (n 438) 112; Sieburgh (n 758) para 44.
[775] Van Dam (n 438) 112.
[776] Sieburgh (n 758) para 55.
[777] Van Deursen (n 756) 413; Backes and De Jong (n 756) 385.
[778] *Greenpeace* (n 49) para 5.46; Van Deursen (n 756) 413.
[779] HR *Urgenda* (n 56) paras 2.3.2 and 5.10
[780] GA van der Veen and ChW Backes, '*De Staat der Nederlanden (Ministerie van Economische Zaken en Klimaat) v Stichting Urgenda*' (2020) 24 AB Rechtspraak Bestuursrecht 139 (note) 170.
[781] *KlimaSeniorinnen* (n 55) paras 475-476; Gijselaar and Kuiper (n 527) para 5; Martins Pereira (n 32) 583.

additionally the remedies as prescribed by the ECtHR, which could consist of monetary compensation or consequential orders.

6.3.3.2 Accountability

The second condition requires that the party who caused the damage can also be considered accountable for the unlawfulness.[782] The accountability requirement relates the unlawful *action* to the accused *party*.[783] Despite the fact that accountability and unlawfulness are two separate elements of liability, they are closely connected to each other.[784] In practice, accountability is therefore often established together with the establishment of unlawfulness.[785] A condition like accountability is not clearly present within the European State liability doctrine.[786] The highest Dutch Court has determined that the violation of an EU law provision by the State in principle establishes the accountability of the State.[787] It is possible for the State to negate this accountability by exception, if it provides sufficient facts to prove the absence of the accountability in the specific case.[788]

In conclusion, the accountability in State liability cases concerning the violation of EU law will usually not be a great hurdle for individuals and NGOs to take once the unlawfulness is established.[789] According to Plambeck and Squintani, this might be different in cases regarding environmental plans because of a possible lack of subjective rights.[790] As explained however, the accountability connects the unlawful action to the accused party.[791] A possible lack of subjective rights would concern the claimant and therefore in my opinion relates to the relativity requirement rather than the accountability requirement. The possible fulfilment of the relativity requirement in State liability cases regarding Articles 4 and 15 NRR is addressed in the next paragraph. The Dutch civil court furthermore confirmed in the *Greenpeace* case that the accountability of a State that violates EU law is in principle established, also in cases regarding environmental plans or programmes.[792]

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[782] Dutch Civil Code, art 6:162(3).
[783] Sieburgh (n 758) para 104.
[784] ibid paras 104-105; Van Dam (n 438) 145.
[785] Van Dam (n 438) 145-146.
[786] ibid 409.
[787] *Staat/Habing* (n 459) para 3.5.2; ibid.
[788] *Staat/Habing* (n 459) para 3.5.2; Van Dam (n 438) 409.
[789] Van Dam (n 438) 409.
[790] Plambeck and Squintani (n 261) 15.
[791] Van Dam (n 438) 132.
[792] *Greenpeace* (n 49) para 5.31; in this case, the court referred to decisions of the Dutch Council of State regarding the so-called "Nitrogen Action Programme" ("Programma Aanpak Stikstof").

6.3.3.3 Relativity

Article 6:163 CC contains the third condition and determines that there is no ground for compensation when the violated norm does not aim to protect the claimant from the suffered damage.[793] This relativity requirement is for the great part similar to the European relativity requirement.[794] However, since the interpretation of both the European and national requirement by the CJEU and the national courts is rather casuistic, it remains hard to conclude which interpretation is broader.[795] In the *EnergyClaim* case, the highest Dutch Court established that for both relativity requirements the violated (European) legal provision should (also) aim to protect the individual's interests or that these interests are sufficiently coherent with the provision's aims.[796] As has become clear from the *JP* case addressed in chapter 4, the CJEU determined that European environmental legislation does in principle not intend to confer rights on individuals, since this legislation focuses on protecting the environment in general.[797]

In the same light, it could be hard for individual persons to prove before the Dutch civil court that Articles 4 and 15 NRR protect them individually, since the Articles are aimed at the protection of nature in general, similar to the Habitats Directive.[798] Based on Article 3:303 CC, applicants before a Dutch civil court should have sufficient interests in order for their claim to be awarded. Individual applicants that do not have a sufficient personal interest in a case are not entitled to receive a remedy before the civil court.[799] In Dutch environmental and climate cases, individual applicants generally do not seem to have sufficient personal interest.[800] In the recent *Bonaire* case, the Dutch civil court in this regard even referred to the *KlimaSeniorinnen* case in which the individual applicants were not admissible because of a lack of the required victim status, while the environmental NGO was admissible.[801]

NGOs that promote a general interest are likely to be more successful before the Dutch civil court.[802] In the *Urgenda* and *Greenpeace* cases, the NGOs Urgenda and Greenpeace were admissible based on Article 3:305a CC, which regulates collective claims within the Dutch

[793] Dutch Civil Code, art 6:163.
[794] Van Dam (n 438) 408.
[795] Duijkersloot, Widdershoven and Jans (n 22) 446.
[796] HR 19 October 2018 ECLI:NL:HR:2018:1973 *AB* 2019/119 (*EnergyClaim and others v De Staat der Nederlanden*), para 3.4.4.
[797] *JP* (n 31), para 55.
[798] Van Dam (n 438) 407-408; Plambeck and Squintani (n 261) 13.
[799] See for example: Rb *Milieudefensie/Shell* (n 49) para 4.2.7.
[800] See for example: ibid; Rb *Urgenda* (n 49) para 4.109; Rb Den Haag 25 September 2024 ECLI:NL:RBDHA:2024:14834 *JOR* 2024/303 (*Stichting Greenpeace Nederland and others v De Staat der Nederlanden (Bonaire)*), para 3.21.
[801] *Bonaire* (n 800) para 3.21.
[802] Van Dam (n 438) 619-620; Plambeck and Squintani (n 261) 16.

private law system.[803] Via this Article, Greenpeace could base its claim on the general interest of nature conservation and environmental protection.[804] This is in line with the right for environmental NGOs to be admissible concerning public participation regarding environmental plans based on Articles 7 and 9 of the Aarhus Convention. In case of a violation of Articles 4 and 15 NRR, NGOs with similar interests of the protection of nature and environment could also fulfil the relativity requirement via Article 3:305a CC. Although Plambeck and Squintani argue that the admissibility of environmental NGOs based on this Article is not very certain, especially in cases regarding nature, the *Greenpeace* case shows otherwise, since the Habitats Directive appealed to in that case does protect nature as well.

6.3.3.4 Causal Link

The fourth condition requires a causal link between the violated norm and the damage of the claimant.[805] As explained in chapter 4, the CJEU leaves the interpretation of the European causality requirement for the greatest part to the Member States.[806] Within the Dutch liability doctrine the starting point for establishing causality is the *conditio sine qua non* connection, which entails that the damage would not have occurred if the unlawfulness would not have happened.[807] Whether such connection is present highly depends on the circumstances of the case at hand.

As explained in chapters 4 and 5, this is often hard to prove in environmental and climate cases because of the possibility of multiple sources that could have caused the environmental or climate damage.[808] With regard to environmental plans, Plambeck and Squintani point to the fact that the damage will usually not be caused by the plan but by specific measures that have been taken.[809] However, Article 15 NRR requires Member States to take measures based on, amongst others, Article 4 NRR regarding terrestrial, coastal and freshwater ecosystems. As argued before, there could very well be some minimum measures imposing directly effective obligation on the State. If a lack of these (minimum) measures leads to damage, causality between the unlawful restoration plan and the damage could in my opinion be established.

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[803] Dutch Civil Code, art 3:305a; HR *Urgenda* (n 56) paras 5.9.1-5.9.3; Rb Den Haag 6 March 2024 ECLI:NL:RBDHA:2024:3007 *RBP* 2024/25 (*Stichting Greenpeace Nederland v De Staat der Nederlanden*) (interlocutory judgement) paras 5.1-5.22; Backes and De Jong (n 756) 384.
[804] *Greenpeace* (interlocutory judgment) (n 803) paras 5.7-5.10
[805] Dutch Civil Code, art 6:162(1); Van Dam (n 438) 533.
[806] *Brasserie du Pêcheur* (n 30) para 65; Van Dam (n 438) 409.
[807] Van Dam (n 438) 535; CH Sieburgh, *Asser 6-II. Verbintenissenrecht. De verbintenis in het algemeen, tweede gedeelte* (Wolters Kluwer 2021) para 50.
[808] Hedemann-Robinson (n 24) 355; Bauw and Brans (n 467) para 6.2.3.
[809] Plambeck and Squintani (n 261) 14.

Furthermore, the Dutch court determined in the *Greenpeace* case that in case of a violation of the non-deterioration requirement of the Habitats Directive causality does not have to be proven.[810] This could analogically apply to a violation of the non-deterioration requirement of Article 4 NRR. Finally, the Dutch liability doctrine includes various ways to ease the causality in cases of causality uncertainty.[811] It goes beyond the scope of this research to analyse all these national easings extensively. However, the fact that the Dutch civil court has in multiple environmental and climate cases accepted (partial) liability and accountability of the State or other actors without the causality requirement hindering this shows the possibilities of claims regarding Articles 4 and 15 NRR also fulfilling this requirement.[812] For example in the *Urgenda* case, the Dutch court established a so-called "partial responsibility" for the State for their part of the greenhouse gas emissions, even though not all climate damage was caused by the Dutch State's emissions.[813] The severity of the environmental and climate problems justifies such partial responsibility, according to the court.[814] Consequently, the strict *conditio sine qua non* requirement did not remain a big hurdle for the claimant.[815]

6.3.4 Remedies

If all five conditions for State liability are fulfilled, Article 6:162 CC obliges the party who caused the damage to compensate the injured party for all the damage he caused.[816] The starting point of the Dutch (State) liability doctrine is that the damage should be compensated in a way as if the unlawfulness has not happened.[817] However, full redress is often hard to achieve in practice.[818] This is caused by the fact that, while not all damage can be expressed in terms of money, monetary compensation is the most common way of redress.[819] Fortunately, monetary compensation is not the only possible remedy following from a successful claim to Article 6:162 CC. The civil court can, based on a claim by the injured party, offer another type of remedy as

[810] *Greenpeace* (n 49) para 5.26.
[811] See for example: ER de Jong, 'Generieke causaliteitsonzekerheid bij het bewijzen van een oorzakelijk verband. Over de grensgebieden van causaliteit' (2021) 2 Nederlands Tijdschrift voor Burgerlijk Recht 41; E Engelhard, 'Keuzeonzekerheid bij de vaststelling van het condicio-sine-qua-non-verband' (2020) September/0810 Ars Aequi 810; Bauw and Brans (n 467) paras 6.2.4-6.2.6.
[812] See for example: HR *Urgenda* (n 56); *Greenpeace* (n 49); Rb *Milieudefensie/Shell* (n 49); Gerechtshof Den Haag 12 November 2024 ECLI:NL:GHDHA:2024:2099 *JA* 2025/47 (*Royal Dutch Shell Plc v Vereniging Milieudefensie and others*).
[813] HR *Urgenda* (n 56) para 5.7.7.
[814] ibid.
[815] Plambeck and Squintani (n 261) 15.
[816] Dutch Civil Code, art 6:162(1).
[817] Van Dam (n 438) 451; Sieburgh (n 758) para 151.
[818] Van Dam (n 438) 451-452.
[819] Dutch Civil Code, art 6:103; ibid 452-453; Sieburgh (n 758) para 151.

well.[820] Next to monetary compensation, the court can provide a declaratory judgment, an injunction in the form of a prohibition or a command or an interim relief.[821] Remedies can either be provided after the damage has taken place or prior to the damage taking place, in order to prevent the damage from happening.[822]

6.3.4.1 Monetary Compensation

The first possible remedy based on a successful claim to Article 6:162 CC is monetary compensation.[823] Monetary compensation can be awarded for pecuniary damage and "other loss", as long as compensation for this loss is provided for by law.[824] This other, intangible loss is limited by law and should be established based on "equity".[825] As explained in chapters 4 and 5, monetary compensation is often not the most suitable remedy in environmental cases.[826] It does provide an important and suitable remedy for individuals who have suffered property damage or psychological damage because of an environmental violation. However, in the case of a violation of Articles 4 and 15 NRR the damage will mostly regard the terrestrial, coastal and freshwater ecosystems instead of individual damage, which makes monetary compensation not a very suitable remedy. In cases like *Urgenda* and *Greenpeace*, the court did not award any monetary compensation at all either.[827] This can be explained by the nature of these cases, which aim to protect the general environmental and climate interests instead of the individual interests. If individual damage were to occur because of a violation of Articles 4 and 15 NRR, the judge will have to establish or estimate the amount of compensation to be awarded, based on the damage the accused party can be held accountable for.[828]

Compensation for intangible loss is probably not likely to be awarded under the Dutch liability doctrine in cases regarding these Articles either, unless there are psychical or personal injuries or if the violation has led to someone's death.[829] I do not estimate the chances of such

[820] Dutch Civil Code, art 6:103; Van Dam (n 438) 582-583.
[821] Dutch Civil Code, arts 3:302 and 3:296(1); Van Dam (n 438) 590 and 594; Sieburgh (n 758) paras 152-154; the Dutch civil court can also provide an obligation for recognition and apologies or a rectification of a misleading publication based on Article 6:167 CC, but these remedies are not relevant for this research and are therefore not addressed.
[822] Sieburgh (n 758) paras 151-154.
[823] Dutch Civil Code, arts 6:103 and 6:162(1).
[824] ibid art 6:95; Sieburgh (n 807) para 24.
[825] Dutch Civil Code, art 6:106; Sieburgh (n 807) para 142.
[826] Hedemann-Robinson (n 24) 357-358; Keller, Heri and Piskóty (n 33) 20-21.
[827] Rb *Urgenda* (n 49) para 5; *Greenpeace* (n 49) para 6.
[828] Dutch Civil Code, arts 9:97-9:98.
[829] ibid art 6:106.

damage as a consequence of a lack of measures to restore and protect terrestrial, coastal and freshwater ecosystems to be very high.

6.3.4.2 Declaratory Judgment

The second possible remedy is the declaratory judgement.[830] The civil court will then declare the act or omission that caused or will cause the damage to be unlawful.[831] The court can also determine the sole declaration of unlawfulness to be a sufficient remedy and refrain from awarding monetary compensation.[832] This corresponds to the power of the ECtHR to decide not to award any just satisfaction but solely to provide a declaration of the violation of an ECHR right by the concerning State.[833] A declaratory judgement could be suitable in cases concerning a possible violation of Articles 4 and 15 by the State, so that the State knows it has to change its restoration plan in order to comply with its judicial obligations. In the *Greenpeace* case the court for example established the failures of the Dutch State to end the (threatening) deterioration and achieve the nitrogen targets in urgent habitats within the scope of Article 6 of the Habitats Directive to be unlawful.[834]

At the same time, a declaration of unlawfulness is not always necessary when another remedy for the liability has already been awarded. In the case of *Milieudefensie v. Shell* the court for example rejected the claim for a declaration of unlawful acting by Shell because the command for greenhouse gas reduction was already awarded.[835] Accordingly, Milieudefensie would not have any interest in a declaration of unlawfulness. If the court provides a declaration – like in *Greenpeace* – it is furthermore often combined with another remedy, such as an injunctive relief.[836]

6.3.4.3 Injunctive Relief

The third remedy individuals and NGOs can claim before the civil court is the remedy of an injunctive relief.[837] This injunction can be either a prohibition or a command. As explained in chapters 4 and 5, such prohibitions or commands are often more suitable than monetary

[830] ibid art 3:302.
[831] Van Dam (n 438) 591; Sieburgh (n 758) para 152.
[832] Van Dam (n 438) 591.
[833] President of the European Court of Human Rights (n 523) para 4; Keller, Heri and Piskóty (n 33) 4; ibid.
[834] *Greenpeace* (n 49) para 6.1.
[835] Rb *Milieudefensie/Shell* (n 49) para 4.5.9.
[836] Plambeck and Squintani (n 261) 11.
[837] Dutch Civil Code, art 3:296(1).

compensation in cases concerning environmental damage.[838] For a violation of Articles 4 and 15 NRR the prohibition of the violating act or the command to restore the damage that has been done would also be suitable. Parties can claim an injunction when an unlawfulness is causing damage, prior to a threatening unlawfulness or when the unlawfulness has already occurred and threatens to occur again.[839] The conditions of damage and accountability are therefore not required to already be established for a successful claim to an injunction, but an injunction will already be awarded when the (threatening) unlawfulness of the act or omission is established.[840] The court can only refrain from awarding an injunction in case of an unlawfulness when "important social interests" require this.[841]

In the *Urgenda* and *Greenpeace* cases the Dutch court imposed injunctions on the Dutch State based on Article 3:296 CC.[842] In *Urgenda* the court commanded the State to decrease its greenhouse gas emissions with at least 25% in 2020 opposed to 1990.[843] The court left the State free in deciding the way in which it would achieve this goal, in the light of the separation of powers between the State and the judiciary.[844] In *Greenpeace*, the court commanded the State to achieve the nitrogen reduction goals in line with the so-called "critical load" ("*kritische depositiewaarde*") by the end of 2030 in which it should prioritise certain urgent habitats.[845] If the State fails to do so, it is obliged to pay a penalty of € 10 million.[846] The imposition of this penalty payment is a rather unique remedy, since constitutional courtesy usually prevents the Dutch civil court from imposing such penalty payments.[847] However, in this case the court apparently does not have a lot of faith in the State to achieve the command completely voluntarily.[848] In *Greenpeace*, the court thus further limited the State's discretion in filling in the concrete measures compared to *Urgenda*.[849] Still, it did not award the claim by Greenpeace to oblige the State to draw up a plan or programme including measures for nitrogen reduction because it would be too hard to determine when such an obligation would be fulfilled.[850] However, such a plan could help the court to further guide the State in the enforcement of (European) environmental legislation, in this case the

[838] Hedemann-Robinson (n 24) 357-358.
[839] Van Dam (n 438) 594; Sieburgh (n 758) para 153.
[840] Van Dam (n 438) 594.
[841] Dutch Civil Code, art 6:168(1); ibid 596-597.
[842] Rb *Urgenda* (n 49) para 5; *Greenpeace* (n 49) para 6.
[843] Rb *Urgenda* (n 49) para 5.1.
[844] HR *Urgenda* (n 56) para 8.2.7; Backes and De Jong (n 756) 385.
[845] *Greenpeace* (n 49) para 6.2.
[846] ibid.
[847] *Greenpeace* (n 49) para 5.95; Van Deursen (n 756) 414; Backes and De Jong (n 756) 386.
[848] Van Deursen (n 756) 414; Backes and De Jong (n 756) 386.
[849] Backes and De Jong (n 756) 385-386.
[850] *Greenpeace* (n 49) para 5.90.

obligations following from Article 6 of the Habitats Directive.[851] The EU also seems to be in favour of such plans and programmes regarding environmental plans, since multiple sources of European environmental legislation do already include the obligation to draw up environmental plans or programmes themselves.[852] Here, we see a contrast between the European and national remedies for effective judicial protection. The CJEU seems to move towards an appeal to the direct effect in order to claim for action plans by underlining in the *JP* case that although individuals could not invoke the obligations of the Air Quality Directive to receive compensation based on a State liability claim, these obligations do enable individuals to appeal to the direct effect of the Directive before the national court and claim an action plan by the Member State to comply with the Directive.[853] In contrast, the Dutch court seems to step away from these action plans and focuses on a more general command based on State liability instead. Greenpeace asked the Dutch civil court to oblige the State to draw up a plan or programme including effective measures to achieve the imposed nitrogen reduction goals.[854] In my opinion this obligation would have been a valuable addition to the court's verdict, since it would have further guided the State in the way in which it should achieve the obligation it now has to achieve anyway. The reasoning by the court regarding the fact that it would be too hard to determine when this obligation would be fulfilled appears a bit odd to me. Although the court agrees with Greenpeace on the fact that the State should take certain additional measures regarding urgent habitats and that a plan or programme including these additional measures would be the most obvious instrument, it does not impose such a plan or programme because of a fear of disputes that would be too hard to enforce.[855] However, the necessary additional measures are imposed and should be enforced in order to comply with Article 6 Habitats Directive.[856] In my opinion, a plan or programme with these measures would only provide more clarity and guidance for this enforcement.

In line with *Urgenda* and *Greenpeace*, the Dutch civil court could also provide an injunction in case of a violation of Articles 4 and 15 NRR. Article 15 includes one of the specific EU law provisions that obliges Member States to draw up an environmental plan, namely a restoration plan for, amongst others, the targets of Article 4. The court should therefore – as opposed to the *Greenpeace* case – command the Dutch State to draw up such a plan if it has

[851] Van Deursen (n 756) 414.
[852] Plambeck and Squintani (n 261) 4; see for example: Dir 2008/50/EC, art 23; Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] Water Framework Directive, OJ L 327/1, art 13; Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L 312/3, art 28; Reg (EU) 2024/1911, art 15.
[853] *JP* (n 31) paras 58-60; Haket (n 418) 112; Jans and Vedder (n 83) 223-224.
[854] *Greenpeace* (n 49) para 4.1.
[855] ibid para 5.90.
[856] ibid paras 5.76-5.78.

failed to do so.[857] As I have argued in chapter 4, in line with the CJEU's case-law on air quality plans of the Air Quality Directive, the obligation to draw up a restoration plan has direct effect.[858] In the interim relief procedure of *Vereniging Milieudefensie and Stichting Adem in Rotterdam* the Dutch court obliged the State to draw up an air quality plan including measures that are in accordance with the Air Quality Directive.[859] In the regular procedure of this case, the court rejected these same injunction claims, but it did not rule out the possibility of obliging the State to include the necessary measures in the air quality plan.[860] From the grounds brought forward by Milieudefensie and Adem could however, according to the court, not be concluded that the State had laid down insufficient measures to comply with the Air Quality Directive in its plan.[861] After the interim relief procedure, the State had announced to adapt its plan, which it is entitled to do based on the Directive.[862] Since this case could not lead to a concrete obligation for the State to take certain measures, it remains difficult to draw hard conclusions from this case for cases regarding (other) environmental plans as well.[863] As explained in paragraph 6.3.2, this case-law is yet inconclusive and does not seem to be fully developed yet. Since the obligations for Member States to draw up environmental plans such as those following from the Air Quality Directive and the NRR do have direct effect, it would in my opinion be in line with the European principle of effective judicial protection and the *Rewe* principles of effectiveness and equivalence to oblige the State to draw up a sufficient environmental plan if it has failed to do so.[864] If the national court would oblige Member States to draw up this environmental plan in such cases, it would enable (mostly) NGOs to enforce the directly effective EU law provisions, such as Article 15 NRR and to receive an effective remedy in case of a violation thereof.[865] Since injunctions are part of the national remedy toolbox before the Dutch civil court, this approach would not be less favourable.[866] Thus, if claimants sufficiently prove the violation of such obligations, the Dutch civil courts would have to follow the line of the interim relief court and the possibility provided by the

[857] See for example: *Janecek* (n 28) paras 35-36 and 38.
[858] *Janecek* (n 28) paras 35-36 and 38; *ClientEarth* (n 28) para 56; *JP* (n 31) paras 59-60.
[859] *Vereniging Milieudefensie and Stichting Adem in Rotterdam* (interim relief) (n 755), para 4.13.
[860] *Vereniging Milieudefensie and Stichting Adem in Rotterdam* (n 749) paras 4.91, 4.100, 4.113, 4.122-4.124 and 4.143-4.145.
[861] ibid paras 4.132 and 4.141-142.
[862] ibid paras 4.119 and 4.142.
[863] Van der Veen and Backes (n 751) 776 and 779.
[864] Charter of Fundamental Rights, art 47; Treaty on European Union, art 19(1); *Rewe* (n 217) para 5; Van Dam (n 438) 410-411.
[865] See for example: Plambeck and Squintani (n 261) 14.
[866] For example, in Rb *Urgenda* (n 49) para 5.1 the Dutch civil court commanded the Dutch State to reduce its greenhouse gas emissions and in Rb *Milieudefensie/Shell* (n 49) para 4.4.55 the Dutch civil court commanded Shell to reduce its greenhouse gas emissions, while in both cases no (direct) violation of EU law was established.

regular court in the *Vereniging Milieudefensie and Stichting Adem in Rotterdam* case.[867] Although the uncertain case-law does not yet show to what extent the European enforcement principles would be fulfilled on the Dutch national level in this regard, the procedures in *Vereniging Milieudefensie and Stichting Adem in Rotterdam* do show the possibility thereto. This is complemented by the *Greenpeace* case. Although the court did not oblige the State to draw up a plan here, it did impose the obligation to take certain additional measures regarding urgent habitats.[868] Still, case-law that provides more clarity regarding this issue is in my opinion desirable.

The *Greenpeace* case might also set an example for commands regarding the content of the restoration plan following from Articles 4 and 15 NRR. In principle, Member States have discretion to fill in the measures included in this plan.[869] However, the court might also be able to impose some (minimum) measures on the State. In the *Greenpeace* case, the command to prioritise certain urgent habitats within the achievement of the nitrogen reduction goals followed from ecological research that shows that irreparable damage will occur in certain habitats without taking certain measures.[870] Such irreparable damage is also likely to occur to terrestrial, coastal and freshwater ecosystems without certain necessary measures. For example, the emission of nitrogen – which is a very big environmental challenge in the Netherlands, amongst others because of intensive farming – highly damages forests and marshes on the Veluwe, a Dutch nature region.[871] Ecological research shows that the current measures are insufficient to prevent significant deterioration and achieve improvement of these areas.[872] Additional measures, such as the limitation of certain fertilisers and pesticides, are absolutely necessary to change this.[873] Therefore, the Dutch civil court could, in case of a violation of Articles 4 and 15 NRR, oblige the Dutch State to include such (minimum) measures in its restoration plan. This would be in line with the analysed command in the *Greenpeace* case and with the European mechanism of direct effect.

In order to guarantee the execution of an injunction, the civil court is empowered to realise the prohibition or command itself, if necessary and possible.[874] The court can to that end declare that its judgment serves as the legal document that is necessary for this realisation.[875] This power

[867] Van der Veen and Backes (n 751) 779.
[868] *Greenpeace* (n 49) paras 5.76-5.78.
[869] See for example: *Vereniging Milieudefensie and Stichting Adem in Rotterdam* (interim relief) (n 755) para 4.13.
[870] *Greenpeace* (n 49) para 5.46; Backes and De Jong (n 756) 385.
[871] Arcadis (n 358) 41 and 46.
[872] ibid 94.
[873] ibid.
[874] Dutch Civil Code, art 3:299(1)-(2).
[875] ibid arts 3:300(1) and 3:301(1).

corresponds with the power of the administrative court to replace the unlawful decision with its own decision, as explained in paragraph 6.2.4.2.[876] It is furthermore in line with the possibility of judicial execution which the CJEU has introduced in *Torubarov* and *Deutsche Umwelthilfe* and is still developing.[877] Different from the administrative court, the civil court is usually more reluctant in using this power, in order to respect the rights of the accused party as much as possible.[878] It will therefore often first try to enforce its verdict by imposing a penalty payment on the party that caused or is likely to cause the damage in order to make them comply with the prohibition or command, like the court did in the *Greenpeace* case.[879] Still, the court is obliged by the CJEU to use the powers it has when this is necessary for the execution of the verdict.[880]

6.3.4.4 Interim Relief

Finally, similar to the administrative court the civil court can also award an interim relief.[881] Such proceedings will, if necessary, also lead to monetary compensation or an injunction. There are two ways in which individuals and NGOs can claim this. First, they can claim an interim relief during the procedure of their main claim for the period of the main procedure.[882] This interim claim should correspond with the main claim, but may not influence the outcome of the main procedure.[883] Second, individuals and NGOs can claim an interim relief in a self-standing case before a court that assesses preliminary relief proceedings (the so-called "*kort geding*" procedure).[884] Such proceedings may take place in urgent cases, based on the interests of the parties. The *Vereniging Milieudefensie and Stichting Adem in Rotterdam* case provides an example of an interim relief.[885] From this example we know that the main proceedings might differ tremendously from the interim proceedings.

[876] Dutch General Administrative Law Act, art 8:72(3) and (4); Marseille and Tolsma (n 615) 292-293.
[877] Verhoeven and Widdershoven (n 17) 251; *Torubarov* (n 391); *Deutsch Umwelthilfe I* (n 386).
[878] AW Jongbloed, 'Artikel 300. Reële executie tot verrichten rechtshandeling' in: J Hijma (ed), *Groene Serie Vermogensrecht* (Wolters Kluwer) para 5.
[879] Dutch Code of Civil Procedure, *Stb* 1828, 14 ("Wetboek van Burgerlijke Rechtsvordering") (hereafter: Dutch Code of Civil Procedure), art 611a(1); ibid; Sieburgh (n 758) para 154; *Greenpeace* (n 49) para 5.97.
[880] *Torubarov* (n 391) paras 73-74; *Deutsche Umwelthilfe I* (n 401) para 52.
[881] M den Besten, 'Samenloop van voorlopige voorzieningen in het burgerlijk procesrecht' (2007) 23 BW-Krant Jaarboek 211, 211.
[882] Dutch Code of Civil Procedure, art 223(1).
[883] ibid art 223(2); Den Besten (n 881) 215.
[884] Dutch Code of Civil Procedure, art 254(1).
[885] *Vereniging Milieudefensie and Stichting Adem in Rotterdam* (interim relief) (n 755).

6.4 Conclusion

On the Dutch national level, individuals and NGOs can appeal to (directly effective) EU law provisions, amongst which Articles 4 and 15 of the NRR, via two mechanisms. First, they can try to invoke the administrative mechanism, if they are admissible and if the administrative court has competence. The restoration plan the Dutch State has to draw up based on Article 15 NRR is not likely to qualify as an appealable decision before the administrative court in the sense of Article 1:3 of the GALA. Although it is possible in theory, an indirect assessment of the restoration plan does not seem to be the most suitable mechanism in practice either. In the first place, it should be seen whether the plan will lend itself for such indirect assessment. In the second place, the broad scope of environmental plans is difficult to assess via this way and the consequence of setting aside (part of) the plan is not very desirable. That leaves individuals and NGOs before the administrative court for the most part with the possibility to appeal to concrete decisions that concern both the individual and the aims of Articles 4 and 15 NRR. Such individual decisions could qualify as appealable decisions. If, for example, an administrative authority grants a permit for intensive farming in an area in which an individual or NGO has concerned interests which sufficiently intertwine with the general interests of Articles 4 and 15 NRR, this individual or NGO could appeal to this permit before the Dutch administrative court (after objection before the administrative authority is made). Based on the Aarhus Convention and the general environmental interests they aim to protect in their statutes, especially environmental NGOs should be admissible in these cases. Such claims may be legitimate insofar the Articles have direct effect. The administrative court could then annul the decision, provide instructions for a new decision by the administrative authority, determine an enforcement decision itself and/or provide compensation in case of damage.

However, it seems as if it remains difficult to appeal to the restoration plan in its entirety before the Dutch administrative court. Therefore, individuals and NGOs can secondly invoke the civil State liability mechanism if the administrative court does not have competence in a specific case. If the claimant was not admissible before the administrative court, they will in principle almost always be admissible before the civil court. However, based on some examples of cases in which the civil court declared the administrative court competent regarding the assessment of environmental plans although no appealable decision existed yet, it remains to be seen to what extent this starting point proves to be true in practice. In order to comply with the European principle of effective judicial protection and the Aarhus admissibility requirements, access to either the administrative or civil court in cases regarding Article 15 NRR's restoration plan should be guaranteed. Even if claimants are admissible to the Dutch civil court, it will be hard for

individuals to prove that they are individually protected by Articles 4 and 15 NRR and thus to comply with the relativity requirement. NGOs are more likely to comply with this requirement via Article 3:305a CC. In the line of the *Greenpeace* case, a violation of the non-deterioration requirement of Article 4 NRR could establish an unlawfulness. Furthermore, Articles 4 and 15 NRR could fill in the category of the unwritten duty of care in order to establish an unlawfulness. Invoking ECHR rights will presumably be difficult because of similar obstacles as identified in chapter 5. The Dutch (State) liability doctrine is not too strict in establishing a causal link between the unlawfulness and environmental damage. Partial responsibility of the Dutch State is enough to hold the State liable in this regard. The most important and relevant remedy the Dutch civil court could award if State liability for a violation of Articles 4 and 15 NRR is established is an injunctive relief. The court could, based on Article 15, command the State to draw up a restoration plan if it has failed to do so. In line with the *Greenpeace* case, the court could also command the State to include certain specific measures in this plan. If the State has for example not taken the measures that are absolutely necessary to prevent significant deterioration or achieve improvement of certain forests and marshes, the court could or even should oblige the State to take these measures, based on the obligation to provide sufficient enforcement of directly effective EU law provisions. Whether the Dutch civil courts are likely to impose such injunctions is not entirely clear from the current case-law yet. Further case-law on this issue is therefore needed.

In conclusion, especially NGOs seem to have quite some chances to successfully invoke remedies on the Dutch national level in case of a violation of Articles 4 and 15 NRR, as long as they are allowed to bring their case before either the administrative or civil court. The administrative mechanism only provides remedies to a certain, limited extent (in case of an appealable individual decision or if indirect assessment would be possible), but the civil liability mechanism seems to, at least partially, fill this void. The chances to establish State liability on the civil level when the Dutch State violates Articles 4 and 15 NRR are in my opinion rather high, based on previous national case-law. The State liability doctrine consequently suggests the possibility to command the State to draw up a restoration plan, even including some minimum measures, although the State does have discretion regarding the content of such plans. This possibility would fulfil the European enforcement principles to a great extent, since it would provide an effective remedy in the sense of Article 47 of the EU Charter and Article 19(1) TEU, it would make the exercise of the rights conferred by Articles 4 and 15 NRR possible and it would be an equally favourable remedy as is provided in purely national cases. The injunction the Dutch court imposed on the Dutch State in the *Greenpeace* case provides a great example of this fulfilment.

Chapter 7. Conclusion

7.1 Introduction

There is an urgent need for nature restoration. The recently entered into force Nature Restoration Regulation obliges Member States to protect and restore the nature of certain habitats. Sufficient restoration of these habitats is essential for the protection and increase of biodiversity and the limit of global warming. Article 4 of the Regulation for example obliges Member States to take restoration measures for certain terrestrial, coastal and freshwater ecosystems. It includes targets to put these habitats into "good condition", achieve a "favourable reference area" and a "sufficient quality and quantity" and to provide "continuous improvement". It furthermore includes the obligation to aim for non-deterioration of the habitats. Article 15 of the Regulation obliges Member States to specify the measures they will take in a restoration plan. Although the norms of the final NRR have been weakened in comparison with the first Commission's proposal, they still provide the only international legally binding obligations for Member States regarding nature restoration. That makes the NRR a crucial legislative instrument that should be enforced effectively. Enforcement of European law in principle takes place on the national level. If Member States violate EU law provisions, individuals and legal persons should be able to enforce the obligations and ask for sufficient remedies before their national court. The Member States' procedural autonomy is being mitigated by the principle of primacy of EU law over national law, the principle of effective judicial protection, the *Rewe* principles of effectiveness and equivalence, the additional *Greek Maize* principles of proportionality and dissuasiveness and specific (European) legislation such as the norms following from the Aarhus Convention. Member States should thus comply with these principles and norms when enforcing Articles 4 and 15 NRR.

In this thesis, I have researched to what extent the existing remedies for individuals and NGOs on the European level, the European Convention on Human Rights level and the Dutch national level would fulfil the conditions of the European enforcement principles in case of a violation of Articles 4 and 15 NRR by, for example, the Dutch State. I have answered this main question based on five sub-questions that addressed (i) the obligations for Member States following from Articles 4 and 15 NRR that are relevant for the possible enforcement by individuals and NGOs; (ii) the European enforcement principles; (iii) the possible remedies for individuals and NGOs on the European level; (iv) the possible remedies for individuals and NGOs on the ECHR level; and (v) the possible remedies for individuals and NGOs on the Dutch national level in the light of the EU and ECHR requirements. The answer to the main question of this research can

be distinguished into different categories. First, the relation between the possible remedies on the integrated European level, the ECHR level and the Dutch national level should be addressed. Second, the difference in chances of individuals and NGOs to invoke these remedies stands out. An important third part of the answer lies in the suitability of the different types of remedies, mainly annulment, monetary compensation and an injunctive relief. After having addressed these different categories, I can draw a final conclusion, look forward to future developments and provide recommendations for further research.

7.2 Possibilities of the Integrated Levels

My research shows three main concepts regarding the analysed levels that are inherent to the enforcement on these levels which crucially determine the possible enforcement of Articles 4 and 15 NRR. First, as already pointed out in the introduction of my research, the three levels constitute a shared legal system. Enforcement on the European level is inherently connected with enforcement on the national level. Without the Member States, EU law provisions cannot be effectively enforced. At the same time, the European level does include its own mechanisms that provide guidelines and requirements for this enforcement in the form of direct effect, consistent interpretation and State liability, which the Member States should apply. The EU and its Member States should also enforce the rights following from the ECHR and the ECHR is in turn dependent on the European and national legal order for this enforcement. In other words, the enforcement of Articles 4 and 15 NRR does not take place on each level individually but depends on the interplay between all three levels. Second, enforcement on the ECHR level is inherently connected with the protection of human rights. If human rights are not involved, the European Court of Human Rights cannot provide any remedies. Third, enforcement on the Dutch national level is inherently connected to the competence distribution between the administrative and civil court. The administrative court assesses appealable decisions and the civil court, in principle, assesses the remaining cases.

These concepts affect the possible mechanisms and remedies in case of a violation of Articles 4 and 15 NRR. The European mechanism of direct effect provides some possibilities in this regard. The obligation for Member States to draw up a restoration plan presumably has direct effect, in accordance with the case-law of the Court of Justice of the European Union on the environmental plans of the Air Quality Directive. The direct effect of the content of this plan is somewhat harder to establish. However, there are situations imaginable in which Member States should really take specific measures in order to comply with the targets and/or non-deterioration requirements of Article 4, so that these specific measures might have direct effect. The European

State liability doctrine seems to provide less possibilities. According to the CJEU, this mechanism is not intended to provide compensation for environmental damage to individuals. The enforcement chances of Articles 4 and 15 NRR before the ECtHR are presumably quite low. In cases regarding nature restoration, a traditional human rights violation will most likely not occur, which means that the ECtHR cannot award any remedies for a possible violation of these Articles. The Dutch administrative enforcement mechanism will presumably only potentially provide remedies in cases in which the violation of habitats falling within the scope of the NRR intertwine with a specific, individual decision or in which the national restoration plan may be indirectly assessed via an individual decision executing or enforcing this plan. It is however questionable to what extent this latter option will be possible in practice, depending on the measures that will be included in the plan. Furthermore, indirect assessments seem to be more suitable for individual cases than for the broad scope of environmental matters. The scope of the Dutch civil enforcement mechanism seems to be broader. It is in that regard crucial that the civil court will allow access to claimants in cases concerning the restoration plan. Supposed they will do so, the chances of a successful State liability claim are rather high, in line with cases like *Urgenda* and *Greenpeace*. The Dutch State liability doctrine thus provides broader protection to individuals and NGOs than the European doctrine in environmental matters. Directly applicable norms following from Articles 4 and 15 NRR will apply in national State liability cases. That means that the shared European and Dutch national legal systems do provide some enforcement possibilities for individuals and NGOs in case of a possible violation of Articles 4 and 15 NRR, mainly via the application of direct effect in a national State liability claim.

7.3 Admissibility of Individuals and NGOs

My research identifies some important differences regarding the admissibility of individuals and NGOs. The most important conclusion in this regard is that NGOs generally seem to have more chances in being admissible before a court in possible claims concerning Articles 4 and 15 NRR. This firstly follows from the Aarhus Convention, which is applicable in the EU and all its Member States. Based on Articles 7 and 9 of this Convention, especially environmental NGOs have a far-reaching right to be admissible in cases regarding environmental matters in general and environmental plans like the restoration plan of Article 15 NRR in particular. This is at least true for cases concerning the NGOs' public participation rights regarding the restoration plan of Article 15 NRR. NGOs should also be admissible and have the right to a full legality review if the restoration plan is placed within the scope of Article 9(2) on the national level or if it regulates

activities with a possible "significant effect on the environment" in the light of Article 6(1)(b) of the Aarhus Convention. These admissibility requirements work through on all levels of enforcement, which again shows the interplay between the shared legal systems. On the ECHR level, its applicability is somewhat mitigated because of the focus on the protection of human rights instead of the protection of the environment before the ECtHR.

On the Dutch national level, the advantages for NGOs are visible as well. Before the administrative court, individuals could be admissible in cases regarding both individual decisions and a possible violation of the NRR or in possible indirect assessment cases regarding individual decisions that execute or enforce the NRR insufficiently, if their collective interests sufficiently intertwine with the interests of nature. Fulfilling this relativity requirement of Article 8:69a GALA will often lead to obstacles for individuals. Admissibility for environmental NGOs will presumably be less complicated in such cases, because the promotion of the interests of nature is inherent to their existence. Before the Dutch civil court, individuals are not likely to comply with the relativity requirement of Article 6:163 CC either because they are not individually protected by Articles 4 and 15 NRR. These Articles focus on the protection of nature and not on the protection of individuals. NGOs are again more likely to fulfil this relativity requirement. Via Article 3:305a CC they can bring a claim before the court in which they promote collective interests. Following from cases such as *Urgenda* and *Greenpeace*, climate and environmental interests may very well fall within the scope of such collective interests.

7.4 Remedies of Annulment, Monetary Compensation and Injunctive Relief

We now know that in case of a possible violation of Articles 4 and 15 of the NRR, NGOs are most likely to seek effective enforcement before the Dutch national court, applying the European direct effect mechanism within the national State liability doctrine. The final question is which type of remedies NGOs could receive in such cases. Here, my research indicates both differences and an interplay between the different levels. On the European level, the direct effect mechanism obliges national courts to set aside national rules that would be in conflict with directly effective provisions following from Articles 4 and 15 NRR. It furthermore obliges national courts to impose a command on the Member State if that would be necessary for the enforcement of these provisions. It lastly obliges national courts to provide enforcement of the provisions themselves, for example via a penalty payment or coercive detention. The European State liability mechanism only provides the possibility of monetary compensation in case of a violation of Articles 4 and 15

NRR, if State liability could even be established in the first place. In the little chance of claims regarding Articles 4 and 15 NRR being successful before the ECtHR, the ECHR could provide the remedies of monetary compensation (just satisfaction) and consequential orders. The ECtHR is not obliged to award monetary compensation. The consequential orders will in most cases consist of indications for measures to be taken by the concerning State and only in exceptional cases of harder injunctions. If (specific individual) decisions lead to a violation of Articles 4 and 15 NRR, the Dutch administrative court could annul the decision, provide instructions for a new decision by the administrative authority, determine an enforcement decision itself and provide monetary compensation. These possible remedies are in line with the requirements set out by EU law. A potential indirect assessment of the restoration plan by the administrative court will presumably not lead to the desirable consequence of a concrete adaptation of the plan but merely to setting aside (part of) the plan. The Dutch civil court can, in line with the European State liability doctrine, also provide monetary compensation in case of established State liability for the violation of Articles 4 and 15. In contrast to the European State liability doctrine, it can furthermore provide a declaratory judgment and/or an injunctive relief in the form of a command or a prohibition in such cases.

From this research it can be concluded that the remedies of an annulment and an injunctive relief are the most suitable remedies in case of a violation of Articles 4 and 15 NRR, depending on the type of case at hand. Annulment of a (rejection of a request for an enforcement) decision that is in conflict with these Articles would be suitable to restore the situation in line with the Regulation. However, since this would only regard specific individual decisions, the scope of the remedy is somewhat limited. Monetary compensation would only be suitable when individuals have suffered damage to, for example, their property because of insufficient nature restoration measures by the State, which damage is not too likely to occur. When a Member State violates the NRR by taking insufficient measures, it would be most important to end this violation by commanding the State to take other or additional measures that would be sufficient via an injunctive relief. This could follow from the European mechanism of direct effect in extreme situations in which certain measures should be taken in order to fulfil the obligations by Articles 4 and 15 NRR. It is still somewhat unclear whether the Dutch civil court would command the State to draw up obligatory environmental plans including such concrete measures. The *Greenpeace* case does set an example of the Dutch civil court commanding the State to take additional measures for certain urgent habitats in order to protect the nature in these habitats. This case in my opinion offers a positive perspective for the possibility to command the Dutch State to take certain concrete measures in case of a violation of Articles 4 and 15 NRR as well.

7.5 Final Conclusion, Prospects and Recommendations

Having charted the possibilities of the integrated levels, the admissibility of individuals and NGOs and the remedies of annulment, monetary compensation and an injunctive relief, the final conclusion of my thesis holds that the European enforcement principles in case of a possible violation of Articles 4 and 15 of the Nature Restoration Regulation could be fulfilled in claims by NGOs via the implementation of directly effective EU law in the (Dutch) national legal order. Human rights are not likely to apply in cases regarding the protection and restoration of nature, which decreases the impact of the ECHR. However, in the light of the current developments regarding environmental and climate cases before the ECtHR, I would argue that the door to a possible connection between human rights protection and nature restoration remains on a small gap. The European State liability mechanism currently provides little chances for individuals and NGOs as well, as this doctrine does not seem to be intended for awarding (suitable) remedies in cases of nature protection and restoration. Via the European mechanism of direct effect, NGOs might have some possibilities in certain cases before the Dutch administrative court but will presumably have the most chances to receive a suitable remedy in the form of an injunctive relief in a national State liability case before the Dutch civil court. This shows that the distinction between direct effect and State liability made on the European level is less important on the (Dutch) national level. Instead, direct effect and (national) State liability can and should be integrated together. It must be noted that the chances of successfully appealing to the (directly effective) provisions of Articles 4 and 15 NRR in Dutch State liability cases are not completely certain yet. If the Dutch case-law were to develop in a different direction, the fulfilment of the European enforcement principles might still be jeopardised. Therefore, further case-law to provide more clarity on the possibility (for NGOs) to claim environmental plans including specific measures before the Dutch civil court is essential and urgent. In my view, this case-law should turn out to provide a positive answer on the question whether such claims are possible. This is necessary in order to comply with the European enforcement principles and with the applicable admissibility requirements from the Aarhus Convention.

In the meantime, we should first await the operationalisation of the NRR by the Member States. The first versions of the restoration plan should be submitted before September 2026 and the final plan should be published before September 2027. The coming years will therefore be crucial to learn the specific measures to be taken by the Member States and to see whether (judicial) enforcement of Articles 4 and 15 NRR by individuals and/or NGOs will actually be necessary in practice. I would therefore recommend conducting further research to the national restoration plans after September 2026 and September 2027. Since the enforcement of European

law is to a great extent dependent on the enforcement on the national level, I would recommend conducting further research to other Member States next to the Dutch State as well. After all, effective enforcement of the NRR remains essential for the sake of the protection and restoration of nature, the protection and increase of biodiversity and the limitation of climate change. Let us (legal) researchers do everything in our control to contribute to this important task.

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