There is no possibility for governance through litigation in the European Union.

Within the political and bureaucratic arena that determines the outcome of governmental policy, the role of public interest groups is a potentially important one. Although democracies have a system whereby citizens can hold their political overlords in check, this usually happens only once every so many years. Then again, even if political overlords are left in the lurch, defeatedly licking their wounds, any "Yes, Minister" fan can tell you that bureaucracies will last for ever. It it therefore important that there are other means for stakeholders in civil society to have means for control over the policies that affect them. A municipality that changes a zoning law, provinces that change their policy on the muskrat that is tunneling under the dike protecting your house, national government planning a eight lane highway through your backyard, all of these are measures can be contested by the people affected, thereby filling a certain democratic deficit in the policy making process.

A well functioning system of judicial review leads to participation of the citizenry in a policy area, creates a system whereby (national, regional and local) government can be held accountable and it is a judicial procedure where the balancing of private against public concern can be observed in a most transparent way. However, this illustrates one of the main problems with the system as it is implemented in most states and, for that matter, the European Union. What means of redress are left available for situations in which a private concern is lacking? Can geese complain that it is allowed to shoot them? Can a population of a country complain about the amount of Nitrous Oxide in the atmosphere? To paraphrase Advocate General Sharpston, what would be the difference between a lake far removed from any citizens, high up in a secluded nature reserve, and a lake in the middle of a residential area? The problems arising from the (legal) differences between these two lakes are the topic for this paper and the accompanying presentation. It will focus on how these public interests are dealt with by the European Court of Justice. Due to the recent developments in the field, this paper will also have a clear focus on the environment as a public interest.

The Problem of Individual Concern

Every student of European Law will find the famous *Plaumann* case in his or her texts and probably on most exams as well. It was the first case in which rules of standing with regard to annulment of EEC acts were interpreted by the Court. Europe as a political and judicial entity was of a completely economic nature in 1963 and in this light the ruling of the Court cannot be seen as remarkable. The old Article 173 EC stated, as Article 263 TFEU still does, that parties seeking annulment of a Community measure will have to show direct and individual concern. In *Plauman* the ECJ stated that 'individual concern' meant that:

> "*Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.*"

Within the scope of economic interests it is clear that there are advantages to

this approach. Imagine agricultural policy and the enormous potential of affected people by the raising or lowering of fixed prices for certain produce. The limitation is clear: a merely adverse financial effect will not be enough to initiate proceedings for judicial review of the measure causing said effect. This limits the need for retroactive compensation and increases legal certainty. However, with the expansion of the Union into policy areas beyond its original economic delineations, the usability of the formula is severely tested. *Greenpeace* is exemplary for how the current definition of individual concern is causing a lacunae in available remedies. In this case the European Union subsidized the construction of a coal fired power station on the Azores, a economically weak region of Spain. Greenpeace and some local fishermen contested the subsidies based on the fact that due to the fact that certain precautionary assessments were not undertaken by the local government in the planning of the power station. However, applying the reasoning on individual concern from the *Plaumann* case, the Court was not able to award standing to either of the parties involved. The situation of the fishermen was exactly the same as that of any other fisherman making use of the waters surrounding the Azores. The Court went even further, stating that it was not even possible to distinguish the fishermen from any other economically active person on the islands. For an NGO as Greenpeace, it was a lost cause to claim standing, it has a general goal of ecological conservationism that is shared by many organizations and is not specific to the situation regarding the contested decision. By and large, the reasoning behind *Greenpeace* still stands.

Matters are only complicated by the fact that the Court of Justice is of opinion that to a large extent these matters can be dealt with via national legal systems, if necessary supplemented by a preliminary reference (Article 267 TFEU). Most measures taken by the Union will need implementation at a Member State level. It is the contesting of these national implementation measures that closes the lacunae described above. However, this means that even when the Union has taken an unlawful decision, prompting a Member State to initiate a contestable measure, the affected party runs the risk of incurring the maximum costs needed to reach the highest levels of the judiciary, the only national courts obliged to make a preliminary reference.

The discussion on change

The discussion boils down to the fact that the Court emphasises that it is only applying the law as it is defined by article 263 TFEU, leaving the judiciary to amend the current lacunae in the system of judicial remedies for the public interest. A number of authors have opposed this line of reasoning, stating that nothing in article 263 TFEU precludes the Court from granting individual concern to parties with a specific interest (as is the case in the Netherlands). It should be noted that the drafting commissions of the Lisbon Treaty did not come to a conclusion on this issue. There was a division in the group, one half being of the opinion that no change to Article 263 TFEU was needed, the other half pleading for redraft with a specific inclusion of NGOs. More recently discussion has started on the fact that, for

instance, biodiversity, forest coverage, quality of groundwater have an economic value. The Department of Environment, Food and Rural Affairs (DEFRA) in the United Kingdom has produced a White Paper in which it tries to analyze the economic value of these environmental issues, making it potentially easier for interest groups to start litigation based on damages incurred. The changes introduced at Lisbon have now dropped the requirement of demonstration of individual concern for regulatory acts not requiring implementing measures. The requirement of direct concern (which has not proved difficult in most cases) is retained.

The way forward

The scientific debate may however be caught up by reality. Although internal pressure has not moved the Court of Justice in its position on individual concern, the signing of the Aarhus Convention by the European Union may be the external pressure needed to finally create a system of judicial review open to (specialized) non governmental organisations. The Aarhus Convention is a regional instrument within the UNECE framework that aims to "[...] improve access to information and public participation in decision-making, enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns." To this end, the Convention makes explicit reference to the role of environmental interest groups in these processes. It gives a definition of 'the public concerned' which encompasses these NGOs, it gives a definition of NGO and it states that if an organization fits that description it will be deemed to have sufficient interest to be 'the public concerned'. This does not mean that the European Union will open up its courts to all lovers of creatures great and small; the Commission has argued that the Convention explicitly makes reference to the possibility for requirements under national law and does not insist on the introduction of the *actio popularis.* This is a valid point, however, in cases against before the Court of Justice against Member States with rules on standing that oblige parties to show the breach of an individual right, standing was awarded to NGOs relying on the Aarhus Convention and its implementation by the EU. Even more interesting is the reasoning by Advocate General Sharpston: "[...]like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action."

This illustrates the main problem for the Court of Justice to ponder: if the EU is steadily increasing its influence in areas of public interest such as the environment (or for that matter, social policy, culture, education) how will the Court fill its position as the sole body of review of acts of the European Union? At the moment, the doors to the EU Ferrari are definitely locked. Although it would be easy for the Court to rely on its old reasoning that it is the Treaty that should be changed and not the interpretation, it would thereby go against its own pro-active reasoning in recent cases such as *Trianel* where it does force Member States to change their interpretation access to justice limiting clauses. Should different norms apply for Member States and the European Union? Should different norms apply for different

areas of law? If so, who will decide which measure falls under which area of law? This paper will defend a uniform approach to Article 263 TFEU, guaranteeing sufficient access to means of judicial review for all interested parties in all areas of law.

The Commission for one has already formulated a clear position with regards to environmental measures: The institutions of the Union do not take legislative measures that fall under the scope of the Aarhus Convention.