



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



**Standing up for your  
right(s) in Europe  
Locus Standi  
Country Reports**

ANNEX VI





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

## **Standing up for your right(s) in Europe**

**A Comparative study on Legal Standing (*Locus Standi*) before the EU and Member States' Courts**

**ANNEX VI - COUNTRY REPORTS**

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## BELGIUM

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (BELGIUM)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

The Belgian civil judiciary is hierarchically organised, with the Court of Cassation at the top of the pyramid. In contrast with the appellate review, which allows the appellate judge to reconsider the merits both in law and in fact, the judicial review by the Court of Cassation is limited to questions of law. Although in theory the judgments of the Court of Cassation do not have binding force of precedent, in practice these judgments are considered a very authoritative source of law. The highest courts with full jurisdiction in civil cases are the five courts of appeal and the five labour courts of appeal. They hear the appeals from the 27 courts of first instance, 27 labour courts and 27 commercial courts. The bottom of the pyramid consists of 187 justice of the peace courts and 34 police courts which serve as criminal and civil traffic courts. They have jurisdiction to hear claims up to 1,860 euro and have exclusive jurisdiction over some matters (e.g. expropriation). Finally, there also is a possibility for constitutional review by the Belgian Constitutional Court. A request for constitutional review can be introduced with this court by means of a separate claim for annulment or through a preliminary reference.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

Specialisation is akin to almost all levels of the civil judiciary. Firstly, the courts of first instance, the labour courts and the commercial courts hear cases in first instance. The labour court has jurisdiction over all disputes related to labour and social security law. The commercial court settles all disputes of a commercial nature. In both the labour and the commercial courts the bench is composed of professional as well as lay judges. In addition there exists a district court which is composed of the presidents of the general court of first instance, the labour court and the commercial court and which settles all jurisdictional conflicts between these different courts. The general court of first instance is divided into multiple divisions dealing with different aspects of civil law. Secondly, at the level of the courts of appeal one can find the same types of specialisation with only one difference: there exists no separate appellate commercial court. There are however specific labour courts of appeal and there is intensive specialisation between the different chambers. Specialisation can also be found within the Court of Cassation which consists of three divisions: a division for civil and commercial cases, a separate division for labour cases and a division for criminal cases. In the justice of the peace courts there is, because of their limited size, no room for specialization within the court. The justices of peace are however exclusively competent for and specialised in lease (tenancy) cases. There are separate police courts dealing with minor criminal offenses such as traffic violations and their civil consequences. Finally, there also exist various specialised administrative courts, yet these courts are not

considered part of the judiciary and fall beyond the scope of this questionnaire.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

Articles 144 and 145 of the constitution stipulate that only civil courts are competent to decide upon conflicts affecting civil rights. Civil rights are generally defined as a residual category: each right which is not of a political nature is a civil right. A political right is defined as each right sufficiently closely linked to the prerogatives of the state, e.g. suffrage, taxation and social security.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

In Belgian law *locus standi* is a distinct requirement explicitly formulated in articles seventeen and eighteen of the judicial code. In particular, standing is seen as a general requirement for the admissibility of claims. Standing is generally considered as a general term which encompasses three separate requirements: capability, quality and interest (Infra 3.1).

*Locus standi* is a general requirement for all parties, remedies and jurisdiction. Firstly, all parties should fulfil the requirement of *locus standi*: claimant as well as defendant. Secondly, the requirement of *locus standi* applies to all remedies: not only to the initial claim, but also to any additional or counter claim. The requirement is also upheld upon judicial review, be it appeal or cassation. Thirdly, the requirement should be met irrespective of the jurisdiction where the claim is initiated.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

In Belgium the idea of standing is grafted onto the relation between a party and its claim. The general idea is that only parties with capability, quality and interest are allowed to file a claim.

A general theory on legal standing is lacking. Charles Van Reepinghen, author of Belgium's current judicial code, deliberately avoided to develop a general theory about the different grounds of admissibility in general and the different aspects of legal standing in particular. He considered it inappropriate for the legislator to develop a general theory on legal standing at a time when the doctrinal theory was still infirm and insecure.

For this reason capability, interest and quality are open norms, interpreted by the courts. Nevertheless, Van Reepinghen was under the impression that it would be useful to include in the code at least some rules about the admissibility of the claim which would be binding for the judge. This is the reason why the judicial code contains some basic rules.

## 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second

instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Legal standing consists, technically speaking, of three related concepts: the plaintiff should give proof of capability, interest and quality. These three conditions are a condition sine qua non for each claim.

Capability is the possibility to file claims. Whether a certain person has capability to file a claim is not determined in the judicial code but rather in the civil code (for natural persons) or in the corporate code (for legal persons). In general all legal persons and all natural persons from the age of eighteen are capable to file a claim before the Belgian courts.

The requirement of quality touches upon the relationship between the right invoked and the claimant: there should be a connection between the party and the substantive right (in Belgium called "subjective right") on which its claim is based. As a general rule one can say that only the holder of a substantive right has the quality to exercise its substantive right. This requirement however gets its real meaning in the light of legal and procedural representation which is outside the scope of this questionnaire.

The claimant should have a sufficient interest in his claim. Interest is defined as any tangible or moral advantage – effective, not purely theoretical – that the plaintiff can obtain from the action at the time of filing, even if the existence of the claim or the harm is only established at the moment of the judgment. More in general, interest can be described as the advantage which the claimant pursues with the claim. From this definition follows that each interest, material or moral, may give rise to legal standing. Some examples can illustrate this: interest can be attached to a purely monetary claim or a claim for defamation.

The interest of the claimant should meet four criteria: the interest should be actual, existent, legitimate and personal. The first two requirements can be found in article eighteen of the judicial code and are designed to avoid an *actio ad futurum*: a claim cannot be made when the harm has not yet taken place. There are however some important exceptions to this general rule. (cf *infra* 7.3) The requirements of a personal and legitimate interest on the other hand are developed in the jurisprudence of the courts. (cf. *Eikendael* doctrine *infra* 7.1) The requirement that the interest should be personal constitutes an important obstacle for multi-party litigation (cf. *infra*).

It is important to mention that these requirements equally apply before the appellate courts and the Court of Cassation. To have an interest in a claim before the appeal court it is necessary that the first judge dismissed the appellant on one or more elements of his claim; an appeal exclusively based on an intellectual dissent with the motivation of the verdict in first instance is not sufficient to qualify for legal standing. The Court of Cassation equally will reject an appeal if the appellate court granted the claim in its entirety. Furthermore, in the Court of Cassation a petition can only be filed by someone who was already a party in the same quality to the proceedings (Court of Cassation, 3 June 1999).

There is no leave to appeal: no permission of the court a quo or the appellate court is required in order to bring an appeal.

It is noteworthy that the Belgian Government has announced its intention to curtail judicial review, in an attempt to reduce judicial cost and backlog. These measures would probably entail a stricter approach of the requirement of legal standing on appeal. It remains to be seen whether the Government will succeed in its plans.

3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

No, as stated earlier, legal standing is a general requirement for all types of relief. It is to be noted that the standing requirement entails a prohibition of anticipatory relief.

Interest should exist at the time of filing. The rationale for this requirement is that Belgian courts should not entertain hypothetical claims. It is however not required that the harm has been suffered before or ultimately at the time of filing of the claim. It is sufficient that the disadvantage is inevitable. The president of the court of first instance of Liège declared that an association trying to obtain certain provisional measures against a rubbish dump in an effort to avoid future water contamination had no interest as this disadvantage was purely aleatory (President of the court of first instance Liège, 25 April 1990).

Article 18 §2 contains an important exception to this general rule: courts may entertain claims which seek to prevent the violation of a severely compromised right. For this form of 'actio ad futurum' two requirements should be met: (1) The claimant should demonstrate the existence of a threat at the time of filing which causes a certain disturbance in his enjoyment of the substantive right; (2) The claim should not be limited to a purely theoretical satisfaction but needs to have a concrete and specific purpose.

It is also worth mentioning that in summary proceedings - proceedings to obtain a temporary or provisional court order - the claimant is required to give proof of the urgency of his claim.

A claim is urgent when any further delay of the requested measures would render any judicial remedy void. This urgency should be present from the time of filing of the claim until the time of summary judgment.

As will be explained further the legislator has made exceptions in respect of certain injunctions. Specific legislation opens injunctive relief to certain representative organisations (cf. *infra*).

3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

The rules regarding legal standing are applicable to all claims alike. This follows naturally from the fact that the judicial code is without an explicit deviation applicable on all civil claims. In general the requirements do not vary according to the field of substantive law. There has, however, been divergent jurisprudence of the lower courts in environmental law, which have declared claims made by environmental organisations admissible because their purpose fell within the ambit of the purpose defined in the articles of association of these organisations (e.g. Court of Appeal Gent 24 June 1997). This jurisprudence was not compatible with the position adopted by the Court of Cassation, which does not allow such a "privatisation" of a general interest (cf. *infra*). Another example of divergent jurisprudence can be found *infra* under question 3.7. Also, the exceptions mentioned in the answer to question 6.2. (injunctions in specific fields of substantive law) can be considered as a departure from the general rules on standing.

3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil

action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

No. It is, however, necessary in this context to deal separately with the three different elements of legal standing. Firstly, the capability of legal persons raises few problems as this is a logical consequence of their legal personality. If problems do arise they are generally dealt with according to company law. There are exceptions: although they do not possess legal personality, labour unions are capable of bringing civil claims with respect to mainly collective labour affairs. Secondly, regarding quality it is important to mention that only the competent corporate body within the legal person can rightfully decide to file a complaint. This competent body should be determined corresponding to the rules of company law. However, if the company is represented by a lawyer, the proxy by the company is subject to a legal assumption. This assumption is always refutable. Thirdly, the interest of a legal person should be personal. (cf. *infra*)

The requirements regarding legal standing apply equally to government agencies and other public authorities. However the legislator sometimes grants governmental agencies the right to request an injunction in case of infringement of certain rules, e.g. unfair trade practices, consumer law, anti-discrimination law or certain financial transactions.

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Belgium's procedural law is not familiar with interpleader actions. It is impossible for a stakeholder to initiate litigation without being involved as a party in the procedure: at least initially the stakeholder will be forced to take up the role of a party and therefore comply with the requirement of demonstrating a personal interest with the claim.

Most often, however, pragmatic solutions will be developed for these kinds of problems. An insurer could for example decide not to pay as long as it is not clear to who the payment should be made and in this way force the parties to solve their dispute. The stakeholder may also frame the dispute as if it was a conflict of him against one or both beneficiaries of the fund, with the techniques of party-intervention (cf. *infra*).

One can also try to simulate an interpleader action by using the contractual concept of sequestration (cantonment). At the request of one of the parties the judge can order that the deposit of the funds in the hands of a third person until the conflict is terminated. There are however three important difficulties with this concept: Firstly when asking for sequestration the requesting party should make a claim in respect of the funds, just as the defendant. Secondly, there is some discussion in the literature as to whether sequestration of sums of money is possible, although there seems to be a consensus that sequestration is possible for an individual bank account. Thirdly, sequestration will only be granted by judges in exceptional circumstances when no other technique can offer a solution for the preservation of the funds. These difficulties render this procedure rather exceptional.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No. As already stated, legal standing is a general requirement, which applies to all civil jurisdictions, all parties and all remedies. Under Belgian law, disputes under a certain value are subject to some restrictions. Judgments in the justice of the peace court under 1,240 euro and judgments in the court of first instance under 1,860 euro are not subject to appellate review. Theoretically speaking, however, these restrictions are not a matter of legal standing.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Human rights law has indeed been known to be used to circumvent the strict requirements of legal standing. We have knowledge of two precedents, both of these precedents being related to the problem of overcrowded Belgian prisons. In each of these cases, collective organisations pursuing a court-imposed solution for the problem tried to get around the requirement of a personal interest by relying on art 3 ECHR. Their legal reasoning was that the judge should set internal law aside (in this case the strict requirement of personal interest) when it prevents the full and efficient application of international law provisions with direct force. Both of these attempts were dismissed by the highest Belgian court, the Court of Cassation, which upheld the Belgian rules of legal standing.

#### **4. Third party intervention**

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Forced intervention on initiative of the court is not possible (art. 811 JC). According to Belgian law intervention can be both voluntary (at the initiative of the third party itself), or involuntary (when the third party is summoned by one of the parties to the proceedings). Regardless of whether intervention is voluntary or involuntary, an intervention can be either conservatory or "aggressive". Either the third party is called into the process to support one of the other parties' position (conservatory intervention) or to pursue a personal interest (aggressive intervention)(art. 15 and 16 JC).

In case of intervention three important requirements should be met:

(1) In the case of a voluntary intervention, the intervening party should fulfil the same standing requirements as the initial parties. The intervening party must demonstrate its own interest in the dispute. An existing party suing a third party (coercively) to intervene in the proceeding must also have standing.

(2) Intervention is possible at all stages of the procedure until the closure of the arguments by the court. Article 812 JC however adds that intervention may not adversely affect the right of defence of the intervening party. This is made more concrete in art. 981 JC, which stipulates that the party who is forced to intervene in the proceedings after the expert has drafted his preliminary report, is not bound by this report, unless he accepts it..

(3) Although in principle intervention is possible at all stages of the



procedure, it is not possible, for obvious reasons, to force the intervention of a third party at the level of appeal. This would deprive the intervening party of the same opportunity as the one given to the existing parties in the proceedings, which is to have the case tried in two instances, i.e. first instance and appeal.

A special form of conservatory intervention can consist of the claim to declare a judgment binding upon a non-party. If this claim is successful, the judgment is binding upon the non-party, who cannot claim to be ignorant about the judgment and cannot file a third-party appeal. Scholars have shown that courts are more lenient with the interest requirement in these cases: The claimant should only show that he has an interest in relying on the binding force of the judgment against the third party.

If judgment is made and a third party (who did not intervene in the proceedings) believes that the judgment prejudices his rights, the third party may launch a third-party opposition (art. 1122 JC). If this opposition is successful the court will annul the initial decision, but only with respect to the third party (except in case of indivisibility) (art. 1130 JC).

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No, not on their own authority. They can however argue that the intervention would substantially prolong the proceedings and hope to convince the judge to reject the intervention on these grounds (art. 814 JC). With regard to this decision the judge has a wide margin of appreciation.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Belgium does not have class actions. The Belgian Court of Cassation adheres rigorously to the requirement that the interest of the claimant should be personal, which is irreconcilable with a concept of a class action.

There are only a limited amount of legislative exceptions which allow certain organisations to pursue the personal interests of their members. These concern mostly the opportunity for trade unions and employer's organisations to stand up for individual interests of their members when it concerns works councils and collective labour agreements (e.g. the law of 5 December 1969 ).

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

In Belgium no legislation is in place for multi-party litigation. Belgian procedural law knows joinder or connected cases and voluntary or compulsory third party interventions. These procedural techniques however are designed to prevent contradictory decisions in similar cases but are not appropriate for effective multi-party litigation.

Courts accept however the possibility of multi-party litigation through filing proceedings by proxy. The representative is given the right to pursue the action in court on behalf of the issuers of the proxy. In this way one representative can obtain a verdict which is binding to all claimants. The representative does not have to have an interest; he has to show that the persons he is representing have an interest. The representative does not even have to disclose the identity of the persons he is representing. However, individual authorisation is necessary.

This technique was used in the Lernout & Hauspie case where 11000 shareholders were united by Deminor, a company specialised in the assistance of minority shareholders. Procedural representation has its limits and is not in itself sufficient to assure effective multi-party litigation: legislative proposals are pending to meet these needs.

The Belgian Government, which took office in December 2011, intends to adopt legislative measures introducing a procedure for handling mass harm claims in consumer affairs. No draft bill has been submitted to Parliament to date.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

In general it is not possible to pursue a purely general interest. A claim concerning a purely general interest will be declared inadmissible. The Court of Cassation is determined in banning each form of *actio popularis*: the interest to file an action should be more than just the interest that each citizen has in everyone complying with the law.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

The legislator has enacted specific piece-meal legislation giving specific groups the rights to collectively defend certain general interests. For example, legislation on racism granted certain associations the right to make collective claims on the condition that the association is established with the aim to fight racism and fulfils certain requirements. Similar provisions can be found in legislation concerning the environment, violence between partners, misleading advertising, trade practices etc. These provisions are rarely used, mainly because of limited funding and the impossibility of claiming damages (cf. *infra* 8.1)

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Reference to the case law has been made in the specific questions (cf. supra en infra)

The Belgian courts tend to maintain very strictly to the standing requirements. The Court of Cassation for example holds rigorous the requirement that the interest of a party should be strictly personal, although this requirement is not explicitly stated in the law. The most notable case is the Eikendael Judgment in which the Court of Cassation closed the door for any action based on collective interests (Court of Cassation 19 November 1982). In this case an association for the "environment in the village of Brasschaat" tried to prevent the construction of several houses in a environmentally valuable area in the same village. In this judgment the court laid down its current jurisprudence by repeating the requirement of a direct and personal interest and by stating that: "The personal interest of a legal person is only that what affects its existence, its material or moral goods, including its capital, honour and good name; that the only fact that a natural or legal persons aims at a certain goal, even in its articles of association, does not create a personal interest, as in that case anyone could adopt any goal."

In a later case the claim of an association of train drivers to be recognised by the railway company as an official trade union was considered an individual claim of the association and was therefore declared admissible (Court of Cassation 4 February 2008).

In general, lower courts follow rigorously the line set out by the Court of Cassation: e.g. the court of appeal of Antwerp decided on 29 November 1994 that the Bar Association of Mechelen had no personal interest in a claim that tried to ensure the judicial assistance of asylum seekers (and supra 3.3 and 3.7).

7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

No

7.2.2. the field of substantive law at hand?

No

7.2.3. the nature of the claimant?

No

7.2.4. the nature of the claim?

No

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

The interest of a party should be legitimate, which means that the advantage which is aimed for should be entirely lawful. He who strives for the preservation of a situation that is incompatible with public order does not show a legitimate interest. In practice this requirement is used to refuse claims based on for example tax evasion or gambling debts. In a judgment on 29 may 2009 the court of Appeal of Gent ruled that the claim by a building contractor to be paid for services performed at an illegal building was illegitimate.

7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid

trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

There is no indication that the civil courts are actively interpreting the standing requirements with judicial backlog in the back of their mind or as means for the administration of justice. The jurisprudence on this subject has hardly changed the last forty years; no reference to judicial backlog is made by the courts. Scholars see an explanation for this in a concern for the division of powers.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

To date EU law has not influenced Belgian legal theory when it comes to legal standing. It has however supplemented Belgium's system of legal standing with some specific European exceptions (apart from specific European procedures such as the payment procedure and the small claims procedure): situations in which European law grants standing to persons which otherwise would not have any standing. An example of this phenomenon is the law of 26 May 2002 on the European injunctions for the protection of consumers' interests which transposes directive 98/27 (and the new directive 2009/22) in Belgium and introduces an injunction for European consumer organizations before the Belgian judge apart from the injunction which already existed for national consumer organisations. The organisations should fulfil two requirements: they have to demonstrate that the practice touches upon the interests they try to protect and the organisation should be recognised as a 'qualified organisation' by the European Commission.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

No

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

No

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

No

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

The lack of a general theory on legal standing has historically not been challenged in significant terms. The rise of multi-party litigation and the growing complexity of cases (in terms of number of parties and dimensions attached to the conflict) however make that nowadays the lack of a general theory is considered a deficiency.

The possible introduction of representative actions (*c.g.* class actions) however could give rise to a thorough discussion about legal standing.

Practical note: Jurisprudence of the court of cassation can be found on:  
[www.juridat.be](http://www.juridat.be) (Dutch and French)

## QUESTIONNAIRE FOR REPORTERS ON ADMINISTRATIVE LAW (BELGIUM)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

Belgium is a complex federal state, composed of 3 autonomous communities (the Flemish, French and German Communities) and 3 autonomous regions (the Flemish, Walloon and Brussels Capital Region). The federal legislator has created in the past several administrative judicial bodies and panels with competencies restricted to a certain field of administrative law, whenever the need was considered necessary, without a structure or a set of legal rules common to each of them. Some of these judicial bodies have been created to give solutions to disputes arising with or within certain administrations. The (most of the time part-time) judges are often civil servants; they are sometimes presided over by a professional judge. Other judicial bodies have been created within the framework of certain legislation, such as the legislation on family allowances or on retirement of a named class of employees. Possible conflicts over the application of this legislation are then entrusted to commissions of experts or civil servants, mostly under the chairmanship of a professional judge. The diversity in the administrative judicial bodies is very large. They cover virtually all legal disciplines, departments and geographic descriptions. In addition, virtually each body has its specific jurisdiction, composition, organization and procedure. It is therefore almost impossible to get a full overview of the various existing "administrative courts" in Belgium. Examples of such bodies are: the Council for Competition (*Raad voor Mededinging*), the Research Council of Navigation (*Onderzoeksraad voor de Zeevaart*), the Branch Council on Trade and Craft (*Vestigingsraad inzake handel en ambacht*), the Commission for assistance to victims of deliberate acts of violence (*Commissie voor hulp aan slachtoffers van opzettelijke gewelddaden*), the Provincial Executive (*Bestendige Deputatie van de Provincieraad*) in a number of matters, the different disciplinary and professional councils. Article 161 of the Constitution provides for the creation of administrative courts, provided that this is done by an Act of Parliament. At the top of the system (art. 160 of the Constitution) stands the (federal) Council of State (Supreme Administrative Court) that serves as an administrative cassation judge for appeals against the decisions of the judicial bodies or panels, and, as a first and final administrative judge, for administrative decisions and regulations for which there are no competent administrative judicial bodies or panels, which is the case with the large majority of administrative acts and regulations. On the level of the communities and the regions there are also administrative judicial bodies, but to a lesser extent, because such bodies can only be created under very strict conditions on the basis of the so-called "implied powers" (Art. 10 of the Special Act of 8 August 1980 on State Reform). Their decisions are also subject to cassation appeal with the (federal) Council of State.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

The highest and most important general administrative court is the Council of State

([www.raadvst-consetat.be](http://www.raadvst-consetat.be)), established by the Act of 23 December 1946, it comprises two divisions, the Division Legislation, an advisory body, and the Division Administrative Jurisprudence (as it is now called), with mainly a jurisdictional function. The Division Administrative Jurisprudence has been set up in the first place to remedy the defects in the legal protection of citizens against abuse on the part of the administration (the so-called '*direct legality test*'). The Division has been given the power to suspend (since 1989) and annul decisions of the administration and of the judicial bodies and panels mentioned under 1.1

It should be noted that the so-called '*indirect legality test*' may constitute an even more powerful weapon in the legal protection of citizens. According to Article 159 of the Belgian Constitution (which reads as follows: '*The courts and tribunals shall only apply the decisions of general, provincial and local authorities, insofar as these decisions comply with law*') the courts and tribunals have to refuse (*ex officio*) to apply illegal administrative regulations and decisions in cases brought before them.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

As stated above, the federal legislator has created specialised administrative courts, judicial bodies and panels, but never worked out a clear structure. There are a limited number of administrative courts composed of full-time professional judges, with an important case load. The Competition Council takes decisions on the basis of motivated reports presented by the College of Competition Prosecutors with the assistance of the Directorate-General for Competition. The Council has to take decisions on appeals against decisions of sectoral regulators.

([http://economie.fgov.be/en/entreprises/competition/Belgian\\_Competition\\_Authority/Competition\\_Council/](http://economie.fgov.be/en/entreprises/competition/Belgian_Competition_Authority/Competition_Council/))

The Foreigner Litigation Council ('*Raad voor Vreemdelingenbetwistingen*' '*Conseil du Contentieux des étrangers*') acts as an administrative court of first instance on the federal level for all individual decisions concerning the application of the Act on Foreigners (including Asylum Seekers). Two recently created regional administrative courts merit special attention: the Flemish Council for Permit Disputes ('*Raad voor Vergunningsbetwistingen*') and the Environmental Enforcement Court of Flanders ('*Milieuhandhavingscollege*').

Since 1 September 2009, the regionally established Council for Permit Disputes has been responsible for dealing with disputes regarding building permits in the Flemish Region, instead of the (federal) Council of State, that continues to act as a cassation judge for those matters. The Council for Permit Disputes is an independent administrative court that hears judicial appeals lodged against administrative decisions (building and allotment permit decisions) at last instance (delivered/refused on administrative appeal) taken by administrative authorities (provided the first administrative appeal procedure is exhausted). The decisions of the Council for Permit Disputes can be appealed on points of law before the Council of State (Supreme Administrative Court), acting as a "cassation judge". More specifically, the Council for Permit Disputes deals with appeal procedures filed against decisions taken by the provincial governments ('*deputaties*') in the course of the 'regular' procedure; and appeal procedures filed against decisions taken by the Flemish Government or the designated zoning law civil servant in the course of the 'special procedure', which is the procedure applicable for (semi-) public legal persons and acts of general interest.

The Environmental Enforcement Court of Flanders was created by the Flemish Act of 21 December 2007, published in the Belgian Official Journal of 29 February 2008. It

effectively started its work on the 1st of May 2009. This Court has specific tasks allocated to in this Act, particularly the hearing of appeals against administrative fines imposed for breaches of environmental law in the Flemish region.

Tax law and social security cases are mainly dealt with by the ordinary judiciary (Court of First Instance for tax cases and Labour Tribunal (*Arbeidsrechtbank*, *Tribunal de Travail*) for social security cases).

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

The principle of the separation of administrative and jurisdictional functions is generally observed in Belgian law. The higher or supervisory authorities under the administrative authority verify whether administrative acts and regulations are legal and compliant with the public interest. In Belgian law, the legality of administrative acts and regulations is verified by the courts and tribunals, as well as by administrative courts with special jurisdictions (e.g. Competition Council, Foreigner Litigation Council, Flemish Council for Permit Disputes and others) and by the Council of State, the only administrative court with general jurisdiction. The Council of State is competent for administrative regulations and individual administrative acts from the federal, regional, community and local levels of government. Under certain conditions – the administrative authority must have been cautioned beforehand – the omission to take a decision when there is a legal obligation to do so can also be challenged before the Council of State. The jurisdiction of ordinary courts (belonging to the judiciary) is based primarily on the Articles 144 and 145 of the Belgian Constitution. According to Article 144, disputes concerning civil rights fall under the exclusive competence of the ordinary courts. According to Article 145, disputes concerning political rights fall in principle under the competence of the same courts, but it is up to the legislator to introduce exceptions to this principle. The application of these provisions has led the ordinary courts and tribunals to hear a sizeable portion of administrative disputes. This is because a good number of cases involving citizens and the administrative authorities pertain to subjective rights and many of these were considered to be civil rights. Disputes pertaining to civil, contractual, extra-contractual and administrative liability, as well as those concerning arrears in payment of salaries to civil servants are consequently heard by the ordinary courts and tribunals and not by the administrative courts or the Council of State. Furthermore, many legislative provisions provide jurisdiction to ordinary courts to hear particular disputes.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

A particular feature of the Belgian system is that in the absence of any other competent court, the administrative jurisprudence section of the Council of State rules on an equitable basis – taking due account of all the circumstances of private or public interest – on claims for moral or material damage caused by an administrative authority. Civil courts of first instance have a general competence. When no other court is competent, claims can be brought before those courts. They can give injunctions or award compensation for damages.



## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Standing is a primary condition of admissibility of a claim before administrative courts or administrative judicial bodies. There are no common rules applicable for all administrative courts and judicial bodies. For the different administrative judicial bodies that were created, often only the person to whom the challenged administrative decision is addressed (e.g. Environmental Enforcement Court of Flanders) has standing. However, the conditions for admissibility applicable to the Council of State ("have suffered a prejudice or showing an interest") (art. 19 of the Act on the Council of State) seems to be the most important, and those requirements are often copied in the acts on specific administrative courts (e.g. art. 39/56 of the Aliens Act concerning the Foreigner Litigation Council). Sometimes a broader or more specific definition of standing is provided (e.g. art. 4.8.16 of the Flemish Codex on Land Use Planning concerning the Council for Permit Disputes, mentions *inter alia* natural and legal persons that could be hindered directly or indirectly by the challenged decision and certain NGOs).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

In Belgium, a natural or legal person asking for suspension or annulment of an administrative act or regulation by the Council of State must declare a justifiable interest. The Belgian system of standing is interest-based ("*pas d'action sans intérêt*"). Administrative jurisprudence is considered to be *recours objectif*. An *actio popularis*-approach is possible whenever explicitly provided by the specific legislation. The Act of 12 January 1993 'establishing a right of action for the protection of the environment' allows environmental organisations that satisfy certain requirements to bring an action for cessation of acts that are evident infringements of environmental law or are serious threats of such infringements before the President of the Court of first instance (District Court). The Act empowers the President of the Court of first instance to establish and, where appropriate, to order the cessation of evident infringements or serious threats of such infringements, or to order measures to prevent damage to the environment. In addition to environmental organisations, administrative and municipal authorities may bring actions for cessation. Moreover, Article 194 of the Municipal Decree allows one or several residents of a municipality to act on behalf of the municipality if the mayor and aldermen fail to do so. It was accepted soon in the case law that this provision could be combined with the Act of 12 January 1993, so that individual citizens are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action. This jurisprudence was endorsed by the Supreme Court when it determined from the joint reading of the two aforementioned Acts that if the mayor and aldermen fail to take action under those circumstances, one or several residents can take legal action on behalf of the municipality in order to protect the environment. No interest needs to be demonstrated because the municipality is presumed to have an interest. A similar procedure as provided for in the Act of 12 January 1993 can be found in the Act of 30 July 1981 combating acts inspired by

racism or xenophobia (art. 18).

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

An action before an administrative court is admissible provided that the objection is made in accordance with the relevant legislative or regulatory provisions and that, when there is an administrative appeal procedure available, that appeal procedure has been used first

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court *a quo* or the appellate court required in order to bring an appeal?

As the Belgian standing requirement is interest-based, the petitioner must prove a sufficient interest, i.e. a direct, personal, clear and lawful interest in the relief sought. There is a requirement that sufficient interest must be met throughout each stage of the proceedings, i.e. from the filing of the petition until judgment. The requirements are identical in the first instance (Council of State or administrative courts or judicial bodies of first instance) and, where relevant, in the cassation phase (Council of State acting as cassation judge *vis à vis* courts and judicial bodies of first instance). In Belgium there is no second instance, only a *cassation* instance (final appeal on questions of law only) when there are courts or judicial bodies of first instance. There is no permission of the court *a quo* required to bring a (cassation) appeal.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

Before the Council of State it is possible to petition for annulment and in urgent cases also for suspension. Both remedies have the same standing-requirements (since a petition for suspension can never be standalone); as stated above the interest must be personal, present, certain, direct and legitimate. On request by the applicant, the Council of State is empowered to suspend the execution of an administrative act or regulation that is disputed by means of an action for annulment insofar a serious plea can be alleged and that the immediate application of the disputed act or regulation threatens to cause a serious damage that is difficult to repair. The requirement 'a serious damage that is difficult to repair' is not a standing-requirement, but is a separate condition that should be met for the suspension of the act or regulation. An action for damages cannot be brought before an administrative court. Only a civil judge can rule on damages. In general, even stricter standing rules apply before civil judges. In the case of actions for damages, only the person who suffered damages can bring the case for the civil judge.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc.)? Are there specific standing rules applicable to certain types of claims?

As stated above, there are no common rules applicable for all administrative courts. Therefore, the standing requirement is regulated on a case-by-case basis and is different before every court. Thus the requirements of standing change according to the field of substantive law at hand. However the rationale of standing stays the same: the petitioner must prove a sufficient interest, i.e. a direct, personal, definite and lawful interest in the relief sought. Except the Flemish Council for Permit Disputes, the courts or bodies of first instance generally deal with cases where there are no third party interests involved.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

Any natural or legal person concerned, whether of private or public law, may petition the Council of State for an annulment. Local authorities can also bring proceedings before the Council of State to annul decisions passed by the supervisory authority which they consider to be illegal. Furthermore, associations or groupings without legal personality, such as trade unions and political parties in Belgium, may take action before the Council of State for an annulment, when they act in defense of a prerogative recognised by laws and regulations, i.e. for the defense of a 'functional interest'.

The Council of State developed a broad view on standing for NGOs in the eighties but more recent jurisprudence demonstrated that the approach has become stricter, perhaps under influence of an ever growing case-load. Following criticism from the Aarhus Compliance Committee (Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW*) and a judgment by the European Court of Human Rights in 2009 (ECtHR, 24 February 2009, *L'Erablière A.S.B.L. v. Belgium*, § 38), the jurisprudence regarding standing for NGOs seems, in some instances, becoming more lenient (e.g. Council of State, n° 193.593, 28 May 2009, *vzw Milieufront Omer Wattez*; Council of State, n° 197.598, 3 November 2009, *vzw Stichting Omer Wattez*; Council of State, n° 213.916, 16 June 2011, *vzw Natuurpunt Beheer*), while in others the Council of State is of the opinion that its previous stricter approach is consistent with art. 9 of the Aarhus Convention (e.g. Council of State, n° 197.509, 3 November 2009, *vzw Milieufront Omer Wattez* and more than 20 other judgments in the same sense); in the latter judgment the Council of State is of the opinion that while environmental NGOs are presumed to have an interest by virtue of art. 9.2 of the Aarhus Convention, they must also show "capacity" or "quality" ("*hoedanigheid*"), an unclear concept that is interpreted in that sense that there should be a clear match between the statutory objective of the NGO and the contested project. A regional organisation can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, are bigger projects that are of supra regional interest.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

Standing rules do not vary according to the value of the dispute.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

In the case of *L'Erablière ASBL* (ECtHR, 24 February 2009, *L'Erablière ASBL v.*

Belgium), a local environmental NGO demanded the annulment of a decision granting planning permission. In a decision of 26 April 2007 the Council of State declared the applicant association's application for judicial review inadmissible because the statement of facts did not satisfy the official requirements and did not provide the Council of State and the judge examining the case with sufficient information. Relying on Article 6(1) ECHR (right to a fair hearing), the applicant association complained that the inadmissibility decision regarding its application for judicial review of planning permission amounted to a violation of its right of access to a court. The ECtHR considered that increasing the capacity of a waste collection site could directly affect the private life of the members of *L'Erablière*, and stressed that the aim of the association was limited to the protection of the local environment. Consequently, it found that its action could not be regarded as an *actio popularis* and held that Article 6 was therefore applicable. The Court noted that the submission of a statement of the facts was one of the formal requirements under domestic law for lodging an application for judicial review before the Council of State. It observed, however, that the Council of State and the opposing party could have acquainted themselves with the facts even without this statement. The Court concluded that the limitation on the right of access to a court imposed on the applicant association was disproportionate to the requirements of legal certainty and the proper administration of justice, contrary to Article 6(1) ECHR. The Constitutional Court has a broad view on standing of NGOs (see e.g. Constitutional Court, n° 114/2009, 9 July 2009, *L'Erablière asbl*) which invited the Council of State, with references to that and other ECtHR cases, not to apply too restrictive or formalistic requirements when assessing the interest requirement (Constitutional Court, n° 109/210, 30 September 2010, *Christel Demerlier*). It is for the moment unclear if this invitation has been acted upon by the Council of State.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Any interested person may ask to intervene during the annulment procedure with the Council of State, either in support of the applicant or of the opposing party. The conditions of this intervention are determined in article 21*bis* of the Act on the Council of State:

- 1) the request to intervene must be filed within 30 days following the notification concerning the initiation of the original procedure;
- 2) the party that intervenes to support one of the parties' positions may only invoke arguments mentioned in the original request.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

The conditions of a third party intervention before the Council of State are, as already stated, determined in Article 21*bis* of the Act on the Council of State. The original parties cannot prevent the third party intervention. The Council has to examine if the third party has a justifiable interest and rules sovereign on this matter. Intervention is only possible to support the original claims of the original party/parties (no new claims can be introduced by way of intervention) or to defend

the challenged act on the side of the authority (e.g. by the holder of the permit that is challenged by a neighbour). Intervention on the side of the original party has thus limited value, but it shows that other than the original parties share their views. It can also happen that the intervening parties are themselves time barred from introducing their own appeal but they can join an action. As a suspension or an annulment has "*erga omnes*" effect, other persons than those who appealed can indeed benefit from such an action.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Under Belgian law class actions are generally unavailable, because each interested party, as a matter of principle, needs to be involved in the proceedings individually. A claimant must, along with having authority and capability, demonstrate an interest in the litigation. This means a direct, personal and legitimate interest. The requirement for a personal interest means that class actions are excluded under Belgian law because a claimant cannot file a claim on behalf of others (*nul ne plaide par procureur*). However, where specific legislation sets out express exceptions, multi-party litigations are possible (e.g. the Anti-Racism and Anti-Xenophobia Act or the Environmental Protection Act of 12 January 1993). One has also to realise that the judgments of the Council of State have an "*erga omnes*" effect. When an administrative act or regulation is annulled, everyone who would have been harmed by the act or regulation, benefits from the annulment, also when such a person was not a party to any proceedings.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

For example, the Environmental Protection Act of 12 January 1993 provides that the legal entity filing the claim must be an authorised, non-profit-making organisation whose purpose is the protection of the environment and whose activity is limited in its Articles of Association. The organisation has to have held its legal status for at least three years at the time of filing the claim and be able to prove that its actual activity corresponds both to the purpose stated in its Articles of Association and the collective environmental interest it is trying to protect. Other options are beyond the scope of administrative law.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

There is no general approach in Belgian law; there are however sector-specific regulations as explained above.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

Nothing prevents parties from filing a claim as 'co-claimants' and instructing the same lawyer to represent them in court. However, each claimant would need to prove his personal interest, would need to give permission for the lawyer to act on his behalf and would need to be identified in the writ of summons or the petition. Given that the judgments of the Council of State have an "*erga omnes*" effect, when

an administrative act or regulation is annulled, everyone who would have been harmed by the act or regulation, benefits from the annulment, also when not a party to any proceedings. In practice we see that in cases where multiple interested parties could be identified, only some of them will act formally as a claimant, to limit procedural costs. In the same sense, when there are large groups of interested third parties, only some of them will intervene in the proceedings.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The (collective) defense of general interests before the Council of State is possible if the interest is sufficiently individualised and distinct from that which any citizen could have in respect of the legality of an Act, so as to distinguish that action from an *actio popularis*. Actions in the collective interest are in principle admissible before the supreme administrative jurisdiction. In some of the more recent judgments of the Council of State we see reference to the broad definition of standing for NGOs in collective interest cases that is used by the Constitutional Court. NGOs have standing before the Constitutional Court if they pursue effectively a collective interest that is sufficiently specified in their Articles of Association and this collective interest is challenged (as the Council of State is concerned: challenged by administrative acts or regulations). But as mentioned earlier (under 3.4) there seems to be for the moment no clear line in the jurisprudence of the Council of State, particularly where environmental NGOs are concerned. Sometimes the conditions under which associations can act in the general interest are specified by the legislator. So, art. 4.8.16 of the Flemish Codex on Land Use Planning concerning the Council for Permit Disputes, gives standing to associations that have "law suit competence" ("*procesbekwame verenigingen*") and are acting in the name of a group whose collective interest is jeopardised by the challenged act, provided that they have lasting and effective activities in conformity with their Articles of Association. This means that an association that is created in view of challenging an act will not have standing, because it lacks a sufficiently long track record.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defence of general interests?

General interest litigation is regulated on a sector-specific basis (e.g. anti-discrimination, consumer law, environmental protection). Wide-ranging access to administrative proceedings is explicitly recognised in the Belgian Environmental Protection Act (1993) and in the Enforcement Title of the Flemish Decree containing general provisions on environmental policy (introduced by the 2007 Amendment). Members of the public get legal facilities to participate in environmental enforcement. Via a request for administrative enforcement individual residents can incite an administrative order against environmental infringements. However, in that case the resident has to demonstrate that the invoked violation causes a personal loss.

A special form of general interest litigation is the right of action for the protection of the environment allowing environmental organisations that satisfy certain requirements to bring an action for cessation of acts that are evident infringements of environmental law or are serious threats of such infringements before the President of the Court of first instance. In addition to environmental organisations,

administrative and municipal authorities may bring actions for cessation. Moreover, Article 194 of the Municipal Decree allows one or several residents of a municipality to act on behalf of the municipality if the mayor and aldermen fail to do so. It was soon accepted in the case law that this provision could be combined with the Act of 12 January 1993 so that individual residents are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action. In Flanders, this possibility has been broadened to include the substitution of a provincial authority by a resident of that province.

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

We can observe an evolution. In the 1970s and 1980s the Council of State became increasingly lenient. Confronted with a spectacular growing caseload and backlog, the Council of State became later on more stringent; particularly in the case of NGOs an public interest litigation, the Council's approach has become more restrictive. Since the creation of particular administrative courts dealing with immigration law (on the federal level) or building permits and alike (Flemish region) the caseload is becoming more manageable and the backlog is gradually disappearing. Together with pressures from the ECtHR, the Constitutional Court, the ECJ (in Aarhus related issues) and the Aarhus Compliance Committee, it can be expected that the Council will become more lenient again. For the moment there is however no clear picture (see 3.4). Triggered by the Aarhus Convention, some judgments can be welcomed (see, for example, the ruling of February 15, 2007 (R.v.St., *VZW Milieufrent Omer Wattez*, nr. 166.889, 15 February 2007). The Council of State had to examine a petition for annulment brought by an environmental organisation. This organisation requested the annulment of an environmental permit to fill a quarry with non-contaminated soil. It was thus an act with a specific and local scope. The defendant argued that the objective of the association was so broad that this action was equivalent to an *actio popularis*. Taking into account the valuable and unique ecological character of the area, the Council of State ruled that the environmental organisation did have a specific interest which was sufficient to petition for annulment of the act in question.

- 7.2. Are there significant variations in the courts' approach based on:  
7.2.1. the type of remedy requested?

There is no evidence for variations of approach based on the type of remedy requested. As indicated above, the only remedies available in administrative jurisprudence are the suspension (by way of interim measures), the annulment (*ex tunc*), often not coupled with maintaining the legal effects of the annulled act or regulation for some period of time, and the enforcement of those decisions by imposing penalty payments (which is very rare in practice).

- 7.2.2. the field of substantive law at hand?

There is no evidence for variations of approach based on the field of substantive law at hand.

- 7.2.3. the nature of the claimant?

One can observe that there is a hesitating tendency for leniency towards environmental NGOs under the influence of the Aarhus Convention (art. 9.2, principally), compared with other NGOs.

7.2.4. the nature of the claim?

There is no evidence for variations of approach based on the nature of the claim.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

There is no evidence that such factors are taken into consideration.

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

As mentioned above there is an impression that as NGOs and public interest litigation are concerned the requirements are varying over time in function of the importance of the caseload. The other factors seem not playing an important role in this regard.

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

In Belgium, the Council of State has attempted to limit the admissibility of appeals filed by environmental protection organisations, by interpreting the requirement of a sufficient interest on the part of the appellants in a manner that can be judged as contrary to the objectives of 'wide access to justice' as stated in Article 9(2), and of 'guaranteeing' the right of access to justice in accordance with Article 1 of the Aarhus Convention. The Council of State has developed an interpretation of the notions of personal interest, aims set in an association's Articles of Association, and legal capacity to act, that resulted in preventing most NGOs from taking action before the Council. This jurisprudence has, diplomatically though clearly, been considered to be contrary to Article 9(2) and (3) of the Aarhus Convention by its Compliance Committee. It is difficult to determine with certainty if the Council of State has altered its jurisprudence in order to comply with the Committee's recommendations, since NGOs, in the meantime, have shown extreme caution in both the definition of their corporate objectives as well as in their choice of actions to be filed. Nevertheless, it seems that there are also positive developments. In our opinion the legal requirements on standing are so vague that these can be interpreted by the administrative courts in accordance with the Aarhus Convention without problem. If they refuse to do so, a legislative intervention will become necessary; private bills to do so were introduced in the past to the Parliament, but without success to date. No other formal transposition measures were taken for the moment to transpose the third pillar of the Aarhus Convention or the corresponding provisions of EU secondary law.

8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

The answer is no, given what has been answered in 8.1



- 8.3. Did the courts use:  
8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

As mentioned earlier, the standing rules are framed in a general and vague way, so that they can in our opinion be interpreted without problem in accordance with the requirements of the ECHR and EU, as interpreted by the ECJ and the ECtHR. There is definitely no need to set aside national standing rules.

Although the principle of effective judicial protection, as developed by the European Court of Justice, is often raised in arguments by parties before the Council of State, there appears to be no case law in which the Council of State itself has interpreted the national standing rules explicitly in the light of the principle of effective judicial protection, in cases falling within the scope of the application of EU law.

The principle will probably play a role in relation to the question if a regional decree of the Walloon Region (Act of the Walloon Parliament) is capable of depriving the Council of State of its jurisdiction to decide some pending cases. Different cases pending before the Council of State are dealing with "regional permits", that are building permits, environmental permits or combined permits for some projects of regional interest that, according to special Walloon legislation, are ratified by the Walloon Parliament, transforming them to Acts of Parliament that cannot be challenged before the Council of State. In these cases the Council referred questions for preliminary ruling both to the Constitutional Court – that on its turn referred some questions to the ECJ. The ECJ answered these questions with its judgment of 18 October 2011 (ECJ, Joined Cases C- 128/09 to C- 131/09, C- 134/09 and C- 135/09, *Boxus and Others v Région wallonne*; ECJ, Joined cases C-177/09 to C-179/09 *Le Poumon vert de la Hulpe ASBL and Others v Région wallonne* (Order of the Court of 17 November 2011) as follows:

*"1. Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive's scope. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337, as amended by Directive 2003/35.*

*2. Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:*

- *when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law;*
- *if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act”.*

The Council of State awaits the decision of the Constitutional Court in relation to parallel questions referred by the Constitutional Court to the ECJ. The judgment of the ECJ in that case held:

*“ (1). For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention. (2). Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended. (3). Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that: - when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and - if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the*

*necessary conclusions by disapplying that legislative act. (4). Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made. (5). Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned. (6.) Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned." (Case C-182/10, Solvay and Others, Judgment of 16 February 2012, nyr).*

The Constitutional Court has now reopened the written procedure, allowing the parties to present their statements on the consequences of this judgment for the pending cases. After expiration of the time allowed for that to the parties, the Constitutional Court will hear the case and decide.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

In the period before the entry into force of the Lisbon Treaty the Council of State held consistently that article 47 of the Charter of Fundamental Rights was not binding and could not be invoked. Since the entry into force it seems that the Council does not exclude the possible application of this article. At present, there are no cases dealing with this article that relate to standing requirements by the Council of State in cases falling within the scope of application of EU law. The position seems also to apply with respect to Article 13 ECHR.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

There seems to be no case law in which the Council of State has referred explicitly the right of access to court as enshrined in Art. 6 ECHR as interpreted by the ECtHR and ECJ jurisprudence, to interpret the national standing rules in cases falling within the scope of the application of EU law.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

The answer seems to be in the negative. The Constitutional Court has ruled several times that the obligation for the parties in proceedings before the Council of State to introduce timely their memorandum of reply or rejoinder, and the sanction that they otherwise are considered to have lost their interest in the case without further investigation, is not a violation Art. 10 and 11 of the Constitution, in combination with Art. 6 (1) ECHR (Constitutional Court, n° 87/2001, 21 June 2001, *L. Quartier*). The Constitutional Court also annulled some procedural provisions concerning the Foreigner Litigation Council because it believed that the very strict timeframes that should have been observed for lodging complaints violated Art. 10 and Art. 11 of the Constitution, in combination with Art. 6 (1) and Art. 13 ECHR, because of the strict timeframes that should have been observed (Constitutional Court, n° 81/2008, 27 May 2008, *vzw Vluchtelingenwerk Vlaanderen and Others*). A similar decision was taken with regard to the Council for Permit Disputes, in which case the Court found it not necessary to include Art. 6 ECHR in its review (Constitutional Court, n° 8/2011, 27 January 2011, *A. de Bats and Others*).

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Art. 9 of the Aarhus Convention

The Aarhus Compliance Committee, which was requested to rule on a complaint lodged by the Flemish environmental umbrella organisation *Bond Beter Leefmilieu Vlaanderen* regarding the restrictive case law of the Council of State in town and country planning matters, was of the opinion that this case law was not in line with the Aarhus Convention.<sup>1</sup> For the moment it seems that the jurisprudence of the Council of State is subject to evolution. In a recent judgment of the general assembly of the Council of State<sup>2</sup>, the Council used the usual formula of the Constitutional Court concerning standing requirements for NGOs, in stating that a non-profit organisation that has legal personality (*association sans but lucrative*) has standing if its statutory objective is of a particular nature (be it of a collective nature), and thus is different from that of general interest, that she is defending a collective interest, that the statutory aim can be affected by the challenged act and that it is obvious that she is pursuing her statutory objective in an active way (para 28.2.3.2). A similar formula was used in later judgments<sup>3</sup>. Since the creation of particular administrative courts dealing with immigration law (on the federal level) and building permits and alike in the Flemish region, the caseload is becoming more manageable and the backlog is disappearing gradually. Together with pressures from the ECtHR<sup>4</sup>, the Constitutional Court<sup>5</sup> and the Aarhus Compliance Committee<sup>6</sup>, it can be expected that the Council will again become more lenient. For the moment

<sup>1</sup> Aarhus Compliance Committee, *Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in the case of access to justice for Environmental organizations to challenge decisions in court (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))*, TMR 2007, 21-27.

<sup>2</sup> Council of State, n. 187.998, 17 November 2008, *Coomans et. al.*, TMR 2009, 64-94.

<sup>3</sup> Council of State, n. 192.085, 31 March 2009, *vzw Natuurpunt e.a.*; Council of State, n. 211.533, 24 February 2011, *vzw Milieufront Omer Wattez*.

<sup>4</sup> ECtHR, 24 February 2009, *L'Erablière ASBL v Belgium*.

<sup>5</sup> Constitutional Court, n. 109/210, 30 September 2010, *Christel Demerlier*.

<sup>6</sup> Findings and recommendations, ACCC/C/2005/11, *Bond Beter Leefmilieu Vlaanderen VZW*.

there is however no clear picture. Triggered by the Aarhus Convention, some judgments can be welcomed<sup>7</sup>, while in others the Council of State is of the opinion that its previous stricter approach is consistent with Art. 9 of the Aarhus Convention<sup>8</sup>. In the latter case law the Council of State is of the opinion that although environmental NGOs are presumed to have an interest by virtue of Art. 9 (2) of the Aarhus Convention, they must also show "capacity" or "quality" ("*hoedanigheid*" "*capacité*"), a somewhat unclear concept in this context that is interpreted in that sense that there should be a clear match between the statutory objective of the NGO and the contested project<sup>9</sup>. A regional organisation can in that view only challenge projects of regional interest, not smaller projects that are only of local relevance, or bigger projects that are of *supra* regional interest. Sometimes also "representativity" ("*representativité*" "*representativiteit*") is requested, meaning that the association should have sufficient support of the people living in the area that is affected by the contested decision.

The conclusion can be that on the question raised by the Aarhus Compliance Committee, the case law of the Council of State seems to tend towards compliance, but there is also dissenting case law.

A bill to amend Art. 19 of the Organic Laws on the Council of State in order to explicitly allow for actions to be brought by NGOs with legal personality for the defence of collective interests was introduced in the Belgian Senate on 22 December

<sup>7</sup> E.g. Council of State n. 166.889, 15 February 2007, *VZW Milieufrent mer Watez*. See in the same sense: Council of State, n. 193.593, 28 May 2009, *vzw Milieufrent Omer Watez*; Council of State, n. 197.598, 3 November 2009, *vzw Stichting Omer Watez*; Council of State, n. 213.916, 16 June 2011, *vzw Natuurpunt Beheer*, *Lefranc* (2010) 447.

<sup>8</sup> E.g. Council of State, n. 197.509, 3 November 2009, *vzw Milieufrent Omer Watez* and more than 20 other judgments in the same sense.

<sup>9</sup> The Council is sometimes of the opinion that there is a sufficient proportional relationship between the material and territorial sphere of action of a (sub-)regional environmental NGO and a contested decision (e.g.: Council of State, n. 208.918, 10 November 2010, *vzw Natuur en Landschap Meetjesland* concerning a specific land use plan for an industrial facility), while on other occasions it believes that this is not the case (e.g. Council of State, n. 208.116, 13 October 2010, *vzw Milieufrent Omer Watez* (building permit for an individual house); Council of State, n. 208.473, 27 October 2010, *vzw Milieufrent Omer Watez* (building permit for an individual house)). In the latter cases the NGO referred without success to Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening*, ECR [2009] I-9967. Two paragraphs of the opinion of AG Sharpston in that case are also quoted in Council of State, n. 205.742, 24 June 2010, *l'asbl L'Erablière* holding that conditions relating to national requirements as to the registration, constitution or recognition of associations, the purpose of which is to obtain a legal declaration of the existence of such bodies under national law, are valid. In that case the Council of State has meanwhile referred a question on the constitutionality of Art. 26 of the Act of 27 June 1921 for a preliminary ruling to the Constitutional Court, referring also to Art. 6(1) ECHR and Art. 1 and 10a of Directive 85/337/EEC (Council of State, n. 218.297, 1 March 2012 *l'asbl L'Erablière*).

<sup>10</sup> Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerken et consorts, 19 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1693/001; a similar proposal has been introduced in the Senate: Proposition de loi modifiant les lois coordonnées sur le Conseil d'Etat en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mmes Z. Khattabi and Freya Piryns, 16 November 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1330/1.

<sup>11</sup> Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Muriel Gerken et consorts, 14 July 2011, *Chambre des Représentants de Belgique*, DOC 53 1680/001; the private bill has also been introduced to the Senate: Proposition de loi modifiant le Code judiciaire en vue d'accorder aux associations le droit d'introduire une action d'intérêt collectif, déposée par Mme Z. Khattabi, 3 Novembre 2011, *Sénat de Belgique* (2011- 2012), DOC 5-1293/1.

<sup>12</sup> Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, *Sénat de Belgique* (2006-2007), DOC 3-2442/1

<sup>13</sup> Proposition de loi modifiant la loi du 12 janvier 1993 concernant un droit d'action en matière de protection de l'environnement, déposé par B. Martens, 6 December 2007, *Sénat de Belgique*, (2007-2008), DOC 4-470/1

<sup>14</sup> E.g. Council of State, n. 212.825, 28 April 2011, *Lauwers*. The Council of State annuls a building permit – delivered on 29 March 2007 - for the construction of a tramway *Deurne-Wijnegem*, together with the decision to release the operator from the obligation to prepare an EIA, because that second decision was found to be unlawful (the decision that there were no significant impacts to be expected was found inconsistent with the elements of a mobility study on cut-through traffic). In that respect the case-law of the Council of State seems in line with the case law of the ECJ (Case C-75/08 *Mellor* [2009] ECR-I-3799, paras 57-59). The demand for suspension had been rejected in 2008 (Council of State, n. 183.799, 4 June 2008). The construction was nearly completed the day the judgment on the merits was passed. The construction works have been delayed. Meanwhile the permit has been issued again with relative minor changes, but that seems to satisfy the requester and the tramway became operational in April 2012.

2006 and adopted (in modified form) on 15 March 2007. In order to become law, however, this bill still has to be adopted by the House of Representatives. For the moment such a private bill is pending in the House<sup>10</sup>. A similar private bill to amend Art. 18 of the Judicial Code has already received the opinion of the Council of State, and is under discussion in the Justice Committee of the House<sup>11</sup>. Although, strictly speaking, these initiatives are not necessary, because judges can interpret the standing rules without any problem in accordance with Art. 9 (3) of the Aarhus Convention, those bills, if adopted, would speed up the solution and bring more uniformity and thus certainty in the case law.

Another bill to amend the Law of 12 January 1993 to strengthen the existing action for injunctive relief and facilitate access to it for NGOs was introduced in the Senate on 1 April 2007<sup>12</sup>. It was re-introduced after the 2007 general elections<sup>13</sup>, but not discussed. It has not been reintroduced after the 2010 general elections. In the 2010 Implementation Report of Belgium it has been stated that this bill must also be reintroduced either by the government or by the Parliament, in order to improve access to justice for environmental NGOs, especially in view to amend Art. 2 which currently lays down some restrictive conditions. Such an amendment would increase considerably the efficiency of the Act of 12 January 1993.

As far as Art. 9 (4) of the Aarhus Convention is concerned we can in general say that the different courts dispose of sufficient remedies to provide for adequate and effective relief. However, in practice, there are a lot of cases that deliver unsatisfactory results, mainly because of the delays in handling the cases due to the historical backlog with the Council of State (and the newly build up backlog with the Flemish Council for Permit Disputes). When a plan or permit is challenged before the Council of State and one does not obtain the suspension of the challenged act within a short period, the risk is real that the developments or projects have been completely or largely realised<sup>14</sup> on the ground the day the act is annulled some years later. It can also happen that a project has to be stopped in the course of its realisation if it takes too much time to obtain a suspension of the permit. This is frustrating, not only for the third parties, but also for the developers and the authorities; even more so if the Council decides e.g. to annul with very much delay on (very) formal grounds, without going into the substantive issues. It can lead to delays in development, extra costs, repeated attempts to regularise the situation, followed by renewed disputes and judgments, claims for damages and, finally, loss of respect for and credibility of the court system.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(BELGIUM)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

Abbreviations used: NL (Dutch translation), FR (French translation), CCP (Code of Criminal Procedure), GPI (Geïntegreerde politie - police intégrée)

#### 1) Police courts

In each of the 27 judicial districts, a police court is established, which is competent for (1) less serious cases (In the Belgian criminal justice system, the crimes are divided into three subcategories according to their severity. The lowest category are called contraventions FR, overtredingen NL and fall within the competence of the police courts. Additionally, when mitigating circumstances are involved, the severity of the second category can be downsized and brought before the police courts ) and (2) for traffic related cases (which can be very serious). An appeal against the decision of the police court has to be brought before the correctional court.

#### 2) Correctional courts and juvenile courts

In each of the 27 judicial districts a court of first instance is established. Criminal law cases can be brought before two of its divisions.

First, within this court, there is the division called the correctional court which deals with general criminal matters committed by adult offenders. Referring back to the three subcategories of crimes, this court deals with the middle sub-category (wanbedrijven NL, délits FR) and possibly also with the top category of crimes provided that their severity is downsized due to the presence of mitigating circumstances. In the different correctional chambers the cases are treated by one or by three judges. An appeal goes to the court of appeals, correctional chambers.

Second, within this court, there is a division called the Juvenile court, which treats 'facts that can be qualified as criminal cases' committed by juvenile offenders. In most chambers of the Juvenile Court the cases are treated by one judge. In one specific chamber three judges treat the cases of the juvenile offenders who have been referred to the adult system. They then apply the rules of the adult criminal procedure and the adult criminal law. An appeal against a decision of the juvenile court goes to the court of appeals, juvenile chambers.

#### 3) Court of Assize

The most serious criminal cases (crimes FR, misdaden NL), political crimes and press related crimes (except the ones committed with racial or xenophobe motives) are judged by the courts of Assize. These courts have a seat in each of the ten provinces and in the Brussels capital territory. However, unlike the other courts,

which have a permanent structure, a Court of Assize has to be constituted for each specific case. It comprises three professional judges and 12 lay jurors. An appeal against a decision of the Court of Assizes is not possible.

#### 4) Court of Cassation

Finally, there is also a possibility of appeal to the Court of Cassation (Cour de Cassation FR, Hof van Cassatie NL). This is however not a third level of jurisdiction, it is not a second appeal. The mission of the Court of Cassation is to verify the correctness (régularité FR, regelmatigheid NL) of the conducted procedures and the legality of the final decisions of judges. It only treats matters of law. This means that an appeal to the Court of Cassation is possible against a judgment of the court of appeals, against a judgment of the Court of Assizes and against a judgment of the Correctional court when it acts as an appeal judge.

### 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

The victim has the right to (ask for):

- initiate the criminal proceedings
- compensation
- return of property
- reimbursement of expenses
- measures for physical protection
- mediation
- access to the judicial file during the investigation by an investigating judge
- add information to the judicial file
- be heard
- receive information in different stages of the procedure
- etc.

The above is a non-exhaustive list which shows that victims have rights in all stages of the criminal proceedings.

Not all of these rights are available for all victims and at all times during the criminal procedure. Often a specific status is necessary (civil party, aggrieved party...). Moreover some of these rights are provided for in the law, but are not legally enforceable.

#### 1.2.1. Is there a possibility of private prosecution?

Belgium does not provide the possibility of private prosecution in a strict sense of the word. If the prosecutor is not taking action, or has decided to drop the case, the victim can, however, activate or initiate the procedure.

The victim can initiate criminal proceedings in two ways.

First, a victim can bring a case directly before a court. When the offence is a misdemeanour (contravention FR, overtreding NL) or a serious misdemeanour (délit FR, wanbedrijf NL), the victim can summon the offender directly to the court (citation directe FR, rechtstreekse dagvaarding NL). (art. 64, al. 2, art. 145 CCP, art. 182 et 183 CCP). This is the only mechanism that empowers the victim to bring a case before a court judge who can decide on the case.



Second, a victim can oblige the authorities to investigate the case. When the offence is a serious misdemeanour (délit FR, wanbedrijf NL), the victim can file a complaint with the investigating judge (juge d'instruction FR, onderzoeksrechter NL) and simultaneously introduce a civil action (art. 63 CCP). This act initiates the prosecution in the sense that the investigating judge is appointed in order to start a judicial investigation. This does, however, not mean that the case will necessarily go to court. At the end of the investigation, the judicial authorities will decide whether or not enough evidence exists to bring the case to court. The power given to the victim is the power to oblige the authorities to investigate the case.

For both possibilities a monetary deposit is required in order to prevent that these procedures would be used in an unthoughtful or abusive way.

1.2.2. Can a victim request review of a decision not to prosecute?

A victim cannot appeal against a decision of the public prosecution service not to prosecute. However, the victim can initiate in which case criminal proceedings in some kind of private prosecution (see question 1.2.1.)

After a criminal investigation by an investigating judge (juge d'instruction FR, onderzoeksrechter NL) the case is sent to the Council chamber who will decide whether the case will be sent to court. The victim can appeal against the decision of the Council chamber (chambre du conseil FR, raadkamer NL) to close the case. This appeal is brought before the Indictment Chamber of the Court of Appeals (chambre de mise en accusation FR, kamer van inbeschuldigingstelling NL)

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

Yes, the victim has the right to ask for full reparation of the damage caused by the crime. This reparation is only due if the defendant is found guilty.

This can include monetary damages (art. 1382 and 1383 Civil Code, art. 44 Penal Code art. 3 preliminary title of the CCP, art. 151 and 189 CCP), but the reparation is not necessarily restricted to monetary damages. Concerning the monetary damages there is no rule that limits this compensation to cases that are not too complex. The monetary damages can be allowed for material losses, physical injuries, medical expenses, mental injuries, the cost of a funeral etc.

The reparation can also include restitution of goods to the victim (art. 44 Penal Code, art. 161 and 370 CCP) and to this effect the seizure of goods (art. 43bis Penal Code).

Victims can have costs reimbursed (art. 162, 194 and 369 CCP).

Belgian law does NOT provide for penal measures of compensatory character (schadevergoedingsmaatregel).

Financial compensation of the victims' damages is however a condition for a transaction and can be a condition in penal mediation, both measures at the level of the prosecutor (see under 6).

This overview shows different possibilities of compensation. These are not open to all victims. Often a specific standing is necessary.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

When the victim wants to ask for compensation, he/she can choose in principle to bring this claim before the civil or the criminal court (in a few exceptions, the option does not exist).

The victim who chooses to bring the case to a criminal court, can still bring an additional claim before the civil court at a later stage, asking for additional compensation based on other damages resulting from the crime and vice versa. This means that the adagium '*electa una via recursus ad alteram non datur*', does not apply in the Belgian system anymore.

The victim is however not allowed to bring a civil claim before the civil and the criminal court at the same time for the same damages.

Before the criminal court the victim will have to get the status of civil party in order to ask for compensation.

If the victim brought his claim before the civil court, the civil court will wait for the criminal court's decision on the guilt and sentence of the defendant before pronouncing on the civil claim. (art. 3 and 4 preliminary title CCP - according to the adagium '*le criminal tient le civil en état*'). The civil court is bound by the decision of the criminal court on the guilt of the defendant. There are exceptions to this rule '*le criminal tient le civil en état*', provided for in specific penal legislation.

If the defendant is acquitted by the penal judge (after examination of the content of the case), the criminal court becomes incompetent to decide on the request for compensation introduced by the civil party. If the criminal court acquits the defendant, the victim can in principle not turn to a civil court for compensation.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

Different legal provisions state that there is a duty for justice professionals to inform victims of their rights. Some of these provisions are very general, others are more specific and target specific categories of professionals and/or specific types of information:

Art. 46 of the Law on the Police Force (adopted 15 August 1992 and in force since 1 January 1993) introduced a general duty for police officers to assist victims, by (amongst other things) providing them with the necessary information.

The circular GPI 58 on the treatment of victims in the integrated police force (adopted on 4 May 2007, entered into force on 5 June 2007) insists that assisting victims, and thus also providing information, is an obligation for every individual police officer coming into contact with victims. This obligation applies to police officers both from the local and from the federal police.

The circular states that all police staff coming into contact with victims must possess the necessary professional skills and attitudes in order to offer a proper and efficient service to victims. GPI 58 holds a detailed list of information items that must be provided, either at the moment the facts are discovered or when the victim files a

complaint, or at a later point in time (this might be better/necessary if the victim was in a state of shock just after the crime happened). Procedural rights of the victim belong to the list of information items that must be provided to the victim.

In each local police service a specialised victim assistance unit supports the police officers in their victim assistance (and victim information) task, by keeping them up-to-date (training) and by taking over especially difficult cases. (Ministerial circular on the standards for the organisation and operation of the local police in order to ensure equal and minimum services to the population, adopted on 9 October 2001, in force since 16 October 2001; circular GPI58 on the treatment of victims in the integrated police force, adopted on May 2007, in force since 5 June 2007).

In 1998 art. 3bis preliminary title of the CCP was introduced. This article creates an obligation for all civil servants within the police system (police officers and other staff working in the police station) and the judicial services (prosecutors, judges and other personnel working in the courthouses) to treat crime victims and their relatives carefully and with respect, in particular by making available any necessary information. This article thus creates the obligation to provide also information on procedural rights for victims.

At the level of the prosecution and the court, specialized 'justice assistants' have the duty to assist victims throughout the criminal proceedings. One way of putting this duty into practice is to provide information on procedural issues during the phase of investigation, when the case goes to court and during the phase of execution of the sentence. They also have the duty to support the staff of the courthouse so that they can fulfil their duty of informing victims correctly. (Ministerial guideline of 15 September 1997 regarding the reception of victims at the prosecutor's office and the courts) In practice however, we see that the major part of the information work is performed by the justice assistants.

Victim support services (Services d'aide aux victimes FR, Diensten Slachtofferhulp NL) which are NGO's financed by the government, provide short term assistance to victims of crime. Providing basic information on procedural rights is part of their task. They will provide support to victims who request their help.

Primary legal aid in the form of initial legal advice and practical information is also provided free of charge by lawyers. (on legal aid see art. 508/1 -508/23 Judicial Code)

Practically speaking the information on procedural rights is provided, depending on the type of information and the situation, in person, or in a letter, or through leaflets and brochures that are available in police stations, in court houses, in victim support services/organisations and on the website of the Ministry of Justice. The duty of providing information applies to each of the professionals mentioned above which, in addition to providing information on basic procedural rights, also have the duty to refer victims to specialised services.

Amongst the basic procedural rights victims have to be informed about we find general information about the different phases in a criminal procedure, and the possibility to acquire the status of civil party or aggrieved person with the rights

attached to this status. This means that information will be provided on the possibility to join the criminal procedure, the possibilities to claim for damages, the possibility to receive information about the case.

Filing a complaint as a victim is not sufficient for a victim to receive information on the decision (not) to prosecute. In order to obtain this information, the victim has to acquire the status of an aggrieved person (personne lésée FR, benadeelde persoon NL) or civil party (partie civile FR, burgerlijke partij NL).

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Whether a specific type of standing is required for a victim to bring a claim depends on the type of claim. For most types of claims, a specific type of standing is necessary. The most common and important standings are civil party (partie civile FR, burgerlijke partij NL) and aggrieved person (personne lésée FR, benadeelde persoon NL). The victim has to take initiative to obtain this standing or status, it is not attributed automatically and also filing a complaint is not sufficient to obtain this status.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?
- 2.3.

Belgian legislation does not provide for a general definition of the term victim. Until quite recently the term 'victim' was not even used.

The term victim first appeared in 1992 in art. 46 of the Police Act (wet op het politieambt).

In 1998 a general provision was introduced in the preliminary part of the CCP (art. 3bis) concerning the treatment of victims, directed to all the civil servants employed in the police and judicial forces. It states that 'crime victims and their relatives should be treated carefully and with respect, in particular by making available any information necessary and, where appropriate, by referring them to specialised services'

While the term 'victim' is used in these two provisions, no definition is provided.

Other provisions providing rights to victims do not use the term 'victim', but describe who the text is directed at, for example the 'civil party' (partie civile FR, burgerlijke partij NL) or the 'aggrieved party' (la personne lésée FR, de benadeelde persoon NL) or the 'persons having a direct interest in a judicial procedure'. It is necessary to analyse the different specific rights provided to victims and to detect each time which kind of victim is concerned.

Overall, taking the different provisions together, we can state that the definition of the 'victim' is not very strict.

Indirect victims, such as family members and heirs (in case of a deceased direct

victim) of the direct victim, are considered to be victims for certain rights.

Legal persons, governmental organisations (GOs) and NGOs can sometimes be 'victims' (if they suffered 'personal damage'), but as a general principle GOs and NGOs cannot act as representative of the collective damages suffered by their members (there are some legal exceptions on this exclusionary rule).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

In general we can make a distinction between different standings. For different types of rights, different standings will be required.

1) Victim of crime 'tout court', without any additional requirement.

2) *Personne lésée* - benadeelde persoon (art. 5bis preliminary title of CCP):

A victim can acquire this status by filing a written statement in person or by his/her lawyer at the prosecutor's office.

3) *Partie civile* :

Before the start of the public action:

- Before the start of the criminal proceedings the victim can already become a civil party by formally manifesting his/her will to become a civil party to a public prosecutor or to an officer of the judicial police. (art. 53, 54, 65 and 66 CCP)

The victim can also initiate a civil and a criminal action at the same time with an investigating judge and start a criminal proceeding by doing so. (art. 63 and 70 CCP)

- The victim can also become a civil party by summoning the defendant directly to the court (art. 64, 145, 182 and 183 CCP)

When the public action has already started, the victim can become a civil party by manifesting his/her wish to do so with the investigating judge, with the courts that will treat the case during investigation and trial (*chambre de conseil*, *chambre de mise en accusation*, *juge du fond*). Asking to become a civil party during the trial is the easiest and most chosen way to become a civil party. An oral statement is sufficient.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

Yes.

Different rights are for example attached to the status of victim tout court, to the status of aggrieved person (*personne lésée*, *benadeelde persoon*) and to the status of civil party (*partie civile*, *burgerlijke partij*):

1) Victims of crime

- are entitled to receive to a certain extent 'information' (see 1.3.)

- have the right to receive a copy of the interrogation, free of charge, when they are interrogated (as witnesses) by the police, the public prosecutor or an investigating judge (art. 28 quinquies and art. 57 CCP)

- have the right, as 'persons with a direct interest in a judicial procedure' to request mediation in every stage of the criminal proceedings (art. 553-555 CCP)

2) An aggrieved person (his/her rights are enumerated in art. 5bis preliminary title of CCP in an exhaustive manner):

- has the right to be assisted by or represented by a lawyer
- can ask for every document he/she deems useful, to be added to the judicial file
- will be informed of a dismissal of the case by the public prosecutor and of the reason for the dismissal,
- will be informed in case the prosecutor refers the case to an investigating judge for a judicial investigation
- will be notified of the date on which his/her case will appear before a court (jurisdiction d'instruction ou juridiction de jugement - onderzoeksgerecht of vonnisrechter)

This is an intermediate position between the victim who only filed a complaint and the victim who becomes a party in the proceedings, as 'civil party'. This status is meant for victims who do not want to claim compensation, but who want to be informed about the progress of the case.

3) The civil party (partie civile, burgerlijke partij): is a real party in the criminal proceedings and thus has in several regards the same rights as the defendant.

Some examples of rights of the civil party:

- During the investigation by an investigating judge the civil party can ask for access to the legal file (art. 61ter CCP)
- The civil part can claim compensation before the court. (art. 3 and 4 preliminary title of CCP, art. 66 and 67 CCP).
- The civil party has the right to ask for additional investigating operations to be conducted by the investigating judge (art. 61 quinquies CCP).

3.3. Are there specific standing rules applicable to certain types of claims?

Yes, see 3.2.

3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

See definition of victims supra.

3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

The value of the dispute or the type of crime does not affect the standing rules concerning compensation.

3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

No information readily available.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

This question is difficult to answer. To my knowledge there is no research available that can answer this question in a general manner.

4.2. Are there significant variations in the courts' approach based on:

4.2.1. the type of remedy requested?

Information not readily available.

4.2.2. the nature of the claimant?

Information not readily available.

4.2.3. the nature of the claim?

Information not readily available.

4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

Not to my knowledge.

4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Information not readily available.

## 5. Influence of EU law

5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

As far as I can see, the framework decision on the standing of victims of 2001 has not led to notable changes in the standing rules in Belgium. The major procedural changes in the standing of victims date from before the 2001 framework decision and are linked more specifically to a major review of the criminal procedure in 1998 (la loi 'Franchimont').

5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

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5.3. Did the courts use:

5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

Information not readily available.

5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

Information not readily available.

5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law) in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Information not readily available.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Information not readily available.

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Expedited criminal proceedings and the effect on the standing of victims:

In Belgium the prosecutor can propose to the defendant to accept certain conditions. If the defendant accepts and respects/executes these conditions, the criminal proceedings will be terminated (extinction de l'action publique FR, uitdoving van de strafvordering NL) and the case will thus not go to court.

There are two main ways of doing this:

### 1) Transaction (art. 216bis CCP)

In a transaction the prosecutor proposes to pay a fine to the State. This is only possible if the defendant first compensates the (non-disputed part of the) damages caused to the victim and admits his/her civil responsibility for what happened in writing. This leads to a non-refutable presumption of fault by the defendant in case the victim goes to a civil court to claim additional damages (the disputed part).

### 2) Penal mediation (art. 216ter CCP)

In a penal mediation, the prosecutor can propose one of four different conditions or a combination of them:

- compensation or reparation (apologies, reparative work, symbolic reparation...) of the damages caused to the victim. Only if this condition is imposed the victim will be invited to participate in order to negotiate an agreement on the compensation or the reparation.
- follow therapy or medical treatment
- carry out community service
- follow a training programme.

The law provides for a non-refutable presumption of fault by the defendant in case the victim has not been associated to the penal mediation, so that the victim can more easily go to a civil court to obtain compensation for damages caused by the criminal act.

The right to be heard for victims of crime is in Belgium spread over different possibilities, for example:

- The victim can be heard when invited to act as a witness.
- The victim with the status of aggrieved person (personne lésée FR or benadeelde persoon NL) can for example add every document that he/she deems useful to the judicial file.
- The victim with the status of civil party can intervene during the trial, but this intervention is limited to the civil claim. This means that the civil party will try to



demonstrate that the crime has been committed, that the compensation requested can be justified (proof of the damages) and shown to be in a causal relation with the crime. The victim is not allowed to plead concerning the penalty to be imposed.

There is no separate right to be heard during the trial, for example in the form of a written or oral victim impact statement.

## ENGLAND AND WALES

### Country reporters

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- For administrative law: **Prof. Richard Macrory**  
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(University of Warwick)

## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (ENGLAND AND WALES)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

(For the purposes of answering the questionnaire, I will take `Civil` to be used in the sense in which it is used by lawyers in a civil law system and not in the sense in which it is typically used by common lawyers (i.e. to mean "not criminal"). It should also be noted that English law does not for most purposes draw a distinction between private law and public proceedings. Proceedings by and against public authorities are also "civil" in the English sense of the term.

At the trial level there are two courts in England and Wales, the High Court and the county court. The High Court is divided into three Divisions, the Queen's Bench Division ("QBD"), the Chancery Division ("ChD") and the Family Division. The present names and allocation of business between the Divisions dates from 1971, but the High Court itself was created in 1875 and took over the jurisdiction of the three Courts of Common Law (the Queen's Bench, Common Pleas and Exchequer), the Court of Chancery, the High Court of Admiralty, the Court of Probate and the Court for Divorce and Matrimonial Causes. For the purposes of the present study it is the Queen's Bench Division and the Chancery Division which are important. The Queen's Bench Division deals with claims in contract and tort, some landlord and tenant disputes, commercial and admiralty matters and proceedings for the judicial review of administrative action. The Chancery Division deals with all areas of the law which are derived from Equity (the body of law developed by the Court of Chancery), typically matters concerned with the law of Trusts. It also deals with all disputes relating to title to land and has some specialised jurisdictions – company law, intellectual property law and tax. In both the QBD and the ChD some of these specialised jurisdictions are carried out by "Courts" within the Division in question (e.g. the Commercial and Admiralty Court within the QBD and the Companies Court within the ChD) but these should not be understood as separate courts but rather as administrative sub-divisions within the Division which apply particular procedures to the types of case in question and to which judges with particular expertise in the relevant areas are allocated. The High Court is concentrated largely in London (in the Royal Courts of Justice in the Strand and its outbuildings) but High Court judges also sit in major cities outside London and the High Court has District Registries for handling pre-trial and post-trial procedural matters in the same centres. The county court is the lower tier of the English civil trial court system. It sits in most towns and cities in England and Wales. Until 1991 there was a fairly clear line, expressed in financial terms, between the High Court and the county court, but since 1991 this line has been abolished and a flexible set of criteria have been set out to determine whether an action is allocated to the High Court or the county court. However, it is still the case in general that large or difficult cases go to the High Court and smaller and less complex cases go to the county court.

At the appellate level there are also two courts. The first level is the Court of Appeal

(Civil Division), which also sits in the RCJ in London. In order to appeal to the Court of Appeal the appellant has to obtain the permission of either the court from which the appeal is brought or the Court of Appeal. From the Court of Appeal a further appeal is possible to the Supreme Court (formerly the House of Lords). Permission to appeal is required from either the Court of Appeal or the Supreme Court. In practice, it is usually necessary to obtain permission from the Supreme Court. It should also be pointed out that some kinds of appeal from the county court (particularly in procedural matters) now go to the High Court as the first level of appeal outside the county court itself. (There is a kind of internal review within the county court for certain types of decision).

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

Yes, but they are usually referred to as Tribunals rather than courts. The obvious example for the purposes of the present study are Employment Tribunals, which deal with disputes about contracts of employment, entitlement to redundancy payments, claims for unfair dismissal and claims relating to discrimination in employment and equal pay. These Tribunals have a professional legally-qualified chairman (nowadays referred to as a Tribunal Judge) and lay members. There is an avenue of appeal on questions of law only to the Employment Appeals Tribunal which has a High Court judge as its chairman but also has lay members.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

All types of non-criminal case fall within the jurisdiction of one of the trial courts mention in para. 1.1. The jurisdiction of the county court is defined by the statute (principally the County Courts Act 1984). Some of the jurisdiction and powers of the High Court are contained in the Senior Courts Act 1981 (formerly known as the Supreme Court Act 1981) but the main part of the High Court's jurisdiction is part of the common law and is based upon the prerogative rights of the Crown. In principle, any civil claim which is capable of being litigated in the English courts can be brought in the High Court, although there are rules designed to deflect smaller cases into the county court, as mentioned above.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

Standing in English law is not regarded as a separate requirement independent of the claimant's (plaintiff's) substantive right of action. The concept of standing is well-understood in proceedings for judicial review of administrative action (a matter which is allocated to the Administrative Court which is part of the Queen's Bench Division of the High Court) but is rarely referred to in ordinary civil proceedings. For example, if A and B make a contract in which B is required to do something for C and B fails to do so, at common law (subject to numerous exceptions) A can sue B for breach of contract but C cannot. This is because of the operation of the doctrine of privity of contract, according to which only those who are parties to a contract can sue or be made liable under a contract and in this example C is not a party. An English lawyer would not however regard this as a rule about standing but rather as explained by the fact that C has no substantive right to assert in these circumstances.

However, there is at least one case in English law where an inability to sue might be regarded as a rule concerning standing. This concerns the right to sue in the tort of conversion. Conversion is a very broad tort which consists of an unlawful interference with the claimant's chattels (i.e. moveable property) which is not in the form of a direct physical interference (which is covered by the tort of trespass to goods). So, for example, if A steals B's bicycle and sells it to C, A commits the tort of conversion; and if C were thereafter to sell the bicycle to D, C would also commit the tort, even if he honestly believed that he owned the bicycle. This is because conversion is a tort of strict liability and not based upon proof of fault. It fulfils in many respects the same function which a vindicatio would fulfil in a civil law jurisdiction although based upon a different theory as to the basis of the liability. One of the principles in the tort of conversion is that it is a tort against the right to possession not ownership. Thus, if someone other than the owner has the immediate right to possession it is that person and not the owner who has the right to sue in conversion. For example, if A owns goods and pledges them with B as security for a loan, and C steals the goods from B, it is B who is the proper claimant in an action against C and not A. A might in some circumstances have a claim against C if he can prove that C's act has damaged his reversionary interest in the goods, but this is not regarded as an example of conversion but a separate tort. The rule concerning the proper claimant in conversion might properly be regarded as a rule of locus standi, although English lawyers would probably not refer to it as such. If in the example given above A, rather than B, were to sue C, C's correct procedural step would be to apply for summary judgment against A under CPR 24.1 on the ground that A has no real prospect of success.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

As explained above, there is no general requirement in English civil proceedings to establish locus standi which is not the same as being able to establish the substantive right being sued upon. The rule in conversion is the only example which I can think of which may be regarded as a true exception to this principle.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

There are no rules concerning standing as such, other than the necessity of having a substantive claim to assert. There are rules concerning the representation of people under a disability (i.e. minors and mental patients) and the estates of the deceased, but these I take not be questions of standing for the purposes of this study.

In appellate proceedings permission is required to appeal from the High Court and the county court to the Court of Appeal (Civil Division). Permission may be obtained from the court whose order is being appealed or the Court of Appeal itself, as explained above. The same principle applies to appeals from the Court of Appeal to the Supreme Court, but here the usual practice is for the Court of Appeal to refuse

permission to appeal, leaving the appellant free to apply to the Supreme Court itself. The effect of this system is that the Supreme Court chooses its own cases.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

No. The requirements of standing (insofar as there can be said to be any) are the same at all stages of the proceedings and do not change according to the remedy being sought.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

In general the answer to this question is no. The question again is whether the claimant has a substantive right of action. If he does, he has standing to sue and if he does not he cannot claim. Standing is not a separate requirement. On possible exception to this rule is that in some consumer proceedings the Office of Fair Trading can initiate litigation to seek the review of unfair contract terms. (An example of this kind of case is given below). Proceedings of this kind are of a "public law" nature in civilian terms, but may influence the outcome of private law proceedings

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

No. The requirements of standing are the same. Since English law does not, save for one limited purpose, draw a distinction between public law and private proceedings, actions by and against public authorities are brought in the same courts as other civil proceedings and subject to the same procedural rules. There were at common law some restrictions on bringing actions against the Crown (i.e. the executive arm of the government) but these were abolished by the Crown Proceedings Act 1947.

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Yes. Interpleader proceedings are a well-established part of English procedural law. An interpleader is a procedure available to a party who is faced with competing claims in respect of property in relation to which he makes no claim himself. Civil Procedure 2011 (the "White Book") explains the situation as follows: "Interpleader proceedings arise where a person, who themselves makes no claim to property, faces competing claims from others to the property. The interpleader action is commenced by the party facing the claims with the objective of removing themselves from the dispute and protecting themselves from competing claims; the court then decides the rival claims."

There are two different types of interpleader: a stakeholder's interpleader (the example given in the questionnaire would be of this type) and a sheriff's interpleader. The latter type arises where a sheriff has seized goods in possession of a debtor in execution of a judgment but a third party claims to be entitled to the goods. In this case, the sheriff is allowed to interplead and the dispute about the title to the goods proceeds between the judgment creditor and the claimant.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

I have been unable to find any cases concerning human rights law where human rights affected standing in civil proceedings.

#### **4. Third party intervention**

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

It is possible for third parties to be joined in English civil proceedings, but again this would not be regarded as a principle concerning standing. A third party may become involved in litigation in two ways. First, the third party may apply to the court for an order that he be joined as a co-claimant or additional defendant in the proceedings. For example, if there is a dispute between A and B concerning title to property (whether chattels or real property) and C also claims to be entitled to own the property or have some other interest in it, C would apply to the court for an order that he be added as a defendant in the action. The second method whereby a third party may be joined in proceedings is where a defendant brings proceedings under Part 20 of the CPR seeking some contribution or indemnity from the third party in respect of the claim which the claimant has brought against the defendant. Under the CPR the third party is known as a "Part 20 defendant". In neither of these cases would English lawyers regard the question of whether the third party should be joined as a question of standing but rather one of whether there is a substantive claim by or against the third party.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No. It is a matter within the court's discretion whether to allow joinder of the third party in the cases mentioned above. The original parties may of course put arguments to the court concerning the proposed joinder but these would not be based, according to English thinking, on questions of standing but rather on whether there appears to be an arguable claim by or against the third party.

#### **5. Multi-party litigation**

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a

large group of litigants? Please specify which types of such actions are available and provide a short definition.

Yes. There are three different forms of multi-party proceedings. The first is known as a representative action. In this type of action a representative may be appointed to represent (as claimant or defendant) a group having the same interest in the proceedings. This is a very long-standing feature of English procedural and was originally the invention of the Court of Chancery. However, the scope of representative proceedings is greatly limited by the very narrow interpretation which has been put upon the phrase "the same interest" in the rule. This has been interpreted to mean that the interests of the members of the group must be identical (including that the remedy must be beneficial to all of them). This means that this procedure cannot be used where each member of the group has his own individual claim for damages, even if the basis of the liability is one which is common to him and other claimants. It cannot therefore be used in "group jeopardy" cases, such as by the victims of a train crash or a product liability claim by people injured by the same defective product.

For this reason a new type of multi-party action called a Group Action has been developed. In this type of case it is only necessary to show that there are common issues of law or fact which can most easily be managed as a group rather than individually. The actions of the various claimants are started individually but the court then makes a Group Litigation Order (GLO) specifying the issues which are to be the subject of the GLO and the cases are then managed as a group. When the actions reach the trial stage the court selects some cases which are typical of the group for trial and the issues decided in these cases form the basis upon which the other cases in the group can then be settled (i.e. compromised) between the parties. In both representative and group actions the orders of the court bind all the parties involved in the collective proceedings, but it is open to any individual litigant who considers that an order should not apply to him to make an application to the court to that effect.

The third type of multi-party proceeding is a Derivative Action, which is a specialised type of Representative Action used where a shareholder or other stakeholder in a company is permitted to bring an action on behalf of a company in respect of a wrong done to the company. (The general rule is that only the company can bring an action for a wrong done to it but there are limited exceptions to this rule.)

It should also be mentioned that the court has the power to order Consolidation of separate actions if it is convenient to do so. This means that the actions remain distinct but the court may decide common issues in the actions at the same time. This technique is also sometimes used at the appellate level where the Court of Appeal or Supreme Court has several pending cases which all raise the same issue of law.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?



- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

The answer to this question is no, in the absence of any private right which a party may be able to assert. Cases of the kind which I think are covered by this question would most probably arise in relation to the judicial review of administrative action, but this would fall under the heading of public law in a civil law system.

It is however worth drawing attention to the case of Office of Fair Trading v. Abbey National plc [2009] UKSC 6; [2010] 1 A.C. 696 (the Bank Charges case) in which the OFT brought proceedings against various banks in respect of the charges which they levied against customers for banking services. This raised a question as to whether the charges were subject to regulation under the Unfair Terms in Consumer Contracts Regulations (which transposed an EU Directive). The Regulations gave the OFT (and certain consumer protection organisations) the power to take proceedings to determine the fairness of certain types of contract term. In the case itself the Supreme Court held that the terms which were being challenged did not fall within the scope of the Regulations, but the significance of the case for the present study is that, although the case was of a "public law" character, it indirectly determined the outcome of numerous "private law" proceedings in which individual bank customers had attempted to defend claims brought against them by banks on the ground that the contractual terms which the banks were relying on were unfair within the meaning of the regulations

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

There is nothing to add under this heading which has not already been dealt with.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

- 7.2.2. the field of substantive law at hand?

- 7.2.3. the nature of the claimant?

7.2.4. the nature of the claim?

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

**8. Influence of EU law**

8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

EU law has not caused there to be any changes in English rules about locus standi in civil proceedings and I can find no case in ordinary civil proceedings in which effective judicial protection or Art 6 of the ECHR was an issue. These have been raised in judicial review (public law) proceedings but not, so far as I can determine in the context of locus standi, where the English rules had been considerably relaxed before UK law became strongly influenced by EU law and the ECHR.

8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

8.3. Did the courts use:

8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

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## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW** **(ENGLAND AND WALES)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

In England and Wales, judicial review ("JR") and other public law claims are mostly handled by the Administrative Court, created in 2000, as part of the Queens Bench Division of the High Court, with appeals to the Court of Appeal and the Supreme Court. High Court judges are nominated by the Lord Chief Justice to deal with cases in the Administrative Court - there are currently 50 such judges (growing from just four in 1981). In Scotland, judicial review cases are heard by the Outer House of the Court of Session with appeals to the Inner House, and then to the Supreme Court. In Northern Ireland, judicial review claims go to the Northern Ireland High Court, with appeal to the Northern Ireland Court of Appeal, and then to the Supreme Court. The principles of law being applied in the three different jurisdictions are very similar, though the specialist legal language used (especially in Scotland) is distinct.

Under the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal (which generally hears appeals against decisions of tribunals) can now also hear judicial review applications either in classes of cases designated by the Lord Chief Justice or in any particular case where a High Court judge considers in 'just and convenient' to transfer a case from the Administrative Court to the Upper Tribunal. Since 2007 the tribunals are part of the court system, and the original rationale for the new judicial review power was a view that this was particularly suitable for cases requiring a high degree of expertise (such as tax or social security) - see further 1.3 below. In such cases, the case would be heard by the Administrative Appeals Chamber of the Upper Tribunal ("AAC") and the Tribunal has all the powers that the High Court has; it would always be presided by a High Court judge sitting as a judge of the Upper Tribunal or a judge specifically authorized by the Lord Chief Justice to preside over JR cases. The current salaried judges of the AAC have all been so authorized to hear JR cases.

JR cases in the AAC are normally heard by a single judge, but the Chamber President may decide that a case be heard by three judges, or a panel of two (though this has not yet happened. The Upper Tribunal also has non-judicial members (with particular expertise) and the Senior President or Chamber President may direct that a matter be considered by a judge and two non-judge members, or two judges and one non-judge member. But at present there is no non-judge member of the Upper Tribunal appointed with expertise in environmental matters. The AAC has dealt with some 200 applications for JR, mostly in respect of criminal injuries compensation awards. At present no class of environmental JRs have been designated for hearing by the Upper Tribunal, and we have no examples of individual environmental JR applications being transferred - the typical example in other fields of an individual transfer is where there is a parallel but related statutory appeal from a lower tribunal decision going to the Upper Tribunal and it is considered sensible to hear to the cases together.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

Subject to the new jurisdiction of the Upper Tribunal (see 1.3) the Administrative Court division of the High Court has near exclusive jurisdiction to deal with judicial reviews, i.e. where the legality of the decision of a public body is being challenged. In certain criminal matters, the Divisional Court of the High Court also exercises judicial review functions, though this is largely due to a product of history. Some specific laws have required other courts or tribunals to apply judicial review principles when exercising their jurisdiction (e.g. a County Court dealing with an appeal against a decision of a housing authority under s 204 Housing Act 1996). Many principles of public law such as procedural unfairness, issues of ultra vires etc. may find their way into the decisions of other courts (such as civil disputes).

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

In relation to Judicial Review, the Upper Tribunal now hears Judicial Reviews in classes of cases designated by the Lord Chief Justice - these now include criminal compensation decisions of the First-tier Tribunal, decisions of First-tier Tribunal not otherwise appealable (e.g. non-appealable case management decisions), and since October 2011 decisions of the UK Border Agency not to hear a fresh immigration/humans rights claim on the grounds that no new material has been raised (repeat applications). In many areas of administrative decision making, initial appeals are heard by specialist tribunals (e.g. social security, tax). The major reforms brought in by the Tribunals, Courts and Enforcement Act 2007 have rationalised the organisation of some 70 separate tribunals into a unified structure consisting of a First Tier Tribunal (divided into a number of different chambers) and an Upper Tribunal, mainly handling appeals. The organisation of the tribunals now falls within the remit of the Ministry of Justice under a unified Courts and Tribunal Service.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

Judicial review is the key remedy to challenge the legality of decisions of public bodies, and increasingly legality questions may encompass issues such as the lawfulness of secondary legislation, the compatibility of laws with European Union law, and the power to declare laws incompatible with Human Rights legislation. In Scotland, the scope of judicial review is somewhat broader in that it rests not so much on a public element but on a relationship between powers, their delegation and individuals affected (decision making of associations for example may be challenged by way of JR). Challenges to administrative decisions made by many types of authority are made by way of appeal to a specialist tribunal of some sort - the relevant legislation determines their powers and remit, and can generally relate to the merits of the decision. Where such rights exist, judicial review would not normally be allowed unless such a right of statutory appeal as been exercised. However the rights of appeal are generally only exercisable by the person directly affected by the decision of the administrative body concerned - for example, the applicant for a licence that has been refused, or a claimant for a benefit turned down. There is no tradition of legislation giving rights of statutory appeal to third parties (such as non-

governmental organisations) - such bodies can only challenge the decision on grounds of illegality by way of judicial review subject to locus standing issues (see below).

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Judicial review has reached a stage of development where according to one leading textbook, no power "is any longer inherently unreviewable". On the other hand, there is no constitutional bar to legislation expressly ousting the jurisdiction of courts to review a decision, but the language must be absolutely clear, and courts will construct any such ouster clauses as strictly as possible. In the United Kingdom there is not such a strict division between public and private law as in some continental jurisdictions. In the early 1980s the courts attempted to develop stricter rules about the division (i.e. issues concerning public law must be heard by way of judicial review), but reform of the procedural rules in 2000 provides more flexibility for cases that involve both private and public law issues, and more discretion to transfer where appropriate. Raising issues of public law in a private law dispute will now essentially only be excluded if considered an abuse of process. Where, though judicial review had expressly been excluded, then it is unlikely that the courts would accept that the same issue can be litigated before the courts in a civil dispute.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

The requirement for standing in judicial review in England and Wales is that the claimant has "sufficient interest" (s 31(3) Senior Courts Act 1981 and Court Civil Procedural Rules). The same test applies in Northern Ireland. In Scotland, the courts used the dual test of "title and interest" which appeared to be rather narrower, but in October 2011 in *Axa General Insurance v Lord Advocate* the Supreme Court held this test was outdated and more appropriate to private than public law - the court preferred the test of "directly affected". The full implications of the decision for public law cases in Scotland have yet to be realised, though undoubtedly heralds a more liberal approach. In addition where the claim is based upon breach of the Human Rights Convention, the claimant must also be a "victim" (see further 3.6 below)

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

In the last thirty years the courts in England and Wales have adopted a liberal approach to the interpretation of 'sufficient interest': "*What modern public law focuses upon are wrongs - that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the text for standing for public law claimants, which is interest based rather*

*than rights based.*" (Lord Justice Sedley, *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (2007)). In Scotland the 2011 decision of the Supreme Court (see above) has shifted a principle of standing that was essentially rights based to one that is more interest based.

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

Under the 2007 reforms, tribunals in the UK are now part of the independent judiciary system, and the line between a court and a tribunal is very fine - the main difference is that tribunals tends to be more specialised, have less formal procedures, and will have expert non-legal members as well as legal chairs. The right to bring a case before a tribunal is generally restricted to the person directly affected by the decision of the administrative body concerned (e.g. the refusal of a licence, turning down of a welfare claim), but appeals generally can concern the merits of the decision and amount to a full rehearing. Judicial Review in contrast has a more liberal standing, allowing third parties including non-governmental organisations to challenge the decisions, but is concerned with the legality of the decision as opposed to its merits. Where legislation does not provide a statutory right to appeal to a tribunal or other body (e.g. the refusal by the Secretary of State to grant a GMO licence), then the only remedy for the person directly affected is a claim for judicial review.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

In England, Wales, and Northern Ireland, a court must first grant leave for judicial review, (the permission stage). In practice leave stage is normally focussed on whether the case has any merit – is there an arguable case? A court can also refuse permission if the standing requirement of sufficient interest is not met, and may take up the issue of standing even it not raised by the parties. But except in obvious cases, the court will generally let issues of standing be considered in the context of the full hearing of the law and facts. In the leading 1982 case *National Federation of Small Businesses* the House of Lords held that some cases ought to be permitted to proceed where issues of standing remained to be argued as the consideration of the factual and legal basis of the claim at the full hearing might inform the decision of whether the claimant had standing or not. 2010 statistics indicate that out of 10548 JR applications, 5148 were refused permission though the grounds for doing so are no provided in the statistics.

In Scotland, there is no prior leave stage.

Appeal lies to the Court of Appeal in England and Wales (Inner House in Scotland, Northern Ireland Court of Appeal) against both the permission for leave, as well as the substantive decision, but leave of either the first court or the appeal court is required. There are no further standing requirements for the appeal process, and the appeal is unlikely to be refused unless there is considered no prospect of success. Judicial reviews involving criminal matters appeal directly to the Supreme

Court but again with leave required and the requirement that an issue of general public importance involved.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

In principle, the question of initial standing is not affected by the remedy sought, although there remains some dispute on this doctrine. However, at the end of the case, where the court had discretion to grant different remedies, the degree to which a claimant has sufficient interest may well be a relevant factor, and when it comes to granting, say, a mandatory order, a court may will require a closer interest - see *R v Felixstowe Justices ex parte Leigh* (1987) (journalist had standing to challenge general policy of not publishing names of magistrates deciding cases, but could not obtain mandatory order to disclose particular names in case in which he had had no interest)

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

The general standing principles apply in all cases. Direct financial interest (e.g. imposition of tax, refusal of development permission) is not a condition of standing, but if present the courts will normally automatically consider there to be sufficient interest.

In Scotland (when the title and interest standing test applied) specific regulations had to be introduced to allow NGO's guaranteed standing where EU environmental law applied Aarhus access to justice principles - see Scottish Statutory Instruments 510/2005 and 614/2006.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

There is no apparent significant distinction made by the courts when applying the standing test to individuals or groups. Courts accept the value of public spirited individuals (*R v Nolan* (1992) "I fully accept the desirability of the courts recognising in appropriate cases the right of responsible citizens to enter the lists for the benefit of the public, or a section of the public of which they are themselves members") and there is no requirement that an individual claimant is affected in a distinct matter from other members of the public. Associations and groups without legal personality have been permitted to bring JR cases. Equally courts have recognized that non-governmental organisations can bring expertise and focus of real value to the courts (e.g. *R v Her Majesty's Inspectorate of Pollution ex p Greenpeace* (1994)). But if individuals do not have sufficient interest, the fact they have formed themselves into a group or organisation does not in itself give standing. Conversely, courts will not normally turn down a 'put up' claimant where individual has been chosen because he is entitled to legal aid; equally where individuals (who themselves have sufficient interest) have formed a limited company to reduce exposure to costs, that has not prevented the company from having standing.

Local authorities and other public bodies have standing to bring judicial review claims as well as other legal action. Legislation have given express power to, e.g.



the Commission for Equality and Human Rights to institute or intervene in judicial review proceedings (s 30(1) Equality Act 2006). There are no special standing requirements for such bodies.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

Under s 7 of the Human Rights Act, a person bringing a claim on the grounds that a public authority has breached convention rights must be a "victim" - this means that where a judicial review is brought raising human rights principle, the claimant must be a victim to have sufficient interest. Strasbourg case law on the meaning of a victim is expressly incorporated into the test. The test, being rights based, is rather narrower than the interest based approach underlying general judicial review. A recent example from the Northern Ireland High Court (*Re Judicial Review* (2011)) illustrates this. An 8 year old child brought a claim alleging that the decision of the police to introduce tasers (electronic disabling devices) was contrary to rights under Art 2 European Convention. But court held claimant not a victim as no scenario had been presented which "*raised any material risk that this particular applicant would be exposed to the possible use of a taser.*"

However, s 11 Human Rights Act 1998 provides that, 'A person's reliance on the Convention does not restrict - (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom ; or (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 - 9 '. To the extent that the Convention Rights have now become a part of the common law, it is unclear whether s 11 implies that claimants who are not 'victims', might bring an ordinary judicial review claim outside of the Human Rights Act 1998 to achieve their objective. This issue has not been explored by the judiciary.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Court procedure rules distinguish between an 'interested party' and an 'intervener'. An interested party is someone who is 'directly affected by the claim' which has been interpreted by the courts to mean not simply someone affected by the outcome of the case but one who is affected "without the intervention of any immediate agency" (e.g. a developer where the legality of the decision of a local authority to planning permission is challenged by an NGO). The claimant must identify and notify any such interested parties. Interested parties become parties to the claim and may appeal against the judgment.

Intervenors in contrast are third parties who have applied to the court to make written or oral interventions. Before 2000 only third parties who opposed the claim could intervene this way but now both those who support or oppose may apply, and there has been a large increase in the number of intervenors, particularly in the

higher courts. This has included many national organisations such as Liberty (civil rights), League against Cruel Sports, and the Ramblers Association. The court may impose conditions, as to the length of the intervention and whether it should be in writing or oral. But at the end of the day the decision is a matter of discretion of the court, who will be looking for the added value the intervention brings. There are no court rules that the party must have internal legal power to intervene (this would be a matter for its members).

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Yes, but ultimately the decision is one of discretion of the court. Parties can oppose the intervention, and are sometimes successful, for example, on the grounds that it will upset time-tables, especially the application is made late in the day. Government departments sometimes accept intervention but only on condition that it is writing rather than oral (an intervention in writing is likely to have less impact in the UK oral based court system). But the decision to permit intervention – and whether the third party is permitted to make an oral submission as well as one in writing remains one of discretion of the court.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Court procedure rules in civil claims allow for: Representative Actions where claimants may also act as representatives of other parties having the same interest in the matter. It is a matter of discretion of the court whether to allow such representative actions, and savings of costs and time to the parties and the court are relevant factors. In 2000, changes to the court procedure rules in England and Wales allowed for Group Litigation Orders to be granted by the court on application. They can be made in any claim where there are multiple parties or claimants to the same cause of action, and the Order is focussed on case management of common or related issues of fact or law. The Group Litigation Order (and more than 70 such orders currently listed on the High Court web-site) is the closest the UK has to a US style class actions law suit, but is based on an opt-in system, requiring litigants to be named before the start of the case. A recent example in the environmental field was the Corby toxic contamination case involving poor reclamation by a local authority resulting in exposure to toxic substances and birth defects -some 19 claimants were covered by a Group Litigation Order. Group Litigation Orders do not exist in Scotland, but a 2009 Government review on civil justice generally called for the introduction of class actions instead. In 2010 the Scottish Government announced that it would introduce such actions in Scotland. As noted above, interest groups, including those without legal personality, may be formed to bring JR claims.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

See above - for representative actions, the same interest in the matter - a question of fact and law to be determined by the court. Group Litigation Orders allow for

more flexibility, and are designed to provide for " the case management of claims which give rise to common or related issues of fact or law" (Civil Procedure Rules 19.10).

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Regulated by civil procedure rules as above, though there remains much discretion to the courts.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

No

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The generous approach to the standing and the test of 'sufficient interest' in judicial review allows for claimants such as a national NGO effectively to represent general interests. In 1998 the Court of Appeal in a judicial review brought by Greenpeace against the Government commented that litigation of this kind was now an "*accepted and greatly valued dimension of the judicial review jurisdiction.*" Nevertheless, in the same case, the court added that the corollary was that a pressure court bringing a public interest challenge should act more as "a friend of the court" and that a rather stricter approach to its conduct, especially in bring a case promptly, was justified.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

By general rules, though see specific example concerning standing in Scottish environmental assessment and IPPC regulations to reflect EU Directives on Aarhus.

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In general, a very liberal approach developed by the courts from the 1970s onwards. In *R v Inland Revenue Commission ex parte National Federation of Small Businesses* [1982] A.C. 617 Lord Diplock in the House of Lords noted that "*It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped*". A high point in the environmental field is illustrated by *R (Edwards) v Environment Agency (2004)* – a local person with no permanent residence (and chosen in order to secure legal aid) was permitted to challenge the legality of pollution permit by way of Judicial Review, even though he had not participated in any of the permit application proceedings – simply the fact that he could breath the polluted air sufficient. But standing is not granted as of right to anyone making a claim, and courts have refused standing to people considered to be mere 'busybodies', or with improper

motives. But standing is not always accepted in other cases - in the recent Scottish case *McGinty v Scottish Ministers* (2011) - someone who lived five miles from proposed site of power station and occasionally took recreational walks there did not have sufficient interest. In England and Wales in *Coedbach Action Team v Secretary of State for Energy and Climate Change* (2010) - the High Court held that local environmental action held not have sufficient interest to challenge legality of decision to permit biomass plant in another locality for fear it would create a precedent relevant to proposed biomass plant in their locality. The case, however, was mainly about protective costs orders, and on appeal the Court of Appeal did not consider the issue of standing in any detail, though Lord Justice Carnwath noted that the courts' approach the standing was generally "set at a low hurdle".

- 7.2. Are there significant variations in the courts' approach based on:  
7.2.1. the type of remedy requested?

The basic approach is that standing test for initial threshold not relevant to the type of remedy sought, but that the nature of the standing will become relevant when court exercises discretion as to remedy - "*the nature and extent of the interest of [the claimant] who has crossed the relatively low threshold of having a sufficient interest for the purpose of obtaining [permission] to bring judicial review proceedings may be relevant at the substantive hearing in relation to the exercise of discretion/*" (*R v Criminal Injuries Compensation Board ex p P* (1995))

- 7.2.2. the field of substantive law at hand?

Generally there is no particular difference as far as one can tell in the approach taken to different fields of law. Historically, courts have been especially liberal in their approach to standing where local ratepayers are challenging the legality of local authority action, on the grounds that authority owes some form of fiduciary duty towards ratepayers. In the environmental field, however, courts appear to be accepting that the provisions of the environmental directives implementing Aarhus access to justice provisions even where not formally transposed into domestic law have to be applied in addition to national principles. In the *Coedbach* case mentioned above, the High Court first considered whether the group was a "member of the public concerned" under the provisions of the Directive, and held it did not for the same reasons as holding they lacked sufficient interest.

- 7.2.3. the nature of the claimant?

As noted above, a claimant who has a direct financial interest in the decision in question will almost certainly be considered to have sufficient interest - "*if the commercial interest of a person may realistically be affected by a decision in a way not common to the general run of the public, then that provides not only a particular interest on the part of the person concerned, but also a sufficient one for the purposes of judicial review.*" (*R (Mount Cook Land Ltd) v Westminster City Council* (2003)). In some cases, the courts have held no sufficient interest where there was another obvious challenger who did not complain.

- 7.2.4. the nature of the claim?

Not as such, though note particular issues in environmental claims, and EU environmental access to justice provisions.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

Weight will be attached to the public interest of the case and the significance of the point of law at issue, especially where NGO applicants involved. See the *World Development Movement* case (1994) where court held that national NGO had standing to challenge Government grant of aid to overseas dam project - factors supporting the acceptance of sufficient interest included: the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief is sought and the prominent role of the NGO in giving advice, guidance and assistance with regard to aid. The courts have consistently held that standing should not be granted to "mere busybodies"

- 7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

To a limited extent the standing test is used to remove cases considered to be brought by mere "busybodies, cranks, and mischief makers" (Lord Scarman, *R v Inland Revenue Commissioners* (1982)), but note that the permission stage in England, Wales, and N Ireland is primarily designed to weed out cases where there is no prospect of success (thus the concept of standing is not necessary to filter out very weak cases). There is no evidence that the courts use or interpret the standing requirements in order to save expenditure for the judicial system. It is arguable however that (except for legally aided cases) the main restraining factor on judicial review cases to date has been the costs of litigation and the exposure to the risk of pay the costs of the other party if the case is lost - this has allowed the courts to be very liberal. In October 2011 the Dept of Justice issued new proposals to cap the exposure to costs in cases falling within the Aarhus Convention to £5000 - if these are implemented, and the amount of environmental litigation rises considerable, courts may take a rather tougher approach to questions of standing and whether a case is arguable or not at permission stage. It should also be noted that the 2010 Jackson Review of Civil Costs (administrative law in England and Wales is treated as civil law) has looked at options for limiting costs in judicial review claims more generally, including the possibility of a 'one way cost shifting' approach, where if the claimant is successful then the government is liable for both its own costs and the claimant's costs, but if the government successfully defends the claim, the claimant is not liable for the government's costs, but will have to pay his own costs. As of yet, the government has not proposed to take any of this forward.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

No  
But in relation to costs - the "not prohibitively expensive" requirement - Ministry of Justice currently proposing to amend Civil Procedure Rules to provide more clarity when courts must award Protective Cost Orders in Aarhus claims to reduce risk of exposure to costs if claim fails. The Ministry of Justice has accepted that this cannot

be left to judicial discretion since this would conflict with EU principles of certainty and transparency.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Not aware of any cases directly on this point. Scottish Courts have accepted that Aarhus and EU transposing directives relevant to interpreting standing requirements: "*The fact of the Aarhus Convention being an international treaty to which not only the UK but the EU are signatories, it should affect the interpretation of ambiguous statutory provisions and the interpretation of the common law so as to arrive at a result which does not place the United Kingdom in breach of what has been agreed to internationally*" but given this was an individual rather than an NGO that claimed, court held, "*The concept of wide access to justice is not further defined either in the Convention or in the relevant Directive and it seems doubtful that it adds very much, if anything, to the notion of sufficient interest*" (*Forbes v Aberdeenshire Council & Anor* [2010] ScotCS CSOH 1). This case-law has to be seen in the context of the hitherto more restrictive approach to standing in the Scottish courts.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

No

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Limitation periods for judicial review have been strongly influenced recently by principle of EU law. The court rules state that a Judicial Review must be brought "promptly" or at least within 3 months. The courts have held that some times, depending on the facts on the case (e.g. where a third party effected financially by the claim) a claimant must lodge the claim much earlier than 3 months to satisfy the

promptness test. The *Uniplex* case where there was similarly worded provisions in specific regulations concerning public contract claims under EU law, the European Court of Justice held that the 'promptness' criterion allowed too much discretion to judges to satisfy requirements of legal certainty.

Last year the British courts have held the reasoning must apply to ordinary JR claims including environmental claims. In *R (on the application of Buglife v Medway Council* [2011] EWHC 746 the court held,

*"The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court has general application to such enforcement proceedings arising out of any directive"*.

The promptness requirement was not applied, and the same approach was adopted in *R (on the application of U & Partners (East Anglia) Ltd) v Broads Authority* [2011] EWHC 1824. Although the judge felt obliged to follow *Uniplex* he criticized the reasoning of the court and felt that they had failed to understand that a court's discretion in UK law had to be applied in accordance with principles.

In the most recent case on the issue of limitation periods, *R (on the application of Macrae v County of Herefordshire District Council* [2011] EWHC 2810, the court held that these principles only applied to cases where EU law was involved. In a case such as the present, which concerned only UK domestic planning law, the promptness test still applied.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(ENGLAND AND WALES)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

There are two levels of first instance criminal courts in England and Wales: magistrates' courts, which deal with less serious cases, and the Crown Court, which deals with more serious cases. Magistrates' courts are presided over by lay magistrates, who deal with most cases, or by 'District Judges', who sit in only a few courts and who deal with a small minority of cases. Lay magistrates are drawn from the local community and sit as magistrates on a part-time, unpaid, basis. They are not legally qualified but are advised by a legally qualified clerk. District Judges are professionally qualified. The Crown Court is presided over by professional judges, who sit with a jury for the purpose of conducting trials.

Where a person has been charged with a criminal offence, they will initially appear in a magistrates' court. However, the court in which the accused is tried and/or sentenced depends upon the offence charged. Offences are classified as either 'summary' or 'indictable' offences, with the latter sub-divided into 'indictable-only' and 'either-way' offences. A summary offence may normally be dealt with only in a magistrates' court. An either-way offence can be tried in either a magistrates' court or the Crown Court, dependent primarily on whether the defendant intends to plead guilty or not guilty. Indictable-only offences can only be dealt with in the Crown Court.

A defendant may plead guilty or not guilty. A guilty plea is considered to be sufficient evidence of guilt; as such, no witnesses are called to give evidence, and no other evidence is adduced. The prosecutor summarises the facts of the offence, and having heard any mitigation from the defence, the court proceeds to sentence the defendant. In practice, over 90% of criminal cases are dealt with in this way. If the defendant pleads not guilty, a 'full' trial is conducted (ie., the prosecution and defence call witnesses, who may be examined and cross-examined, and adduce other relevant evidence).

Beyond the first instance criminal courts, England and Wales has an appellate system. A person convicted in a magistrates' court (but not a prosecutor) can appeal, on a matter of law or fact, to the Crown Court. In addition, a defendant or a prosecutor can appeal 'by case stated' on a matter of law to the High Court. A person convicted in the Crown Court can appeal to the Court of Appeal (Criminal Division) against conviction or sentence, but requires leave (permission) to do so. An application for leave is normally made to a single judge, and about three-quarters of such applications are refused. If the judge refuses leave, the convicted person may renew their application for leave to the full court (although legal aid is rarely, if ever, granted for this purpose). The prosecutor has limited rights of appeal. Appeal thereafter lies to the Supreme Court (formerly called the judicial



committee of the House of Lords), but only with leave.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

Under the adversarial system of England and Wales, the two parties to a criminal trial are the state and the defendant; as such victims have no standing and no rights in 'their' cases as they are not a formal party to the proceedings. Their active involvement extends to participation as a witness (usually as the principal prosecution witness), but no further. In some cases, they may be eligible for protective 'special measures' in court and for compensatory measures after the trial, but these are at the discretion of the court.

It should be noted that between 2006 and 2008, five Crown Court centres in England and Wales piloted a 'victim's advocates' scheme; under this scheme, the court could hear representations from a member of the victim's family in homicide cases or from an advocate (a Crown prosecutor or independent advocate) speaking on their behalf about how the crime had affected them. This was only available to the immediate family, resident in the Crown Court area. Although this scheme formally ended in 2008, the scheme continues to be run in this form in the five pilot areas, but has not been adopted nationally. In addition, some areas have specialist domestic violence magistrate' courts, and there is also a network of independent domestic violence advisers who can provide advice and support for victims of domestic violence.

- 1.2.1. Is there a possibility of private prosecution?

Section 6(1) of the Prosecution of Offences Act 1985 entitles any private individual (including, but not limited to, victims) to undertake a private prosecution. However, the Director of Public Prosecutions (DPP) may take over a private prosecution under Section 6(2) and may then discontinue the prosecution. In some cases, a prosecutor (whether a private or public prosecutor) must seek the consent of the DPP or the Attorney-General (AG) before the commencement of proceedings. The consent of the DPP is required for various specific offences; the consent of the AG is, in general, required where issues of public policy, national security or relations with other countries may affect the decision whether to prosecute. Legal aid is not available for a private prosecution.

- 1.2.2. Can a victim request review of a decision not to prosecute?

The Crown Prosecution Service (CPS) 'Code for Crown Prosecutors' states that the CPS should 'take into account' the views of a victim in deciding whether to prosecute (para 4.18). However, it also makes clear that the CPS 'does not act for the victim' and that the guiding principle for a decision to prosecute is the public interest (Rule 4.19). The Code contains no provision granting a victim the right to review or appeal a decision not to prosecute. Rule 7.2 of the Code of Practice for Victims of Crime (which applies to the CPS) states that where the CPS and the police decide not to prosecute, the police must notify the victim. If the decision is taken by the CPS alone, then the CPS must notify the victim (Rule 7.3). No right to review a decision is specified.

A victim may seek Judicial Review (a form of legal action heard by the High Court) of a decision not to prosecute, primarily because no other remedy is available (DPP *ex parte* Manning [2001]). The primary grounds for judicial review are: error of law on the face of the record; excess of jurisdiction; or breach of the rules of natural

justice. For example, a decision to caution (an out-of-court disposal) rather than to prosecute is susceptible to judicial review. In *R (Guest) v DPP* [2009], the giving of a conditional caution as an alternative to prosecution was successfully challenged by the victim on the grounds that it was inappropriate for an offence of assault occasioning actual bodily harm and that the decision did not comply with the Conditional Cautioning Code of Practice. However, it is difficult for a victim to seek Judicial Review of such decisions – the process is costly, and the court is concerned with the propriety of the decision (ie., whether it was properly made with due regard to the law) rather than the substance of the decision. Furthermore, even if a judicial review is successful, it does not necessarily result in the criminal prosecution of the alleged offender – the court can only order the Crown Prosecution Service to reconsider its decision not to prosecute.

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

The victim does not have a right to ask for compensation or protective measures per se; however, there are mechanisms that operate both in and outside of the court which can provide either or both.

In Court

Following a conviction, or a guilty plea, the court has a discretion to order the accused to pay compensation to the victim. Section 130 of the Powers of Criminal Courts Act 2000 states that:

'A court by or before which a person is convicted of an offence... may, on application or otherwise, make an order... requiring him... to pay compensation for any personal injury, loss or damage resulting from that offence'

Victims cannot themselves make the application, but can request that the prosecutor do so. In making its decision, the court must '[have] regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor', but retains its discretion to make a compensation order.

Victims can choose to provide a Victim Personal Statement (VPS) which can explain how a crime has affected them emotionally, financially or physically, and any other factors deemed relevant. The VPS is made available to the sentencing court, and the victim may be questioned about it. It has been suggested that it may have some influence on sentencing outcomes (for example, compensation), but research suggests that the impact of VPSs is minimal.

'Special measures' are available for victims who appear in court to give evidence. These are primarily governed by the Youth Justice and Criminal Evidence Act 1999, and the special measures include screens in court, video link evidence, the removal of wigs and gowns by judges and lawyers, prohibitions on the introduction of evidence about past sexual behaviour (in sexual offence cases), and the use of a mediator to provide evidence.

All children are automatically granted special protection in the form of video link evidence (which they may decline with agreement of the court). Non-child victims may apply for special measures in writing within 14 days of a not guilty plea by a

defendant (Rule 29, Criminal Procedure Rules); they may be eligible for special measure if they are vulnerable or intimidated (defined in the Act), but the court is not obligated to grant special measures.

#### Outside of court

The CPS may decide to impose a conditional caution (a form of out-of-court disposal) rather than to prosecute. Conditions that can be imposed include the payment of compensation, and/or 'restorative justice' measures, such as direct mediation between the offender and victim (or community conferencing where multiple victims or secondary victims are involved). The decision to impose a conditional caution is at the discretion of CPS and although victims should be consulted about the use of restorative measures and must consent to them, they have no formal (legal) rights in respect of the decision to impose a conditional caution.

Victims can access Victim Support (a charity) at any time, regardless of whether they have reported a crime or are engaged in the criminal justice process. When they are engaged in the criminal justice process as a witness, victims have the right to access the services of Witness Support (a branch of Victim Support) both prior to and during the court process. Victim Support and Witness Support primarily provide 'moral' support, and practical and procedural information and guidance. They do not, however, represent a victim.

Victims of violent crime may obtain compensation through the extra-judicial 'Criminal Injuries Compensation Scheme', regardless of whether an offender has been convicted of the relevant crime. Victims may apply to the Criminal Injuries Compensation Authority, which will assess eligibility, considering a number of factors including timing, victim behaviour, criminal record, character, etc. Compensation is, therefore, discretionary.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

In terms of compensation, there is a distinction between criminal and civil courts. The compensation order described in 1.2.3 is restricted to the criminal courts.

Victims can sue an offender for damages (compensation) under the Law of Tort (for example, trespass against the person where the victim has been injured, or trespass to property where they have suffered loss or damage to property) in the civil courts. However, victims face significant practical obstacles in taking such action in the civil courts, including limitations on legal aid and difficulties in enforcing civil judgements, especially against impecunious offenders.

The Criminal Injuries Compensation Scheme is neither criminal or civil - it is an extra-judicial mechanism. 'Special Measures' are restricted to criminal courts.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

As noted above, victims do not have participation rights in criminal proceedings. Generally, the Police, CPS and Witness Support are primarily responsible for

informing victims about the opportunities for compensation or other measures; the CPS are obligated to do so under the Code of Practice for Crown Prosecutors, and Witness Support aid witnesses in understanding court procedures and communicating with officials. The police should tell a victim about the opportunity to make a Victim Personal Statement when giving the police statement.

The Code of Practice for Victims of Crime was issued under Section 32 of the Domestic Violence, Crime and Victims Act 2004. It details the obligations of criminal justice organisations, including the CPS, the police, and the courts, to keep victims informed about the progress of a case and if a decision is taken not to prosecute. Since victims do not have a right to request compensation in court, this is not covered in the code. Rule 4 outlines general eligibility for special measures in court, and Rule 8.5 obligates the courts to ensure that any granted special measures are made available to victims. The code also obligates the Criminal Injuries Compensation Authority to 'make available clear information on eligibility for compensation' (Rule 13.3). Under the 'victim's advocates' pilot scheme referred to above, the families of victims were given an information leaflet, entitled 'Your Choice to Have a Voice in Court'.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Under the adversarial system of England and Wales, victims have no formal standing in a criminal court. They are not a party to the criminal process; only the defendant and the state have this status. As such, the victim cannot bring claims before a criminal court. The CPS choose to prosecute an alleged criminal offence committed against or involving the victim, a process which may have been initiated by the victim reporting a crime. However, a prosecution is not pursued on behalf of the victim since crimes are theoretically considered to be offences against the state, rather than the victim specifically. One consequence of this is that the CPS may decide to prosecute even though the victim withdraws their complaint or does not want (or no longer wants) the alleged offender to be prosecuted. Since the victim is not a formal party and does not have standing, he or she has no right to speak in court or to be represented (although the CPS indirectly represents the victim's interests in prosecuting the case).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

For the general legal theory of locus standi in relation to victims of crime, see 2.1.

The Code of Conduct for Victims of Crime defines a victim as 'any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard' (Rule 3.1). They must be a 'direct victim of the criminal conduct (Rule 3.2). In the event of death of a direct victim, the 'victim' may be a family spokesperson (Rule 3.4). A legal person can be considered a victim of crime;

the above code specifies that 'businesses are entitled to receive services under the Code' (Rule 3.7). The CPS technically constitutes a legal body which indirectly represents the interests of the victim, although this is not the formal position; there is no formal lawyer-client relationship as with the defendant and his/her representative. Otherwise, victims are not entitled to be represented by a legal person.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

As stated above, victims do not have any formal standing in the criminal courts, other than as a witness, which is governed by their proximity to the crime (i.e. were they directly affected by it). As such, there are no 'requirements' for standing.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

In court, the only 'remedy' which a victim can request is special measures. Special measures are not, strictly, a remedy but, rather, a modification of the normal rules governing the trial process: for example, screening of the witness, giving evidence by 'live-link', giving evidence in private, or video-recording of examination and/or cross examination. Special measures can be applied for by a victim if they are eligible and if the court exercises its discretion to grant them. As such, the eligibility rules for special measures (contained in the Youth Justice and Criminal Evidence Act 1999) constitute the requirements for standing. The requirements are different for other potential remedies; the Criminal Injuries Compensation Scheme has its own set of eligibility criteria (referred to under 1.2.2) and private prosecution is open to anybody (meaning there are no requirements in terms of being a 'victim'). In relation to civil proceedings arising from a crime, the standing requirements for the victim (or claimant) may vary according to the type of claim made. For example, a criminal assault may result in an actionable claim for trespass against the person; however, in part due to the uncodified nature of English common law and a lack of clear discussion or definition, the criteria that must be satisfied for a victim to have standing is unclear and would require more research.

The rules governing eligibility for special measures in court and compensation through the Criminal Injuries Compensation Scheme effectively form the 'requirements' for standing.

- 3.3. Are there specific standing rules applicable to certain types of claims?

See 3.2, above.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

Again, this is covered in 3.2. Although the 'standing' of a victim is not affected by their nature (i.e. whether they are vulnerable) it can entitle them to apply for protective measures as outlined in the Youth Justice and Criminal Evidence Act 1999. Special measures are designed to aid vulnerable and intimidated persons, as defined within the legislation; as such, victims not classified as eligible cannot be granted special measures.

Although applicable only to civil proceedings, it should be noted that a tortious claim arising from a criminal offence (such as trespass to the person, mentioned above) can be pursued by a third party representative of a vulnerable person, for example an infant or person suffering from a mental illness, under the 'next friend' doctrine, officially referred to as a 'litigation friend'. The criteria for who can be a 'litigation friend' for children are covered extensively under Rule 21 of the Civil Procedure Rules.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

Regarding their ability to access special measures or compensation, the value of a dispute is not a relevant issue in relation to victims of crime. The value of the dispute may affect the level of compensation granted, but this is decided at the discretion of the court or, in the case of the Criminal Injuries Compensation Scheme, the Criminal Injuries Compensation Authority.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

Human Rights Law has rarely been used as a basis for victim standing in England and Wales, and with little success. In *McCourt v United Kingdom* (1992), the European Court of Human Rights dismissed the case of the mother of a murder victim, who claimed her rights to privacy and family life (Article 8 ECHR) had been breached because the state had failed to allow her to participate in the sentencing process.

In the case of *Osman v United Kingdom* (1998), the widow and son of a murder victim claimed that the police had failed to protect the deceased's right to life in violation of Article 2. However, the European Court of Human Rights found that there had been no clear point at which the police knew that life was in danger; as such, no duty to uphold Article 2 applied. In a sense, this case severely limited any notion of standing that victims (or in this case, secondary victims) might have in suing the police for failure to act.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Since victims have no formal standing in the criminal courts, the courts can neither be rigorous nor lenient in applying requirements. In terms of the exercise of discretion to grant special measures or compensation, the courts can refuse to allow victims these benefits, but rarely do. As such, this might be interpreted as a lenient approach to the standing of victims. Since anyone may undertake a private prosecution, this might be interpreted as a very lenient approach to victim standing; however, as stated in 1.2.1, certain cases require permission from the DPP, and such rules are enforced rigorously.

- 4.2. Are there significant variations in the courts' approach based on:  
4.2.1. the type of remedy requested?

Since a remedy can't be requested (it can only be granted at the court's discretion)

this is not applicable.

4.2.2. the nature of the claimant?

In terms of special measures, the more 'vulnerable' or 'intimidated' a victim is, the more likely they are to receive protective measures. For example, children, the disabled or mentally impaired, or sexual offence victims. However, as stated above, the courts rarely refuse special measures when requested. This is presumably recognition of the fact that giving evidence in court is a difficult experience for most victims of crime, even those without particular vulnerabilities.

4.2.3. the nature of the claim?

The type of criminal offence involved will generally have no effect on whether the victim is granted special measures. However, where a sexual offence is involved, the accused is normally prohibited from questioning a victim about previous sexual behaviour (s.41 Youth Justice and Criminal Evidence Act 1999). These rules are strictly enforced to the point that some have questioned whether the defendant's fair trial rights are being impaired (see *R v A (No. 2)* [2001]).

In terms of compensation awarded by the courts, the level of award should be 'appropriate' considering the defendant's means and the loss to the victim (s.130 Powers of Criminal Courts (Sentencing) Act (2000)). A Magistrates' Court can award compensation up to a maximum of £5,000, whilst in the Crown Court it is unlimited. There is no available evidence as to whether the seriousness of the offence with which the defendant is charged influences the level of compensation awarded.

4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

See above.

4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Although victims do not have standing in criminal courts, the availability of special measures and compensation can be considered in this context. Court-ordered compensation does provide immediacy in terms of a decision of compensation for victims; however, it is limited by factors such as the offender's means and if the offender is being imprisoned. In addition, the compensation will often not cover the full extent of loss/damage suffered. As such, it may often amount only to a symbolic gesture.

One might speculate that the Criminal Injuries Compensation Scheme is an extra-judicial mechanism for avoiding civil litigation; however, guidance to the scheme makes only one reference to its rationale, stating that compensation is 'recognition of public sympathy for the blameless victim'.

Special measures in court are arguably a tool for the administration of justice. Section 19 of the Youth Justice and Criminal Evidence Act 1999 entitles the court to grant special measures where 'the court considers that the completeness, coherence and accuracy (the 'quality') of evidence given by the witness is likely to be

diminished' without said measures. As such, special measures are a tool for furthering the administration of justice through better evidence, avoiding delays, repeat hearings, etc.

## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

The transposition of secondary EU law has not resulted in a change in the standing of victims of crime in England and Wales, although it arguably has had a significant effect on the supportive and protective measures provided for them. The Council Framework Decision (FD) on the standing of victims in criminal proceedings (2001) set out a variety of requirements for member states, including measures to protect vulnerable victims and enhance communication, rights to information, creation of victim support organisations, and rights to compensation. England and Wales did not change the formal standing of victims in its adversarial process, as this was not required. Paragraph 9 of the FD stated that the legislation did not 'impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings'. However, it is notable that a variety of key changes were introduced following the FD.

Although Witness Support services existed prior to the FD, in 2002 they were extended to cover magistrates' court proceedings as well as Crown Court proceedings – magistrates' courts deal with 95% of criminal proceedings, making this a significant change. The Victim Personal Statement Scheme was introduced in 2001, and the Criminal Injuries Compensation Scheme was significantly revised and extended in the same year. Following the 2003 'No Witness No Justice' initiative, the CPS introduced dedicated Witness Care Units, which inform victims about the progress of a case. In 2006, the Code of Practice for Victims of Crime was introduced, imposing a number of obligations on the organisations of the criminal justice system (albeit not legally binding). No available official documentation explicitly states that these changes were a direct result of the FD. However, the FD required transposition of its provisions into law in staggered stages between 2004 and 2006 and it is unlikely to be coincidental that changes occurred in England and Wales during this timeframe. In the EU Commission's 2009 report on implementation of the Framework Decision, England and Wales' transposition of provisions appeared inconsistent, with a multiple failures to submit legislative proof of compliance.

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

As stated above, various measures beyond a change in standing rules appear to have been influenced by the Framework Decision.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

The standing of victims in the criminal courts has not been altered by the principle of effective judicial protection. It is unclear whether any European Court of Justice case law has addressed the status of victims of crime in England and Wales, or whether any domestic court has considered the principle in relation to victims.



- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

Although the right to an effective remedy has not altered the formal standing of the victim in criminal proceedings, it has been used by the courts to interpret the rights of victims in relation to the criminal law. In the case of *Osman v UK* (1998), the widow and son of a murder victim claimed that they had been denied an effective remedy and access to a court under Articles 13 and 6 of the ECHR respectively. They had attempted to sue the police for negligence on the basis that they did not fulfil a duty of care owed to the deceased and his son; they were prevented from doing so on the basis of public policy, namely that the police had an immunity from actions for negligence.

The European Court of Human Rights ruled that there had been a breach of Article 6, but chose not to rule on a breach of Article 13 considering it to be subsumed by the violation under Article 6. As such, the case established that a blanket immunity for the police against negligence actions was in breach of a victim's right to access to a court, although since Article 13 was not formally considered by the court, it does not necessarily breach the right to an effective remedy. The case of *A v UK* (1998), an excessive corporal punishment case, also claimed a breach of Article 13; however, the Commission expressed the opinion that there had been no breach, which the court and the applicant accepted. As such, application of Article 13 to breaches by England and Wales in relation to victims of crime could be described as relatively weak.

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

In *Stubbings v UK* [1996], the European Court of Human Rights considered the case of an applicant who was physically and sexually abused by her adoptive father and brother as a minor. She later suffered severe mental health problems; she did not realise the connection between these problems and her earlier abuse until years later. However, she was prevented from bringing a civil claim against her adoptive father and brother on the basis that a claim was time-barred - in effect, it had been too long since the commission of the offence or, since she was a minor at the time of the offences, since her 18th birthday (Limitation Act 1980). The applicant appealed to the court on the basis that her right of access to a court under Article 6 had been denied; however, the court disagreed, stating that time limitations were necessary and that the limitation imposed (six years) was not unduly short. As such, the court did not set aside domestic law under Article 6, which would have allowed the victim standing to bring a civil claim for criminal offences.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

See above.

**6. Other**

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

It should be noted that the UK as a whole (England, Scotland, Wales and Northern Ireland) is an EU member state. However, England and Wales has a separate legal system to both Scotland and Northern Ireland. Only the standing of victims of crime in England and Wales is addressed in this questionnaire.

## FRANCE

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (FRANCE)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

The French Court system distinguishes between criminal courts and civil courts. These courts differ in both the organisation of the courts as well as how they operate which is slightly different. The Civil Courts are organised in a pyramid hierarchical way. The claims brought before the courts are firstly examined by the first instance courts which have very specific areas of competence (for example there is the High Court (Tribunal de grande instance), the First Instance Court (Tribunal d'instance), the Commercial Court and the Employment Tribunals) and each of these courts is found throughout France. When the litigant is not satisfied with the decision made by the lower courts, he may appeal to the Court of Appeal which will re-examine the whole case. The litigant therefore exercises his "right to a two level court system". There are fewer Courts of Appeal than first instance courts (36 in France) and these comprise, depending on the importance of the cases that they handle, specialised chambers for each subject (civil law, employment law and commercial law). The "right to a two level court system" (droit à un double degré de juridiction) is not absolute. For example, small claims are not subject to ordinary appeal (when the value of the claim is less than 4 000 €, no ordinary appeal is admissible, except if the value cannot be determined). Finally, in these case or if the litigant believes that these various courts have handed down a decision that is prejudicial to him, he can bring an appeal (called a pourvoi) to the Cour de Cassation. There is only one Cour de Cassation. It is in Paris and consists of three specialised civil chambers, a commercial chamber, an employment chamber and a criminal chamber. It has a specific role. Article 604 of the French Code of Civil Procedure states that the role of the Cour de Cassation is to check that the judgements made by the lower courts properly comply with the law. This Court does not therefore re-examine the case but only the decisions made by the lower courts. Thus it has the important task of harmonising the interpretation of the law and ensuring that other courts follow this interpretation.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

In the first instance, there are specialised courts called "exceptional" courts. "Exceptional courts" (juridictions d'exception) mean that those courts only have jurisdiction in the matters expressly allocated to them by legal act or governmental decree. In first instance, all civil courts are exceptional courts except the Tribunal de grande instance, which has jurisdiction not only in some specified matters but also in all cases where no other court does. Some of them are competent in very specific areas of law that are defined by law. This is the case for example for the Courts of Commerce, which are made up of non-professional elected judges and which have jurisdiction over disputes between traders, between traders and commercial companies and any disputes about

commercial transactions (Article L. 721-3 of the French Code of Commerce). This is also the case for the Employment Tribunals, which consist of non-professional elected judges and have jurisdiction over disputes arising from an employment contract between employers and employees (Article L. 1411-1 of the French Employment Code). They also handle disputes between employees during their employment (Article L. 1411-3 of the French Employment Code). Finally there are very specialised courts such as the Joint Agricultural Tenancies Courts which consist of one professional judge and four non-professional elected judges and hear disputes regarding agricultural tenancy agreements between the landowner and the person who works the farm land (Article L. 491-1 of the French Agriculture Code) or even the Social Security Courts which consist of a professional judge and two non-professional judges and which deal with disputes between those that are insured and the social security bodies (Article L. 142-4 of the French Social Security Code).

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

The Civil courts hear all claims made by private persons (natural or legal) against another private person (natural or legal) regarding property, a contract or the infringement of a right.

The Civil Courts therefore handle any private law dispute such as purely civil litigation (regarding civil rights, family law, property law, probate litigation or civil liability cases) commercial disputes and employment litigation.

There are no specific legal definition of what is a civil claim. One could say that a civil claim is any claim between private persons brought before any civil court and which does not relate to public or criminal law.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

In order to bring an action before a court a person must have an interest in the outcome of the claim. This is the one very necessary requirement for bringing a claim at all. Thus the maxim "no interest, no case" applies to French civil procedure. This interest may be defined as the benefit or advantage that the claimant is likely to gain from the court proceedings. The type of benefit is not important, it may be a property benefit, a non-pecuniary, pecuniary or moral advantage. More specifically, to say that a person has an interest to act is to show that the person's claim could improve their legal status. Article 31 of the French Code of Civil Procedure refers expressly to this. Earlier case law has consistently considered that, for their claim to be upheld, a person must have an existing and real interest which means that it must be something that exists at present or is certain in the future. It must also be a legitimate interest, which means that the benefit to be gained from the claim must not be immoral or inappropriate (Article 31 of the French Code of Civil Procedure) and finally the claimant must be acting in his own personal interest, which means that the outcome of the court proceedings must exclusively benefit the person who brings the claim. If there is a want of interest because the claimant does not have an existing, legitimate or personal interest, the claim shall be declared inadmissible irrespective of whether the claim was well-founded.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

Since the 1970s the French Code of Civil Procedure has provided a specific view of civil court proceedings. This view is the same at all stages of the proceedings. Article 30 of the French Code of Civil Procedure states that, "the court action is the right, for the person making the claim, to have his arguments heard so that the court can decide whether or not his claim is founded. For the defendant, the court action is the right to debate whether or not the claim is founded". Access to legal proceedings thus seems to be a subjective independent right which is different from the substantive right which one seeks to establish or contest through legal proceedings. It therefore does not depend on the nature of the claim nor the relation between the parties. It is simply a specific right of the claimant and the defendant to be heard by the court. For this right to exist effectively, the claimant must first have an interest to protect as mentioned, and even in certain cases "locus standi". Locus standi is an additional requirement established by the legislator for certain official actions (Article 31 of the French Code of Civil Procedure). It may be defined as the legal entitlement granting the right to bring litigation. Thus in certain cases the legislator has chosen, among those persons whose interests have been affected, those who in fact have locus standi. Only such persons may bring a claim before a court. If others bring a claim to court, their claim shall be declared inadmissible even if they have an interest in the outcome of the proceedings. These official actions are frequently brought in civil rights and family law matters. For example, under Article 180 of the French Civil Code, only the spouses or the Attorney General may request the annulment of the marriage for lack of consent. Other persons may have an interest in the annulment of the marriage but the law reserves locus standi for those it has identified.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

At every stage of the proceedings in France, whether at first instance, at appeal or final appeal (cassation) in order for the court to hold his claim to be admissible, the claimant must prove that he has the right to bring an action. First of all, as already mentioned, the claimant must show that it is in his interest to bring an action, in other words that the court action could improve his legal situation (for example, for appeals, this requirement is found at Article 546 of the French Code of Civil Procedure). For certain official actions, in addition, the claimant must have locus standi which is established on a case-by-case basis by law and allows the claimant to be party to the proceedings. These requirements apply to the claim which is filed with the clerk of the chosen court. There are no additional requirements for an ordinary appeal or an appeal brought before the Cour de cassation. However, there are specific procedural rules which allow a litigant to appear before the court to challenge a claim. First of all, at first instance, proceedings generally begin by a Writ of Summons filed with the court (Article 56 of the French Code of Civil Procedure), a joint claim (Article 57 of the French Code of Civil Procedure) or a claim (Article 58 of the French Code of Civil Procedure). Before some courts such as

the High Court, the parties must be represented by an attorney (Article 751 of the French Code of Civil Procedure).

For ordinary appeals, only a party that has taken part in the proceedings at first instance may make an appeal (Articles 546 and 547 of the French Code of Civil Procedure). The appellant must make the appeal in the month following the handing down of the first judgment; otherwise his appeal will be refused (Article 538 of the French Code of Civil Procedure). The appeal is generally made by one party or by joint request (Article 900 of the French Code of Civil Procedure). If the appeal is brought by one person, the appellant has three months to present his arguments or his appeal will be null and void. As per Article 899 of the French Code of Civil Procedure, the parties must be represented by attorneys unless otherwise stipulated.

Finally, to bring an appeal before the Cour de cassation, the appellant must have been party to the decision appealed (Article 609 of the French Code of Civil Procedure). The appeal must be brought within two months of delivery of the decision in question (Article 612 of the French Code of Civil Procedure). The parties must also be represented by an attorney who is authorized to appear before the Cour de Cassation, unless otherwise stipulated (Article 973 of the French Code of Civil Procedure). The appeal must be filed with the secretary of the Clerk of the Cour de Cassation (Article 974 of the French Code of Civil Procedure), and within four months of the appeal being filed a brief must be filed containing all the arguments against this decision; otherwise the right to bring an appeal may be lost (Article 978 of the French Code of Civil Procedure). As the appeal before the Cour de Cassation is a rather special appeal, the appellant must, for his claim to be valid, file an appeal that complies with the requirements of Article 978 of the French Code of Civil Procedure i.e. lack of legal grounds, lack or contradiction of arguments or even failure to comply with the law. If not the appeal will be inadmissible.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

No, the requirements for the content or form of the court proceedings do not change according to type of remedy requested.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

No, the type of law that applies does not affect this right to appear before the court. In France, generally the requirements to appear before a court do not change according to the nature of the claim or the applicable law. In certain cases, there may be certain requirements as to the way the claim is made or the time limits to bring the case to court. For example, at first instance, before a First Instance court in "grace" proceedings (an application to change a legal situation which is not challenged and does not involve a respondent party), the matter may be brought before the court by way of a verbal declaration registered by the clerk of the court (Article 62 of the French Code of Civil Procedure). In the same sense, the time period to make an appeal against a decision by the summary court (emergency proceedings) is fifteen days from the service of the first decision (Article 490 of the French Code of Civil Procedure).

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

The requirements to bring an action before the civil courts (interest and locus standi) do not change depending on the persons involved. They are always similar whether it is a natural person or a legal entity.

When a legal person wishes to bring a claim before court as a claimant or a defendant, there are no additional conditions to be met. The person must be acting to protect their own interest and if the law so requires have locus standi. However a legal person must satisfy specific requirements to initiate proceedings and more especially must be represented by a natural person. This representative must prove that he is duly authorised to act on behalf of the legal entity. For associations for example, the Articles of Association generally appoint a natural person who is authorised to represent the association in court, if not the general meeting must appoint such a person. For companies, the law decides who represents the company. Thus for public limited companies, the representative is always the Chairman.

If the case involves a public authority (such as an administrative body or local government body) as a claimant or a defendant, the civil courts do not have jurisdiction. Only the Attorney General (a body of magistrates responsible for representing the State and ensuring that public order is upheld before various courts) may intervene in civil proceedings as a main party or be joined as a claimant or defendant. The law decides when the Attorney General may act as a main party (Article 422 of the French Code of Civil Procedure). Especially in insolvency proceedings and some family matters, the Attorney General is expressly allowed by law to take part in the proceedings in order to protect public order. If not, the Attorney General must prove that it is acting to protect public order. When the Attorney General is joined to the proceedings, it is generally so that it may give its opinion on the application of the law in the case in question (Article 424 of the French Code of Civil Procedure).

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

No, interpleader actions do not exist in French Civil proceedings as, as already stated, the claimant may only bring proceedings if his personal interests have or will be affected. If he brings an action it is for himself and cannot involve other parties who are then required to find a solution to their own specific problems before the court. There is no equivalent in our procedural system. At best, the closest situation is when a third party is forced to join the proceedings in accordance with Article 331 of the French Code of Civil Procedure. This procedural measure makes it possible to join a third party to proceedings already brought by other claimants so that the third party may defend himself. The judgment can order the third party to pay damages or that this party be bound by the decision, for example when a defendant



forces his insurance company to join the civil liability proceedings (claim for contribution from third party, *appel en garantie*).

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

No.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Third parties may voluntarily join civil proceedings (*intervention volontaire*). Such a voluntary intervention may be as a party to the action or in support of the action (Art. 328 French Code of Civil Procedure). A third party is party to an action when that party wishes to directly benefit from the decision, for its claim to be admissible the party must have the right to bring an action with regards to that claim (Art. 329 French Code of Civil Procedure). A third party may join an action in support of the claims of another party. Such an action is admissible if the third party, in order to preserve his rights, has an interest in supporting that party (Art. 330 French Code of Civil Procedure)

Third parties may also be joined to proceedings against their will. Such is the case when a third party is implicated by a party in proceedings that have already been initiated. This is called forced intervention (Article 331 of the French Code of Civil Procedure). The third party must be joined to the proceedings in good time to be able to defend himself. How much is required of the third party depends on the situation. A third party may be implicated so that he is ordered to compensate any party who could have brought a claim against him. He may also be joined by a party so that the decision applies to both of them.

Finally, in accordance with Articles 582 to 592 of the French Code of Civil Procedure, the "third party opposition" is a remedy available to a third party who requests that the decision which is prejudicial to him is withdrawn or re-examined. Only those third parties who have not been party to the decision challenged, nor represented in the proceedings relating to the decision challenged but who have an interest (and in some cases *locus standi*) may make a third party opposition. Third party opposition may be made within thirty years of the decision. However, if by precaution, the said decision has been served on the third party, they have only two months from this service to make a third party opposition (Article 586 of the French Code of Civil Procedure).

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No. A third party may intervene or bring an action if they have an interest and in certain cases *locus standi*. The original parties may not oppose this action. The only way to prevent an action brought by a third party would be in the way previously

mentioned, which is to prove that a procedural formality has not been complied with (for example the time limits).

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Generally, French civil procedure is not really in favour of group actions. The adage "no-one shall plead by proxy" summarises the general viewpoint quite well. The claimant may only act for himself to protect his own personal interests. Therefore, in principle a claimant cannot bring a claim for another party or group of persons. By way of an exception to this rule, the law has taken a more flexible approach to this strict concept of court actions, especially for associations. Created for the benefit of consumer protection associations by the law of 18 January 1992 (Article L. 422-1 to 422-3 of the French Code of Consumption), then in 1995 extended to include environment protection associations (Article L. 142-3 of the French Environment Code), the legislator has offered way of bringing a joint representation action (similar to a class action but still very far from the American style class actions). If many identified consumers have suffered an individual loss which has been caused by the same person or company, an approved association may bring an action on their behalf so as to make the process of obtaining damages for the consumers easier.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

In joint representation actions, the association, in order to be able to bring an action before any civil court, must satisfy certain requirements. It must, before making the claim, have obtained at least two written authorisations from the consumers concerned. These authorisations must not have been obtained by request through advertising on television, radio, on billboards, in pamphlets or personal letters. The association must have specific approval in order to bring a matter before the courts.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

The joint representation actions are restricted to very specific sectors of the law such as consumer law (Article L. 422-1 to L. 422-3 of the French Code of Consumption) and environmental law (Article L. 142-3 of the French Environment Code).

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

No.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

Once again, the requirement that a person must have a personal interest in order to bring an action excludes actions for the general interest of an individual, group of

individuals or organisation having a legal existence. Only the Attorney General (a hierarchical body of magistrates responsible for representing the State before various types of courts) is legally authorised to act in the general interest. The law allows the Attorney General to bring such an action even though it has no direct and personal interest. Its position justifies such an exception.

However, to allow groups of individuals to better protect their interests, French civil case law has begun to accept actions by trade unions and associations brought not to protect their own interests but those of the social category that they represent. This is called an Action for a Group Interest however the interest of a group does not mean a general interest which only the Attorney General has the power to protect.

Trade unions may bring an action on behalf of its members in accordance with Article L. 2132-3 of the French Employment Code. This right is subject to two cumulative conditions. Firstly for a group action to be brought, the interests of the professional body that the union represents must have been affected. Secondly, the union must act to protect the interests of the group it represents.

The law is however more restrictive as regards associations and tries to limit as much as possible the associations that may act to protect a group interest. This is to avoid such associations encroaching upon the prerogatives of the Attorney General. Articles L. 421-1 to L.421-7 of the French Code of Consumption for example set the conditions for group actions brought by a consumer protection association.

Generally speaking associations may bring an action to protect a group interest if they are authorised to do so, by law, on a case by case basis.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

The proceedings brought to protect group interests are regulated specifically for the legal entities, such as associations and trade unions, which are entitled to make such claims. What is most important is to know what type of organisation intends to bring the action, if it is authorised to do so and if it satisfies the requirements set on a case-by-case basis for each type of action.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

The French Civil Courts are rigorous in the way they interpret the requirements for court proceedings. They are vigilant when examining whether the natural or legal person has an interest in bringing an action (a real, existing, legitimate and personal interest) and in certain cases, *locus standi*. These requirements for bringing an action help determine whether the claim is admissible which must be established before the court examines the grounds of the action.

The courts are just as rigorous as regards the requirements to bring the action, especially *locus standi* and the authorisation to act.

There is an abundance of case law on whether a person has an interest to bring the claim, *locus standi* and authorisation to act which illustrates the courts' rigorous approach. For example any person acting in court proceedings, for whatever reason, must have an interest (decision of the Cour de Cassation, 17 July 1918 for the defendant and decision of the Cour de Cassation 1st Civil chamber, 19 January 1983 for third parties). In the same sense, the court examines rather closely whether the

person lacks locus standi if required by law (decision of the Cour de Cassation, 27 January 1998 regarding the lack of standing of a legal representative of a company who has been banned from managing). Finally, if a person makes a claim for and on behalf of another and is not authorised to do so (whether by law, a court decision or contract) this is a procedural defect that results in the action being declared void (decision of the Cour de Cassation, 2nd Civil Chamber, 12 November 1975).

7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

No.

7.2.2. the field of substantive law at hand?

No.

7.2.3. the nature of the claimant?

This is an interesting point as since the beginning of 21st century, the Cour de cassation case law has been very favourable to associations in particular. In order to encourage actions by associations to protect collective interests, the Court has overcome the legislator's reluctance and opened the way for group actions by associations. It considers that even if an association is not authorized by law to protect a group interest and if there is no express provision in its Articles of Association, it may still bring a matter before the courts for joint interests provided that this falls within the purpose for which it was created as per its Articles of Association (decision of the Cour de Cassation, 3rd Civil Chamber, 26 September 2007; Cour de cassation 1st Civil Chamber, 18 September 2008).

7.2.4. the nature of the claim?

No.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

The French civil courts try to avoid court actions where the claimant abuses his right to bring an action. The courts may therefore consider that a claim is inadmissible if it demonstrates malicious intent, ill will or the intention to harm (abundant case law on this, see Cour de cassation decision, 1st Civil Chamber, 5 July 1965 (intention to harm); Cour de Cassation decision, 2nd civil chamber, 4 May 2000 (action without grounds, foolhardy and malicious); Cour de cassation, 3rd Civil Chamber, 1st April 2009 (wild accusations)). The claimant's claims are dismissed and he is ordered to pay damages. Furthermore, the claimant may also be ordered to pay a civil fine for having unnecessarily wasted the time of a public court service on the basis of Article 32-1 of the French Code of Civil Procedure.

7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Whether a person may appear before the court is not strictly speaking seen or used as a tool for the proper administration of justice. However the courts' rigorous approach to the requirements for initiating proceedings (interest and locus standi) and the way that they dismiss actions where there is clearly an abuse of standing helps avoid civil courts being unnecessarily burdened.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

Several directives on the protection of consumer rights such as Directive 98/27/EC and Directive 2009/22/EC have led to a significant change of French substantive law on group actions which are available to approved consumer protection associations. Thus, under the influence of EU law, a new paragraph was inserted into Article L. 421-6 of the French Code of Consumption allowing group actions brought by approved associations to stop illegal practices which affect the consumers' interests. In May 2009, the European Commission proposed a Directive in favour of setting up group actions in the countries of the European Union. This initiative should lead French Civil Procedure to further evolve and establish a proper group action especially for consumers. There have already been proposals and attempts (for example the draft law for consumers in Autumn 2006 to create a group action in France, also the working group to the law commission at the Senate in May 2010 on group actions), however no project has yet succeeded.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

Yes. The changes made through the influence of secondary EU law in collective actions by consumer associations now have an impact outside the scope of application of EU law.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No, civil courts have not yet noticeably used the principle of the right to effective judicial protection as defined by the ECJ in 1986 in the "Johnston" case. However as a general principle of EU law, it applies and is applied by French civil courts independently of any secondary legislation that refers to it.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

Yes, even though it is not often used in civil law, the Cour de cassation sometimes examines or applies these provisions on effective remedies. It may refer to one or both of these acts. It depends on the type of case. Thus for example the Commercial Chamber of the Cour de cassation, in a decision of 27 October 1998 on the time period to make a third party opposition briefly available in civil proceedings, decided that this time limit was not contrary to Article 13 of the European Convention and did not infringe the right to an effective remedy.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Yes, all the civil courts regularly refer to this convention and the way the European

Court of Human Rights has interpreted it. The right to a fair trial as provided by Article 6 of the European Convention for the Protection of Human Rights and as interpreted by the European Court of Human Rights, is an important resource for the civil courts. (For a good illustration of the fundamental aspect of this right to a court hearing before the Cour de cassation see: Cour de cassation decision, full court, 30 June 1995.

See also the case law relating to third party opposition. Admissibility under Article 6 (1) of the European Convention of an action brought by a partner against a judgment in insolvency proceedings concerning a real estate company: Cour de cassation, 3<sup>rd</sup> civil chamber, 6 October 2010, n°08-20959).

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Yes, especially the right to an effective remedy (Article 13 of the ECHR) and the right to a fair trial (Article 6 of the ECHR). Thus, in a decision of 9 March 2011, the first Civil Chamber of the Cour de Cassation closed the French version of the "DC UTA case" by declaring the request to have the Libyan state declared civilly liable inadmissible on the grounds of the State's immunity from court action. In its decision it referred to Article 6 of the ECHR and the interpretation of this article by the European Court of Human Rights.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

It is interesting to note that there is a specific court action for trade unions to protect the individual interests of a worker. It is really an action on behalf of another (action of substitution) which assists workers in particularly precarious or inferior situations (Articles 1144-2, L.7423-2 and L. 8255-1 of the French Employment Code). The trade union does not have to prove it is acting for a personal interest nor does it need to have specific written authorization to act from the worker concerned. The only requirement is that the trade union must inform the worker of the nature and scope of the planned action so that the worker may oppose the action of substitution or take over the action for himself.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW (FRANCE)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

The French court system may be described as a dual court system, which is indirectly inherited from the Ancien Regime and a direct result from the Revolution especially the law of the 16th to the 24th August 1790. There are therefore two separate court systems: on the hand, the "ordinary" courts which include the civil and criminal courts for which the Supreme Court is the Cour de Cassation; and on the other hand, the administrative courts for which the Conseil d'Etat (Council of State) is the Supreme Court. Litigation involving administrative bodies is always shared between the ordinary courts and the administrative courts. Cases are divided according to the principle that there must be a link between jurisdiction and the subject matter. If the matter involving the administrative body is governed by administrative law, the administrative court has jurisdiction; if the matter involving the administrative body is governed by civil law, then the ordinary court has jurisdiction (T. confl. 8 February 1873, Blanco). Where there is a dispute over jurisdiction, the Court of Conflicts decides which court has jurisdiction over the matter. The Court of Conflicts is a specific court, which is made up of judges from the Cour de Cassation and the Conseil d'Etat. Nevertheless, defining the competent jurisdiction taking into account the nature of the subject matter makes for a very complex and very confused distinction. Actually some matters (i.e. immigration law, public economy law) are dispersed between the two different court systems, so much so that it is particularly difficult to determine the competent judge as the answers of the following questions demonstrate.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

The administrative courts consist of first instance administrative courts and administrative appeal courts and the Conseil d'Etat (the Supreme Court), which are ordinary administrative law courts. There are also specialised administrative courts (see 1.3). The Constitution now protects the jurisdiction of the administrative courts. The Conseil Constitutionnel (Constitutional Council) considered that there was a "fundamental principle recognised by the laws of the Republic" according to which "save for those matters which are intrinsically a matter for the ordinary courts, the invalidation or reform of decisions made by authorities with executive power, their officers, local authorities of the Republic or public bodies put under their supervision, whilst exercising public authority, fall within the jurisdiction of the administrative courts" (Conseil Constitutionnel, 23rd January 1987, n°86-224 DC). Whether a matter falls within the jurisdiction of the administrative or the ordinary courts depends mainly on case law. The principle that there must be a link between jurisdiction and the subject matter (see 1.1) determines whether the matter is governed by administrative law or civil law. The following are taken into consideration: Is a public body/person involved in the matter? Does the matter involve public prerogatives? Does the matter relate to a public service? As regards

this last question if the matter relates to an industrial or commercial public service and not to an administrative public service, the activities of the administrative body are governed by civil law and any disputes fall within the jurisdiction of the ordinary courts. Finally, it should be noted that any one of these various aspects are not sufficient to determine jurisdiction; they must always be combined (see 1.4). Furthermore there are several specific legal provisions which determine whether a matter is to fall within the jurisdiction of the administrative or the ordinary courts.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

There are many specialised administrative courts in France. Some of these courts are disciplinary courts. This is the case for example for professional disciplinary bodies for the liberal professions such as lawyers, doctors or architects. There are also courts for certain types of civil servants, which are independent and this independence is guaranteed by the Constitution. For example, ordinary judges are subject to the Supreme Council of Magistrates, university professors are subject to the National Council of Higher Education and Research (Conseil national de l'enseignement supérieur et de la recherche). Moreover, there are courts that are competent in social matters, such as the courts of social assistance, the interregional commissions and the national commissions for the rates of social security, the departmental commissions for the handicapped and the court of pensions. In addition there are financial courts (the Regional and Local Chamber of accounts and the Court of accounts) which judge public accountants and de facto accountants. Finally there are the Commissions for appeals from refugees. There are also ordinary courts that are specialised in administrative disputes such as the court of social security matters, which hears all matters arising from the implementation of social security law. The national court of incapacity and work accidents insurance rates for example is in charge of deciding the state and level of invalidity and handles matters relating to the level of contributions for accidents at work. As it can be understood with such a non-exhaustive list the administrative jurisdiction system is particularly complex.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

According to the principle whereby there must be a link between jurisdiction and the subject matter, the division of jurisdiction between the administrative courts and the ordinary courts mainly depends on whether the acts or activities are administrative or not.

1. Acts by an administrative body. The acts of public persons are in principle administrative acts, except individual acts regarding an industrial public service. The same applies for the acts of private persons in charge of carrying out a public service. There are two types of court remedies for administrative acts. The action for abuse of power is an action to nullify an administrative act; the administrative court only has the power either to dismiss the claim or nullify the act. The "full jurisdiction" action allows the administrative court, if it considers that there are grounds to do so, to substitute its decision for that made by the administrative body. If an administrative body omits to act, there is no specific remedy, but such a



situation may be remedied by means of an implicit decision of refusal. This means that if the administrative body does not respond within two months, it is implied that it has refused and therefore has made a decision against which an action may be brought.

2. Administrative contracts. Certain contracts are defined by law as being administrative contracts such as contracts governed by the Code of Public Procurement Contracts and the contracts to occupy public property. Contracts made by a public person can only be considered administrative contracts if they contain a "clause exorbitante" (a provision that would be impossible or unlikely in a private law contract) or if the contracts contribute to the performance of an administrative public service. The contracts for the performance of an industrial or commercial public service and contracts made by private persons are in principle private law contracts and only in very rare cases does administrative law apply to such contracts.

3. Non-contractual liability. The liability of public persons in charge of an administrative public service is governed by administrative law. However, the liability of public persons in charge of an industrial or commercial public service is governed, except in very limited cases, by private law. The liability of private persons in charge of an administrative public service is governed by private law, except where there are public authority prerogatives. The liability of private persons in charge of carrying out an industrial or commercial public service is also governed by private law.

4. The staff. Administrative staff who are civil servants are governed by administrative law. The officers under contract with public bodies in charge of an administrative public service are considered public law officers whereas the officers under contract with public bodies in charge of an industrial or commercial public service are governed by private law, except for the director and the accountant. Those persons working for private law persons in charge of an administrative public service or an industrial or commercial public service are private law officers.

5. Property. Property disputes which are governed by the General Code of Property of Public Bodies are subject to the jurisdiction of the administrative courts. Private property disputes are a matter for the ordinary courts.

6. Tax. Litigation on direct taxes and VAT come within the jurisdiction of the administrative courts. The ordinary courts however have jurisdiction for indirect taxes, stamp tax (inheritance and gifts especially) and solidarity tax on fortunes.

7. Elections. Litigation regarding political elections is shared between the Conseil constitutionnel and the administrative courts. The Conseil Constitutionnel has jurisdiction for litigation regarding the election of the president, deputies and senators. The administrative courts have jurisdiction over litigation arising from local elections. The Conseil d'Etat is competent to hear matters regarding European Parliament elections.

8. Finally, there are certain specific legal texts which provide jurisdiction for certain administrative disputes to the ordinary courts. Article 66 of the Constitution grants the ordinary courts jurisdiction for matters relating to infringements on individual freedom.

9. There are also several laws which deal with the issue of jurisdiction over litigation. For example, disputes about decisions made by the Council of Competition are handled by the Paris Court of Appeal and traffic accident litigation is handled by the ordinary courts even when the vehicle in question belongs to an administrative body.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

All administrative litigation is divided between the administrative courts and the ordinary courts (see 1.4). There are acts of government for which neither the administrative courts nor the ordinary courts have jurisdiction. There is no way of systematically distinguishing an administrative act from an act of government. The list of acts of government has been established on a case-by-case basis by administrative case law, but it can be said that these are acts from high State authorities such as the President of the Republic or the government. For example, the enactment of a law, the appointment of a member of the Conseil constitutionnel, the decision to recommence nuclear trials or suspend a treaty are all examples of acts of government.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Locus standi is always a requirement for the admissibility of a claim before the administrative courts; if there is no locus standi, there is no case. However it is only a central issue for abuse of power actions but is less important for subjective disputes (i.e. disputes concerning subjective rights). Locus standi has not been defined by the legislator nor even by case law; it has resulted from abundant, diverging and unsystematic case law. It is generally defined as the reason for which a litigant brings his case before the court. Locus standi should be distinguished from the ability to act which is the aptitude of any legal entity or private person to bring their case. To have locus standi, the claimant must for example be a tax payer, use a public service, be a public officer or neighbour but this is not sufficient, there must also be a direct link between the type of claimant and the object of the claim, a direct interest. They must have an actual, certain and legitimate right to bring an action. This right is variable, it may be material or moral, individual or collective, private or public (see 3.1 for more details). Thus since the end of the 19th century the Conseil d'Etat has through an abundance of case law defined locus standi on a case-by-case basis. However its approach is not systematic.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

Where locus standi plays a significant role is in abuse of power actions which is an objective action. The action for abuse of power is in essence an action about legality; it is not about restoring the claimant's rights but forcing the administrative body to comply with the law. According to Maurice Hauriou, there is only the need of an alleged "affected interest", as far as it is not necessary to show that any subjective right has been infringed. However, not everyone has locus standi. There is no *actio popularis* as there must be an actual, direct and certain link between the claimant and his claim (see 2.1). This rather broad concept of locus standi is one of the principal examples of the classic concept of French administrative law, based on

defending legality and not subjective rights.

The issue of locus standi is not however restricted to abuse of power actions. In recent years, under the direct and indirect influence of the European Union, this issue has also arisen more acutely in contractual litigation and especially in pre-contractual and contractual summary proceedings (see 8.1 and 8.2). In subjective litigation, locus standi is generally confused with the object of the claim, but the fact remains that this is a separate condition. There are therefore a number of decisions in which the court considers that the claim should be dismissed for lack of locus standi.

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

Before the claim is brought before a court, a grace or hierarchical administrative remedy may be obtained from the administrative body. The grace procedure is where a request to review the decision is made to the officer that made the decision whereas the hierarchical procedure is an objection procedure introduced to the supervising or superior administrative officer. The ordinary administrative remedy extends the deadline for litigation. There is no specific requirement for locus standi to bring such an ordinary administrative action (CE Sect, 23 November 1962, *Association des anciens élèves de l'institut commercial de Nancy*, Rec., p. 625). However there are a number of special administrative remedies established by law in a specific subject and that are not a prerequisite for bringing a court action. These remedies may be grace or hierarchical remedies, or actions before bodies specially created for this purpose but which are not courts. For these special actions, the law may specify which persons have standing to bring such an administrative action, therefore only such a person may bring such an action (CE, sect., 10 March 2006, *Société Leroy Merlin*, n° 278220). If the law is silent, the solution for ordinary administrative actions applies.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Standing must first be direct, for example a landowner does not have standing to act against planning permission for a building which is not visible from his property (CE, 5 May 2010, *Comité de sauvegarde de la Coudoulière*, n° 304059). A hotel owner does however have standing to challenge the decision of the Minister of National Education setting the dates of the school holidays (CE Sect., 28 May 1971, *Damasio*, Rec., p. 391).

Standing must be actual and certain, a litigant cannot challenge a decision which is in his favour, thus a civil servant cannot challenge a decision granting him the transfer that he had requested (CE, 18 October 2002, *Diraison*, n° 231771). A tourist camping in a camp-site has standing to contest a council decision regulating camping in the area where the camper regularly camps (CE Sect., 14 February 1958, *Abisset*, Rec., p. 98).

Locus standi must not be used to protect an illegal situation: it must be legitimate. For example, the illegal occupant of a hotel cannot contest the planning permission

granted to transform the premises into lodgings (CE, 27 February 1985, SA « Grands travaux et constructions immobilières », n° 39357).  
Standing may be material but also moral (i.e. a catholic association may challenge the permission to show minors a pornographic film: CE Sect., 30 June 2000, Association Promouvoir, n° 222194 and 222195) or aesthetic (i.e. an association of local residents may challenge the decision to build an international conference centre: CE Sect., 30 October 1992, Ministre des affaires étrangères et secrétaire d'Etat aux grands travaux c/ Association de sauvegarde du site Alma Champ de Mars, n° 140220).

One person or a group of persons may have standing (see 6).

A private person or a public body may have standing: a public authority may challenge the decision of another public authority (see 3.4).

As regards appeals, Article R 811-1, first paragraph states "any party to proceedings before an administrative court or who has properly made an appeal, even though they have not prepared their defence, may appeal against any court decision made during these proceedings". It should be noted here that in certain matters the administrative court rules as a first and final instance court, and that therefore the matter may only be appealed before the Supreme Court.

Only the parties to the proceedings may appeal the decision before the Conseil d'Etat (CE, 12 March 1954, Ministre de la santé publique, Rec., p. 158). The party must be affected by the operative part of the decision; it is not possible to introduce an appeal in order to attack the reasons and the motivations the judge enounces in its statement. (CE, 11 December 2006, Madame Mas, n° 280696).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

The aspects of standing as explained in question 3.1 are the same for all litigations. However some precisions must be added. In subjective disputes, whether the litigant has a direct interest or not is necessarily examined more restrictively for subjective disputes than for actions for abuse of power, in so far that the issue of locus standi is confused with the subjective right to be protected by the action. As regards full jurisdiction actions, which are not necessarily subjective, especially since a third party can challenge an individual decision that the court may reform, locus standi is treated in the same way as for an abuse of power action. In litigation for non-contractual liability, a person who does not have standing to challenge a decision which caused a loss, equally does not have standing to claim damages. However in liability litigation, the issue of standing is often of less importance when the issue of whether or not the claimant has actually suffered a loss is addressed.

In contractual litigation, only the parties to the contract have standing, except for litigation regarding the execution of contracts (see 8.1 and 8.2).

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

The requirements for standing do not change according to the field in which the action for abuse of power is brought. Nevertheless, as far as the administrative court has to decide whether a litigant has standing and especially direct standing or not, the requirements of standing appears to be determined on a case-by-case basis for each field (please see the examples given for question 7.2).

As the only purpose of an action for abuse of power is to nullify an administrative act, there is no change in standing depending on the nature of the claim.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

There are three categories of litigants that are taken into consideration when deciding locus standi: private natural and legal persons; associations and organisations; and local authorities.

Private legal or natural persons irrespective of their nationality have standing if they have a sufficiently special characteristic. It is therefore possible to claim as a local tax payer to challenge a decision of the local authority which has financial implications (CE, 29 March 1901, Casanova, Rec., p. 333). However being a State tax payer does allow you to challenge tax decisions but not decisions with financial implications (CE, 13 February 1930, Dufour, Rec., p. 130).

Associations or organisations only have standing to challenge acts that affect the interests which they intend to protect (CE, 28 December 1906, Syndicat des patrons coiffeurs de Limoges, Rec., p. 977); they must therefore protect a general interest (see 6). An association that is not declared and therefore does not have a legal existence can nonetheless have standing for an action for abuse of power (CE Ass., 31 October 1969, Syndicat de défense des canaux de la Durance, Rec., p. 462).

Public authorities may bring a court action against decisions of another public authority. If an action for abuse of power is brought by one public authority against another public authority under the former's supervision, there is no requirement of standing (CE, 10 November 1911, Commune de saint-Blancard, Rec., p. 1001).

Thus the Prefet may challenge the legality of the acts of local authorities and may defer any act taken by a local authority (called a "Prefectoral deferral"). However these local authorities do not have standing for abuse of power actions when they themselves in their capacity as administrative supervisory bodies can invalidate the act (CE, 30 May 1913, Préfet de l'Eure, Rec., p. 583). Local authorities may introduce remedy against acts taken against them by their supervisory authority (CE, 18 April 1902, Commune de Nérès-les-Bains, Rec., p. 275). Generally, local authorities may act against State decisions if they have standing, this one being appreciated in the same way as for other legal persons. A local council may challenge the decision of a Prefet that allows, by way of derogation, a pharmacy to open in a neighbouring village (CE, 19 November 1980, Wendling, n° 19746, n° 19783). What can seem rather strange is that a minister was also deemed to have standing to challenge a decision of another minister, although solidarity is supposed between the members of the government (CE, 10 March 1933, Ministre des finances, Rec., p. 307).

Finally it can be noticed that the Conseil d'Etat has no problem acknowledging that foreign local authorities have standing, for example it was admitted the possibility of some foreign local authorities, the northern province of Holland and the town of Amsterdam, to challenge the permission to dump rubbish in the Rhine (CE Sect., 18 April 1986, Société « Les Mines de Potasse d'Alsace », n° 53934). In extradition proceedings, a foreign state the claim of which was refused was able to challenge this decision (CE Ass., 15 October 1993, Royaume-Uni Grande-Bretagne et Irlande du Nord et Gouverneur colonie royale Hong Kong, n° 142578).

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

There are no other aspects that are taken into consideration in the standing rules.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

Given the way locus standi is widely interpreted for abuse of power actions, there does not seem to be any situations where a litigant may use human rights, such as those in the Constitution or the ECHR, for a specific ground for standing. It can however be underlined that the Conseil d'Etat considered that Article L. 4121-4 of the Code of Defence prohibiting members of the armed forces from creating associations to protect their professional interests was not contrary to Article 11 of the ECHR (CE Ass., 31 December 2008, Association de défense des militaires, n° 307405).

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Such an intervention is partially determined by Article R 632-1 of the Administrative Justice Code and therefore also from case law. There is a difference between voluntary intervention and forced intervention.

The purpose of voluntary intervention is either to support the claim (claimant intervention) or to challenge it (defence intervention). However, the third party's own arguments are in principle not admissible (CE sect., 19 October 1934, Association des usagers de l'énergie électrique de Saint-Omer, Rec., p. 932). Third parties may intervene at any stage of the proceedings. Any person who has standing before a court may intervene. Whether a third party has standing is determined differently for abuse of power and subjective disputes.

For abuse of power actions, it only needs to be proven that the person has standing. For claimant intervention, whether the third party has or not the right to intervene is determined more widely than their standing: thus an association that protects foreigners has standing to contest an individual decision made against a foreigner (CE Ass., 18 June 1976, Moussa Konaté, n° 2714). An association however does not have standing if the act challenged is unrelated to the association's purpose (CE, 13 February 1981, Association pour la protection de l'eau, Rec., p. 88). For defence intervention, the beneficiaries of the act mainly have standing, thus a foreign State which has requested an extradition has standing to intervene in defence of the action of abuse of power against the decree granting this extradition (CE, 29 July 1994, Saniman, Rec., p. 367). Civil servants that have not contributed to the act do not have standing to intervene (CE Sect., 27 February 1948, de Fraguier, Rec., p. 98).

In subjective disputes, only the voluntary intervention of those "persons whose rights are likely to be affected by the decision" have standing (CE, sect., 15 July 1957, Ville de Royan et SA des casinos de Royan, Rec., p. 499). This right must be separate from the right the original party is defending (CE, Ass., 20 December 1985, Ville de Paris c/ SCI Champs-Élysées-le-Boëtie, n° 38801).

Forced intervention forces a third party to become party to the initial proceedings.

The third party thus becomes a defendant. A "claimant request to join a third party"

(appel en cause) allows a claimant to request that a third party be party to the proceedings so that the initial defendant is not the only party ordered by the court. A "defendant request to join a third party" (appel en garantie) allows the defendant to request that a third party be party to the proceedings so that the defendant is not the only one who is ordered. The claimant request to join a third party and the defendant request to join a third party are used in liability proceedings. The declaration of a joint decision request is a particular type of forced intervention since its aim is not to have a decision made against the third party but to avoid a "third party opposition" against the court decision. However a third party can only appeal a decision if they had standing in the original proceedings.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

The parties can always challenge the admissibility of the intervention but they cannot prevent it. During the appeal, they may also challenge the decision which allowed the intervention.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Traditionally, group claims are considered to be against French judicial tradition because of the adage "no one shall plead by proxy" and the fact that court action is individual. However, for administrative litigation and especially abuse of power actions, that are objective actions, such objections seem to be rather weak. No law prevents multi-party claims. Nevertheless there are no class actions, strictly speaking, i.e. proceedings in which one person acts for other persons who are not officially party to the proceedings.

The Conseil d'Etat has allowed multi-party claims "provided that they are sufficiently related" (CE Sect., 30 March 1973, David, Rec., p. 265). For example, actions were brought by students against the examination results board which involved different complaints but on the same grounds (CE Sect., 30 March 1973, David, as above). Abuses of power actions against a regulatory act or against an ensemble of individual decisions are also allowed. A full jurisdiction action, especially a non-contractual liability action may be brought by a multi-party claim. If the claimants' requests are not sufficiently related, they must be invited to amend their action by a different claim (CE, 27 April 2001, M. Lubrano, n° 200659).

According to Article R. 411-5 of the Administrative Justice Code "unless it is signed by a duly appointed representative, the claim filed by many natural or legal persons must contain the appointment of a single representative, chosen from among the signatories. If this is not done, the first claimant named shall be informed by the clerk that he is considered to be the representative stated in the previous paragraph, unless the other signatories inform the court that they have appointed another single representative chosen from among them." Earlier case law allowed a representative and in particular an association to act before an administrative court on behalf of several individuals (CE, 28 December 1906, Syndicat des patrons coiffeurs de Limoges, as above).

Finally, it should be noted that the court may itself decide to join several claims that are separate but identical or similar so as to hand down only one decision (CE, 7 February 1912, Jellineck-Mercédès, Rec., p. 160).

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

The case law on the locus standi of multi-party actions seems rather uncertain and has not been studied with sufficient accuracy. For multi-party-abuse of power actions against regulatory acts, the claim is admissible if at least one of the signatories has standing (CE Sect., 22 December 1972, Langlois et Ministre de l'équipement et du logement, Rec., p. 832). For abuse of power actions against individual decisions and subjective remedies, each claimant must have standing.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

In addition to the common law approach to multi-party litigation, it is worth mentioning Article L 142-3 of the French Environment Code: "when many identified natural persons have suffered individual losses which have been caused by the same person and which have a common origin, in the fields mentioned in Article 142-2, any association approved under Article 141-1 may, if appointed to do so by at least two natural persons concerned, act to obtain compensation before a court on behalf of these persons. The appointment must not be requested. It must be given in writing by each natural person concerned. Any natural person who has given his consent for an action to be brought before a criminal court is considered in such as case to be exercising recognised rights as a civil party, in accordance with the Code of Criminal Procedure. However, the notices served shall be sent to the association. The association that brings an action before a court in accordance with the previous provisions may be a civil party to the proceedings before the investigating court, or the court in the place where the company implicated has its registered offices, or the court where the first offence was committed". This provision has, it would seem, never been put into practice.

It is also possible to imagine that Article R. 779-9 of the Administrative Justice Code could be used as grounds for a multi-party claim, "The associations which have been properly declared for at least five years and the Articles of Association of which allow them to fight against discrimination may bring claims before the court under the law n° 2008-496 of 27 May 2008 on behalf of a victim of discrimination. The association must prove that the person concerned has given their consent after having been informed of the following: 1° The nature and purpose of the proposed action; 2° The fact that the action shall be bought by the association which may itself appeal the decision; 3° The fact that the person concerned may at any time take part in the proceedings brought by the association or end these proceedings".

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

There are actions brought by associations but their purpose must only be to protect a general interest. As regards individual acts, if they affect a member of an association, the association does not in principle have standing. But if a decision is made in favour of a third party, the association has standing if the act affects its joint interest. Indirectly such an action therefore allows it to protect individual rights of each of its members (see 6).



## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The locus standi of natural or legal persons is perceived so broadly so that it is difficult to establish the line of demarcation between the individual interest and collective interest. Thus when a local taxpayer is allowed to act against a decision of the local council that has a financial impact on the community (CE, 29 March 1901, Casanova, see above), he has both an individual and a collective interest. This line is even more difficult to identify when moral interests are affected, for example the members of a cult were allowed to challenge a decision which affected the way in which they practiced their religion (CE, 28 July 1911, Rougegré et a., Rec., p. 908). However, group interests are mainly protected by associations and organisations. As regards to regulatory acts, an association may only challenge acts that are within the scope of their purpose; for example a workers union was allowed to challenge a circular which affected the situation of foreign workers in France (CE, 13 January 1975, Da Silva et CFDT, Rec., p. 16); notwithstanding, a union of magistrates could not contest a decision creating a register of foreigners (CE, 12 March 2007, GISTI, n° 297888). For associations whose purpose is broad, the requirement that the court examines whether it has a direct interest or not usually implies that they do not have standing to contest a provision that is too specific. Thus an association that protects the environment in a region has no standing to challenge the decision granting planning permission in a village, even if this village was in the region (CE, 26 July 1985, Union régionale pour la défense de l'environnement en Franche-Comté, Rec., p. 251). When are considered individual acts, if they affect a member of an association, the association does not have standing (CE, 13 December 1991, Syndicat CGT des employés communaux de la mairie de Nîmes, Rec., p. 444), unless the individual decision also affects the general interests of the association (for example the decision dismissing the workers representative (CE Ass., 23 June 1972, Syndicat des métaux, Rec., p. 473). The adage "no one shall plead by proxy" applies here. However, if this decision benefits a third party, the association has standing if the individual act affects its collective interests. An association that protects the environment may act against a decision which allows the significant extension of the area and capacity of a campsite situated near a marsh (CE, 17 February 2010, Société Loca Parc Loisirs, n° 305871). Finally, the fact that public authorities are allowed to protect their interests must also allow the collective defence of general interests as it may be supposed that public interest is necessarily a collective interest.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

The only sector that has specific rules is environment law. According to Article L 142-1 of the Environment code: "Any association the purpose of which is to protect nature and the environment may bring proceedings before the administrative courts for any grievance relating to these matters. Any association for the protection of the environment, approved under Article L. 141-1 as well as the associations mentioned under Article L.433-2, has standing to act against any administrative decision directly related to the purpose and activities of the association as stated in its Articles of Association and which may damage the environment in all or part of the territory for which the association has been authorised provided this decision is made after the date of authorisation". Despite this provision, the principles that apply to the standing of associations that protect the environment are the same as

those that apply to other associations (see 7.2.2. and 7.2.3). Furthermore it is significant that this provision is only rarely used by litigants.

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

The position of the French administrative courts as regards to locus standi seems to be rather lenient. Of course not every member of the population has locus standi but a great number of categories of litigants can have standing.

Thus for electoral litigations, a person only has to be an elector (CE, 7 August 1903, Brocas, Rec., p. 619). In public service litigation, the person only has to use the public service (CE, 21 December 1906, Syndicat des propriétaires du quartier Croix-de-Séguey-Tivoli, Rec., p. 962), be a local tax payer (CE, 29 March 1901, Casanova, as above), or national tax payer (CE, 13 February 1930, Dufour, Rec., p. 130) to have locus standi. It has even been accepted that any citizen has standing to act against a national act, such as in 2005 the state of emergency over the whole of France's metropolitan territory (CE Ass., 20 March 2006, Rolin et Boisvert, Rec., p. 171).

Furthermore the courts are quite flexible when determining whether there is a link between the measure contested and the person contesting it or not. Thus a hotel owner had locus standi to contest the decision of the Minister of National Education setting the dates for the school holidays (CE Sect., 28 May 1971, Damasio, as above). The same applies for a deputy who challenged the decision of the Prime Minister to appoint the Chairman of the Competition Commission (CE Ass., 20 November 1981, Schwartz, Rec., p. 437) or even a student union which had standing to act against the decision of the minister for internal affairs regarding the deportation procedures (CE, 10 January 1992, Union national des étudiants de France, n° 115718 et 115719).

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

See 3.2.

- 7.2.2. the field of substantive law at hand?

Substantive law is not taken into consideration when determining locus standi, but in practice it depends on the situations of each area of litigation. Here are a few examples to illustrate this point.

In civil service litigation, the officer's standing is largely extended but is not limitless. In principle, actions brought by public service officers against measures to organise the service are inadmissible (CE Ass., 26 October 1956, Association générale des administrateurs civils, Rec., p. 391), unless the decision affects either the statutory rights or the financial interests of the claimant or the prerogatives of the corps he belongs to (CE, 16 June 2003, Monnier, no 247870). However, a trade union may have standing against such measures (CE, 11 October 1985, Syndicat général recherche agronomique CFDT, n° 28106, n° 34811, n° 34812). Any civil servant has standing to act against the appointments and promotions made, either to his grade or the grade above (CE, 22 March 1918, Rascol, Rec., p. 318).

In town planning litigation and more specifically planning permission litigation, the claimants must have a certain urban interest: a wine union whose purpose was to protect the territory to be used for growing vines was able to contest the planning

permission for a wine research laboratory (CE, 5 May 1994, Syndicat viticole Pessac-Léognan et autres, n° 130382, n° 130383), however, a local tax payer did not have standing to contest planning permission (CE, 8 April 1987, Fourel, n° 50755). For claimants other than residents or town planning associations, the person must live near the planned construction, a landowner did not for example have locus standi to contest the planning permission granted for a building that was not visible from his property (CE, 5 May 2010, Comité de sauvegarde de la Coudoulière, as above).

In economic litigation, locus standi is interpreted more empirically than in other fields. Whereas a hotel owner had locus standi to contest the decision of the Minister of National Education setting the dates for the school holidays (CE Sect., 28 May 1971, Damasio, as above), the holder of a licence to run an artificial insemination centre for horses and mules did not have standing to contest the decision to grant a licence to another artificial insemination centre for the same species (CE, 18 February 1998, Lebas, n° 134955).

7.2.3. the nature of the claimant?

See 3.4. and 6.1.

7.2.4. the nature of the claim?

Where the only purpose of an action for abuse of power is to nullify an administrative act, there is no change in standing depending on the nature of the claim.

It should only be specified that locus standi is determined by the claims presented by the claimant and not by the arguments made in support of such claim. A claimant may therefore use all arguments that are likely to succeed without the court being able to dismiss them because of the nature of the interest which allows him to bring the claim (CE, sect., 25 January 1963, Lemaesquier: Rec., p. 48).

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

These aspects are not taken into consideration. When a claim is considered to be abusive, there is a way of treating this in the final court decision rather than preventing the claim.

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

The proper administration of justice does not, at least not explicitly, seem to be an advanced way of determining locus standi.

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

The implementation into French law of the 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 environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC has not lead to any amendment of French law on locus standi rules. The provisions of Article L. 142-1 of the

Environment Code (see n° 6.2.) exist since the law n° 76-629 of 10 July 1976 on the protection of nature.

However, the implementation into French law of the Directive 89/665/EEC of 21 December 1989, on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, the Council Directive 92/13/EEC of 25 February 1992, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and the Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts radically changed the way standing was decided for contractual litigation. In the past, it was impossible for third parties to challenge the validity of a contract. This principle was extended by the possibility to challenge unilateral acts that were severable from the contract (CE, 4 August 1905, Martin, Rec., p. 749) and more recently by the possibility to challenge regulatory clauses in contracts through an abuse of power action (CE Ass., 10 July 1996, Cayzeele, n° 138536). There are however exceptions to this principle: the Prefet can introduce an abuse of power action against contracts made by local authorities (Article 2131-6 of the General Code of Local Authorities) and a third party may have standing to contest the employment contract of a civil servant (CE Ass., 30 October 1998, Ville de Lisieux, Rec., p. 375).

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

The pre-contractual and contractual summary proceedings not only benefit public contracts which are within the scope of the Directives but all public contracts as well as the public service contracts (Article L 551-1, 551-5 and 551-13 of the Administrative Justice Code).

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

As has already been mentioned (see 3.6), the French administrative courts' approach to locus standi seems to be so broad that there does not seem to have been any attempt to extend it by the right to bring a case to court or the right to an effective remedy.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

Idem

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Idem.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Idem.

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

The court decides whether the claimant has locus standi on the date the claim is filed (CE Ass., 1er July 1955, Charles, Rec., p. 379).  
The conditions of admissibility of the claim before the administrative court are a public policy argument, i.e. an argument that may be made by the court even if the parties have not raised it.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(FRANCE)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

There are three levels of jurisdiction in the French court system: lower courts, appellate courts and the Court of Cassation (supreme court). Criminal cases are tried in courts of either ordinary or specialised jurisdiction. Ordinary criminal cases are tried in three main types of lower courts, whose jurisdiction depends on the nature of the offence. Neighbourhood courts ("juridictions de proximité") have jurisdiction over minor offences of the first four classes (art. 521 al. 2 of Criminal Procedure Code [CPP]), but Law n° 2011-1862 of 13 December 2011 (effective 1 January 2013) abolishes them. For minor offences of the 5th class ("contraventions de cinquième classe"), and from 1 January 2013 for all minor offences, the police court ("tribunal de police") has jurisdiction; for misdemeanours ("délit"), the criminal court ("tribunal correctionnel") is competent; and felonies are tried in the Assize Court ("Cour d'assises"). At the second level of jurisdiction, there is the Criminal division of the Court of Appeal ("chambre des appels correctionnels"). It has jurisdiction over all appeals against decisions regarding misdemeanours (CPC art. 496) and for appeals from the judgments of the police court mainly in cases of minor offences of the 5th class, which are the most serious (CPC art. 546). The Appellate Courts of Assize ("Cours d'assises d'appel") hear felony appeals. At the highest level of jurisdiction, the Court of Cassation has a Criminal Division ("Chambre criminelle de la Cour de cassation"). In addition to these "ordinary" courts, there are various courts with specialised jurisdiction based on the *ratione materiae* (organised crime, maritime affairs, drugs trafficking and terrorism, economic and financial affairs, public health, offences against the fundamental state interests), the *ratione personae* (juvenile, politicians), or both (military affairs). Details on each type of specialised court are beyond the scope of this study, but two new types, established by the Law n° 2011-1862 of 13 December 13th 2011 (effective 1 January 2012), should be mentioned: those for crimes against humanity and war crimes (art. 628 et seq. of the CPC), and those for transport or technological disasters (art. 706-176 et seq. of the CPC). With the exception of courts having jurisdiction over politicians and those with jurisdiction over military matters (excluding the direct summons [see 1.2.1] in peacetime and excluding all civil actions during war), actions for damages in these specialised courts are all subject to roughly the same legal conditions.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

There are principally two ways for crime victims (called "injured parties" ("parties lésées") in criminal procedure) to bring a civil action ("action civile" or action for damages caused by an agent, CPC art. 2) before a criminal court. Injured parties can obtain compensation for damages either by triggering public prosecution ("exercice de l'action civile par voie d'action", CPC art. 2 and art. 1 al. 2, when the

prosecutor has not prosecuted) or merely intervene in the trial ("exercice de l'action civile par voie d'intervention", when the prosecutor has prosecuted). Both ways give the victim the opportunity to claim compensation for the material, physical or moral damage caused by the offence (CPC art. 3: "The civil action may be exercised at the same time as the public prosecution and before the same court. It is admissible for any cause of damage, whether material, bodily or moral, which ensues from the actions prosecuted").

If the injured party has lodged a complaint and asked for damages, it is considered a party to the prosecution and can, for instance, ask for investigative measures (Crim. 18 January 2011, n° 10-87468), have access to the case file, attend the trial, be represented by a lawyer, be heard, call witnesses, etc.

#### 1.2.1. Is there a possibility of private prosecution?

There are two possibilities for a victim to pursue private prosecution: the complaint for damages ("constitution de partie civile") and the direct summons ("citation directe"). The complaint for damages and the direct summons are triggering public prosecution, which will be conducted by the prosecutor.

According to CPC article 85, the victim may trigger prosecution instead of the prosecutor ("déclenchement de l'action public") who nevertheless remains solely responsible for the exercise of public prosecution ("exercice de l'action publique").

To do so, s/he must first lodge a complaint ("plainte simple") alleging a misdemeanour (with the exception of violations of the press law) with the public prosecutor. If the latter refuses to prosecute or does not answer within three months the victim may file a claim for damages ("plainte avec constitution de partie civile") with the dean of the investigating judges ("doyen des juges d'instruction"). Victims of misdemeanours and minor offences committed by adults may also summon the suspect to appear in criminal or police court, without the support of the public prosecution authorities ("citation directe", CPC article 551). This may be considered a direct private prosecution before the criminal court because the victim serves the summons. In such cases, which are nowadays quite rare and exclude offenders who are minors, the criminal court will determine the amount of a deposit to be paid by the victim ("consignation"), as would have done the investigating judge had the victim filed a complaint for damages (CPC art. 88). The deposit serves to guard against abuse of this procedure ("abus de constitution de partie civile", CPC art. 177-2, 470 and 472); injured parties who have obtained legal aid are exempt from paying such a deposit.

#### 1.2.2. Can a victim request review of a decision not to prosecute?

A decision not to prosecute, which must be reasoned, must be transmitted to the victim when identified (CPC article 40-2, al. 2). Such a decision is considered an administrative measure, so the only recourse is to lodge a formal complaint with a higher authority, which is the General Prosecutor ("Procureur général"). There is therefore no possibility to request judicial review of a decision not to prosecute. Nevertheless, it is still possible for the victim to bypass this refusal by referring the matter to the investigating judge ("juge d'instruction") or to a criminal or a police court (Please refer to 1.2.1.). Furthermore, according to article 87 of the CPC, the injured party may appeal a decision of the investigating judge declaring its complaint for damages inadmissible. While the above-mentioned "plainte avec constitution de partie civile" is not a legal remedy against a decision not to prosecute, it is a way of forcing the public prosecutor to prosecute. But it is not available in all cases: crimes against humanity, genocide and war crimes which are

liable to be prosecuted in France according to the Rome Statute (CPC art. 689-11) cannot be subject to private prosecution.

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

According to article 2 and article 3 of the CPC, the victim is allowed to ask for monetary compensation for the damage caused by the offence, based on the principle of full compensation ("indemnisation intégrale"). This restriction of compensation to money damages is controversial and some decisions of the Criminal Division of the Court of Cassation have allowed other measures of restitution ("mesures de restitution"), such as destruction of an illegally built house or return of property, which have been interpreted as granting the injured party the right to ask for other measures when lodging a complaint with the criminal court. This interpretation of the case-law must be confirmed: for instance, the destruction of an illegally built house (e.g. art. L. 480-5 of the Urban Planning Code) is a measure pronounced by the court that an injured party may request (see e.g. Crim. 3 November 2010, n° 10-80752). But there is a special legal provision that prevails over the limits of article 2 of the CPC.

There are also support measures for victims, such as the granting of a residence permit or removal of a violent partner. In practice, it still might be difficult for a victim to obtain real protection, either from the police during the investigative stage, or from the judicial authorities thereafter. One of the best examples is that of aliens staying illegally in France and being exploited for the purposes of prostitution or illegal employment. The legal framework provides for issuing a residence permit, at least for the time necessary to complete the investigation and obtain a judgement, and the possibility to be protected from pressure from those responsible for the exploitation. But the conditions are so strict that most victims known to NGOs do not dare seek compensation from the criminal court, fearing deportation as well as physical harm (please refer to the report by Johanne Vernier for the National Commission for Human Rights, p. 230 and download:

[http://www.cncdh.fr/IMG/pdf/Etude\\_Traite\\_et\\_exploitation\\_des\\_etres\\_humains\\_en\\_france.pdf](http://www.cncdh.fr/IMG/pdf/Etude_Traite_et_exploitation_des_etres_humains_en_france.pdf)). Furthermore, some simplified criminal procedures and some penalties may include reimbursement of damages or the return of stolen property. In addition, victims may apply for the restitution of property seized by the police (CPC art. 420-1). Finally, injured parties may claim compensation in the form of specific performance ("en nature"), but only before civil courts ("action aux fins civiles").

Article 375 and article 475-1 of the CPC provide for the reimbursement of expenses, which are not paid by the State. (art. 375: "The court orders the perpetrator of the offence to pay the civil party the sums it determines in compensation for the costs expended by the civil party and not paid by the State. The court takes into account considerations of equity and the financial situation of the convicted party. It may, even on its own motion, decide that for reasons related to these matters there is no case for such an order. ")

1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

The injured party is given the choice between criminal and civil courts, according to article 3 al. 1 of the CPC: "The civil action may be exercised at the same time as the public prosecution and before the same court" and article 4 al. 1 of the CPC: "The civil action may also be exercised separately from the public prosecution".



Whereas the victim has the right to choose either the criminal jurisdiction or the civil jurisdiction, it cannot change its choice afterwards. According to the adage "Electa una via, non datur recursus ad alteram", once the choice for the civil court is made, the victim cannot decide to refer her case to a criminal court (CPC article 5: "The party who has brought his action before the competent civil court may not bring it before the court for felonies. It may only be otherwise where the case was filed with the criminal court by the public prosecutor before a judgment on the merits was made by the civil court."). However, victims who initially proceed in criminal court may refer the case to a civil court.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

The Preliminary article of the CPC provides that "The judicial authority ensures that victims are informed and that their rights are respected throughout any criminal proceedings". With this in mind, two prongs must be detailed here, one pertaining to actors in the judicial system, the other to NGOs or public actors.

Victims are to be provided various information concerning their rights before criminal courts. Such information is to be provided by the police (CPC articles 53-1 and 75 in fine), the prosecutor CPC (art. 40-2, 41 in fine, 41-2 al. 2, 495-13), and the investigating judge (CPC art. 80-3). In addition, each injured party, who has filed a lawsuit, must be informed of the date of the hearings (CPC article 391). However, non-compliance with these provisions does not void the proceedings.

Progress has been made, especially with respect to article 6 § 1 of the European Convention for Human Rights and the efficiency of providing access to the courts. Some NGOs specialised in the defence of certain groups of people (disabled people, aliens, juveniles, consumers, etc.) or in combating particular forms of criminality (terrorism, sexual offences, racism, etc.) may provide their audiences with such information. In places called Houses of Justice and Law ("maisons de justice et du droit"), legal advisory panels are held to provide people with legal information. And in the past few years, France has created "legal information spots" ("points d'accès aux droits") to foster citizens' access to their rights. These "spots" contribute to improving the level of information, as they are located close to the people, even in remote or landlocked areas.

One of the problems in providing information is obtaining access to or even identifying victims, especially when they are particularly vulnerable, as are the homeless, minors, illegal aliens, the disabled and the elderly.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

First of all, the injured party must have the capacity to sue. Minority and mental health may stand in the way of criminal justice. (Please refer to 3.4.) Secondly, the injured party must have an "intérêt à agir". According to article 2 of the CPC, one must have suffered direct, certain, personal prejudice to be considered a victim. (Please refer to 2.2. and 2.3.)

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a

governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

The French criminal justice system is deeply rooted in an inquisitorial tradition, even if the rules of criminal procedure are now more adversarial. In such a justice system, the main part is played by the public prosecution, whereas the victim appears as a secondary actor. The right to punish is mainly exercised by the public prosecutor, according to article 1 of the CPC.

According to article 2 of the CPC, the injured party ("partie lésée") may lodge a complaint. The use of this term, which is wider than "victim", allows other persons than the direct victim to bring an action before criminal courts.

The direct victim may be both a legal or a natural person. For instance, a union or an NGO may lodge a complaint for robbery as long as it proves the existence of personal and certain prejudice stemming directly from the commission of the offence. Where the direct victim or the prosecutor has triggered prosecution, the direct victim's heirs may pursue the action. And pursuant to a recent decision of the Criminal Division of the Court of Cassation (Crim. 1 September 2010, n° 09-87624; two decisions of the Plenary Assembly of the *Cour de cassation*, 9 May 2008, n° 05-87379 and n° 06-85751; C. Saas, - « *Les héritiers face au préjudice subi par leur auteur* », AJP, n° 9/2008, pp. 366.), the victim's heirs may even claim damages before a criminal court when prosecution is triggered either before or after the victim's death. The date of the victim's death is now irrelevant.

Indirect victims, e.g. relatives of the direct victim, may take legal action if they have suffered from the offence. For instance, the Criminal Division of the Court of Cassation has held admissible actions brought by the sister of the direct victim of a rape (Crim. 29 May 2009, n° 09-80023) and by the child resulting from rape or sexual assault (Crim. 23 September 2010, n° 09-82438 and n° 09-84108).

In addition, legal entities (unions, NGOs, public entities, independent administrative authorities and professional orders) may sue for damages in criminal court pursuant to CPC articles 2-1 to 2-21 or other special provisions (e.g., art. L. 2132-3 of the Labour Code, pertaining to unions, or art. L. 4122-1 of the Code of Public Health, pertaining to the National Medical Order). The prejudice claimed by legal entities is called collective ("préjudice collectif") rather than personal. Among these special legal authorizations to bring a case before a criminal court, two types of actions must be considered (please refer to 3.4). On the one hand, there are "full" actions, which allow for both prosecution if necessary and settling claims for damages even when the prosecutor stays inactive ("droit d'agir", see above section 1.2.). On the other, where prosecution has already been triggered, legal entities are restricted to merely intervening to obtain compensation for damages.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

According to article 2 of the CPC, the injured party must have undergone a direct and personal prejudice and this prejudice must be certain. The courts are fairly lenient with regard to proof in the preliminary stage: the Criminal Division of the

Court of Cassation considers an action for damages admissible when the circumstances and facts on which it is based are sufficient to show a mere possibility of damage directly resulting from a criminal offence ("il suffit que les circonstances sur lesquelles elle s'appuie permettent au juge d'admettre comme possibles l'existence du préjudice allégué et la relation directe de celui-ci avec une infraction à la loi pénale"). Case-law is now quite lenient (Crim. 4 April 2012, n° 11-81124).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

The requirements of standing do not change according to the type of remedy requested.

- 3.3. Are there specific standing rules applicable to certain types of claims?

Legal entities, which have a special authorisation for lodging complaints for damages, must in general be lawfully registered for at least five years on the date the offence is committed. Furthermore, the Criminal Procedure Code provides, in each of its 21 specific provisions on standing for legal persons, the kind of offences that must have caused the prejudice for the action to be considered admissible. For instance, article 2-1 of the CPC relates to the action that might be lodged by an NGO combating racism. It is admissible only where the offence is a discrimination-related offence: murder, assault or property infringement motivated by the race, national origin or religion of the victim. In this case, if there is a direct victim, the NGO is allowed to bring the matter before the criminal court only if the victim has so authorised the association (25 Crim. September 2007, n° 05-88324). Many provisions require the victim's consent: CPC art. 2-1, 2-2, 2-6, 2-8, 2-10, 2-12, 2-18, 2-19, 2-20. In some very rare cases (Crim. 12 September 2006, n° 05-86958; Crim. 9 November 2010, n° 09-88272), legal entities may file a lawsuit without any special authorisation, on the mere basis of the *clausula generale* (Please refer to 3.6.).

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

The claimant's nature affects the requirements as far as capacity to sue is concerned. An unemancipated minor victim of an infraction must be represented by the minor's father, mother or legal guardian. Where the offender is one of the minor's relatives, the prosecutor or investigating judge might appoint an *ad hoc* administrator. An adult who is under trusteeship ("*tutelle*") or guardianship ("*curatelle*") must be represented by his guardian (art. 475 of the Civil Code for trusteeship and art. 475 and 467 for guardianship). An adult who has been placed under judicial protection ("*sauvegarde de justice*") may bring the case before criminal court and claim for damages as long as he has not been assigned a special representative, in accordance with article 435 of the Civil Code.

The claimant's nature may involve different conditions as far as legal entities are concerned. To file a complaint on the basis of CPC article 2, the same conditions apply to legal entities and natural persons. Where legal entities bring a matter before a criminal court on the basis of a special legal authorisation, there are, in each various provision, conditions pertaining to the nature of the offence, the qualities of the legal entity (date of the registration, bylaws, etc.) and the victim's

consent (please refer to 3.3). In addition, there is a difference between two main actions. On the one hand, some special legal authorisations do allow civil actions, even if neither the public prosecutor nor the direct victim have triggered prosecution. Among the provisions recognising a right for action ("droit d'action"), there are different types. While it is not always compulsory for the legal entity to point to direct or indirect prejudice (CPC art. 2-1, 2-2, 2-4, 2-6, 2-7, 2-10, 2-14, 2-19), its right of action does sometimes depend on its mission suffering direct or indirect prejudice, as provided in CPC art. 2-5, 2-11 and several other codes, such as art. L. 132-1 of the Environment Code and art. L. 421-1 of the Consumer Code. On the other hand, there are special legal authorisations to act a third-party intervener (CPC art. 2-3, 2-8, 2-9, 2-12, 2-15, 2-16, 2-17, 2-18, 2-20, 2-21).

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

Article 6 of the European Convention for Human Rights is often used as an additional basis for standing, especially where the action for damages lodged by a legal person has been dismissed. One of the most striking examples is the recent decision by the Criminal Division of the Court of Cassation recognising the admissibility of the action brought by the NGO Transparency-International France (Crim. 9 November 2010, n° 09-88272). **Arguments** made to the Criminal Division of the Court of Cassation were based on article 6 of the ECHR and both the preamble and article 35 of the UN Convention against corruption of 11 December 2003.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Over the last decade, since the Law n° 2000-516 of 15 June 2000, the main tendency in French criminal law and procedure is an opening up towards victims, at each stage of criminal procedure and even post-sententiam. A distinction must be drawn however between admissibility at the pre-trial stage and admissibility at the trial stage. During the pre-trial stage, a showing that prejudice is possible is sufficient. During the trial, the existence of the prejudice and its link with the committed offence must be proven.

Even though most legal provisions pertaining to actions for compensation have not been changed, the Criminal Division of the Court of Cassation now admits actions by injured parties on the basis of CPC article 2 and article 3, where it previously was reluctant to do so. A few cases showing a particular leniency, mostly based on article 6 of the European Convention for Human Rights, are:

\*Crim. 9 November 2010, n° 09-88272: admissibility of an action lodged by an NGO specialised in the fight against corruption in a case pertaining to the purchase of real estate in France by three foreign heads of state. The Criminal Division considers that because of its mission, the NGO may suffer direct and personal prejudice, as per CPC article 2, because the misappropriation of public funds – used

for purchasing real estate – was facilitated by corruption. This affair is also very interesting as the Criminal Division admits the action without remanding it to the investigating judge for a new assessment. Such leniency in admitting actions for compensation isn't new (Crim. 12 September 2006, n° 05-86958), and is certainly due to the kind of interests affected by the offence.

\*Some decisions of the Criminal Division of the Court of Cassation have over the past years broadened the possibility for a victim's relative to sue for damages in the field of sexual offences (Crim. 29 May 2009, n° 09-80023; Crim. 23 September 2010, n° 09-82438 and n° 09-84108). It has also recognised the direct, personal moral prejudice of the child born after a rape and of the sister of a rape victim.

As far as special legal authorisations are concerned, case law appears a bit more rigid.

- 4.2. Are there significant variations in the courts' approach based on:  
4.2.1. the type of remedy requested?

No. There are only two types of remedies that may be requested: monetary compensation of the material, physical or moral prejudice or/and restitution measures. Legal standing requirements may be different, but the differences depend upon the kind of offence committed and the claimant's nature, rather than the remedy.

- 4.2.2. the nature of the claimant?

Yes. Where the action is based on a special legal authorization, case law is still quite rigid; where the action is based on the *clausula generale* of article 2 of the CPC, case law now appears more lenient (please refer to 4.1)

- 4.2.3. the nature of the claim?

No

- 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

Not directly. But there is an indirect way of taking other considerations into account: the amount of the deposit. According to CPC article 88, the investigating judge will ask the claimant to deposit a certain amount of money, which will be kept in cases of abuse of process. If the claimant does not comply, the action is dismissed. This deposit is also required in cases of direct summons (CPC articles 392-1 and 533). The lower the merits of the case, the higher the amount. France has already been condemned by the European Court for Human Rights (ECHR, *Aït-Mouhoub vs France*, 28 October 1998, n° 22924/93) because the deposit might prevent access to a judge.

- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

There are several systems in France which can provide a quite easy, quick and certain decision on compensation without considering legal standing before criminal justice, so that it does not appear that courts use standing as a tool for the administration of justice. These systems are called indemnification funds ("fonds d'indemnisation"). They target victims of what can be called mass prejudices which

cannot really and fully be compensated by either insurance companies or criminal/civil justice: terrorism, natural disasters, public health, war crimes, etc.

## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

The Framework decision 2001/220/JHA on the standing of victims in criminal proceedings is presented by France as having led to several changes in criminal law or procedure. But most provisions pertaining to victims' protection had already been granted in 2001 and cannot be considered transposition measures. In addition, no accessible decision refers to Framework decision 2001/220/JHA on the standing of victims in criminal proceedings. Among more recent texts, which should be transposed within a few years, Directive 2011/36/EU on human trafficking should lead to several changes in French criminal law and procedure. Pertaining to legal standing, the transposition of this directive will involve, e.g., reform of the statute of limitations for triggering public prosecution when the victim is under 18, the conditions and the requirements for asking the Commission for Indemnification of Crime Victims for compensation (please refer to 6) or to benefit from legal aid. Directive 2011/92/EU on child sexual abuse, sexual exploitation and pornography should not lead to many changes, as French criminal law and procedure taken as a whole complies with the directive. Article 18 (3) may be interesting as there is no presumption of minority in French law when the age of a person is uncertain. The bone age test, which entails a highly questionable examination, is the method currently used to determine a person's age.

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

n/a for the moment.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No accessible case law in criminal matters refers to the principle of effective judicial protection as far as legal standing is being concerned.

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

The right to an effective remedy is quite often used by lawyers when appealing either the amount of the deposit or decisions dismissing actions for compensation. Its efficiency is very difficult to assess (Crim. 16 June 2004, n° 03-86889; Crim. 24 February 2004, n° 03-86019).

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Please refer to 3.6. and 4.1.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Please refer to 3.6. and 4.1. Another recent decision of the Criminal Division of the Court of Cassation may be cited as an example (Crim. 23 March 2011, n° 09-88540): article 6 of the European Convention for Human Rights was used, without success, by the Defence to set aside the legal standing of a victim, outside the scope of application of EU law.

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Two points must be mentioned. Since 1977, there is a Commission for Indemnification of Crime Victims ("Commission d'indemnisation des victimes d'infractions" – CIVI). It concerns only victims of criminal offences who cannot obtain compensation because the offender is unknown or insolvent. Until now, it has not been open to victims who are aliens staying illegally in France. The transposition of Directive 2011/36/EU will lead to a reform at least as far as victims of human trafficking are being concerned.

Prescription has not been addressed. It must be added that the action of a victim in criminal court is subject to prescription rules. The statute of limitations for triggering public prosecution is usually one year for minor offences, three years for misdemeanours, and ten years for felonies, but there are many exceptions. Moreover, in some cases, the starting point of prescription is postponed.

# GERMANY

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (GERMANY)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

Civil law cases (with the exception of labour cases; see section 1.2.) are handled by the ordinary courts (ordentliche Gerichte). These are the Amtsgerichte (local courts), the Landgerichte (regional courts), the Oberlandesgerichte (higher regional courts) and the Bundesgerichtshof (Federal Court of Justice); see § 12 Gerichtsverfassungsgesetz (Act on court organisation). The ordinary courts (with the exception of the Bundesgerichtshof) are institutions of the Länder, but jurisdiction and procedure are matters of federal law. The Amtsgerichte have jurisdiction at first instance if the value of the case does not exceed EUR 5,000. In some cases, the Amtsgerichte have jurisdiction regardless of the value in dispute, most notably in family law matters, in matters of tenancy law and in matters of non-contentious proceedings (freiwillige Gerichtsbarkeit). The Landgericht decides at first instance if the value of the case exceeds EUR 5,000 (except where such matters are explicitly allocated to the Amtsgericht). Some civil law matters fall within the jurisdiction of the Landgericht regardless of value, most notably certain matters of commercial and company law and cases where compensation for wrongful acts of state officials is sought (§ 71 Gerichtsverfassungsgesetz). The Landgericht also acts as appellate court in cases decided at first instance by the Amtsgericht (with certain exceptions, e.g. family law matters, where the Oberlandesgericht is the appellate court). In cases where the Landgericht decides at first instance, the Oberlandesgericht is the appellate court. In test-case proceedings under the Kapitalanleger-Musterverfahrensgesetz (see section 5.3.), the Oberlandesgericht acts as first instance court in the test-case procedure. The Bundesgerichtshof only acts as appellate court. Generally, only decisions of lower-level appellate courts may be appealed from to the Bundesgerichtshof. Subject to certain prerequisites, however, a direct appeal from a first instance court to the Bundesgerichtshof (Sprungrevision, Sprungrechtsbeschwerde) is also possible. A party claiming that a civil court violated a constitutional right can lodge a complaint with the Bundesverfassungsgericht (Federal Constitutional Court) after exhausting other remedies.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

There are specialised courts for labour law cases. They are regulated in the Arbeitsgerichtsgesetz (Act on labour courts). These courts are the Arbeitsgerichte (local labour courts), the Landesarbeitsgerichte (regional labour courts) and the Bundesarbeitsgericht (Federal Labour Court). There is also a specialised court for certain intellectual property matters, the Bundespatentgericht (Federal Patent Court). Certain civil law cases concerning health insurance matters are decided by the Sozialgerichte (social security courts). As regards family law and commercial law cases, there is no branch of separate

courts. But there are specialised departments of the ordinary courts for such cases, and the Länder can concentrate such matters in a single court of a region encompassing several court districts. Furthermore, there are special courts for certain disputes concerning navigation on the Rhine and the Moselle.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

The concept of a civil claim is not explicitly defined by law. Delimitation of civil and criminal cases is quite straightforward. Meanwhile, delimitation of civil and administrative matters can be difficult in borderline cases. The prevailing opinion is that, absent a statutory rule, a combination of the Subjektionstheorie and the Subjektstheorie should be used. On this basis, a claim belongs to public law (as opposed to civil law) if one of the parties in the dispute is endowed with imperium and the dispute concerns a relationship where this party acts as holder of such imperium. The civil courts have jurisdiction to adjudicate compensation claims arising from acts of state (especially compensation for expropriation), as well as for damage claims arising from wrongdoing by state officials. A criminal court in which criminal proceedings are pending has jurisdiction over civil claims arising out of the offence (Adhäsionsverfahren, ancillary civil procedure, §§ 403 ff. Strafprozessordnung – Code of criminal procedure). But this procedure is rarely used in practice. The criminal courts usually refer such claims to the civil courts (though there have been efforts in recent years to encourage criminal courts to exercise their ancillary jurisdiction more frequently).

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

Two requirements for the admissibility of the action are relevant in this regard, Prozessführungsbefugnis and Rechtsschutzbedürfnis. The requirement of Prozessführungsbefugnis means that the claimant must be entitled to pursue the claim. In general, only a person whose own individual rights are at stake has Prozessführungsbefugnis. Nevertheless, in a number of cases the law gives another person standing to act on behalf of the holder of the claim as nominal claimant (gesetzliche Prozessstandschaft). Cases where certain persons or institutions are authorised by law to bring suits in the collective interest before the civil courts (see section 6.2) have traditionally often been understood to be cases of Prozessführungsbefugnis without substantive rights. Today, however, the prevailing opinion seems to be that the law also confers substantive rights on institutions that are entitled to sue in such cases. Nevertheless, such entitlements to sue in the collective interest are not usually conceived as subjective rights in the classical sense. Furthermore, a transfer of Prozessführungsbefugnis by agreement (gewillkürte Prozessstandschaft) is possible according to German doctrine and case-law. In addition to being authorised by the (alleged) holder of the right, the nominal claimant must also have an own interest in the claim. Thus it is not possible to authorise somebody totally unconnected with the case to bring a suit in their own name. The requirement of Rechtsschutzbedürfnis means that the claimant must have a legitimate interest in the adjudication. Such interest is lacking if the adjudication of

the claim obviously would not be of any benefit to the claimant. The assessment of Rechtsschutzbedürfnis should not be confused with an assessment of the merit of the claim, not even a prima facie one (but see also section 7.3.). If the claim is clearly unfounded, the court should dismiss it in a judgment on the merits.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

Both. With regard to Rechtsschutzbedürfnis German law distinguishes between different types of claims (see section 3.2.). Prozessführungsbefugnis relates to the nature of the relation between the parties (see section 2.1.).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Regarding Rechtsschutzbedürfnis and Prozessführungsbefugnis, see section 2.1. There are also specific prerequisites to bring a case in appeal. In all cases, an appeal is only admissible if the judgment is detrimental to the appellant. This requirement, referred to as Beschwer (gravamen), is the manifestation of Rechtsschutzbedürfnis at the appellate level. As regards the claimant, the requirement is satisfied if the judgment departs from the claimant's petition. This is called "formelle Beschwer". Meanwhile, according to the case-law of the Bundesgerichtshof, the defendant can appeal in all cases where the judgment is detrimental to their legal position, regardless of the petition made in the first instance (if any) (materielle Beschwer). Some scholars contend that in cases where the defendant made their own petitions in the proceedings, formelle Beschwer should be decisive for the admissibility of appeal. If the value of the appeal does not exceed EUR 600, permission of the court a quo is required to bring an appeal. Permission is granted if the matter is of general importance or if a decision by the appellate court is necessary for the development of the law or to ensure the uniformity of case-law. Access to the Bundesgerichtshof is now mainly based on the general importance of the issue to be resolved (and no longer mainly on the amount in dispute). Appeal to the Bundesgerichtshof always requires permission by the court a quo or by the Bundesgerichtshof. Permission is granted if the matter is of general importance or if a decision by the Bundesgerichtshof is necessary for the development of the law or to ensure the uniformity of case-law. The appellant can lodge a complaint against denial of leave to appeal with the Bundesgerichtshof if the lower appellate court refuses permission. Note, however, that there is a transitional provision contained in § 26(8) of the Gesetz betreffend die Einführung der Zivilprozessordnung (Act implementing the code of civil procedure) according to which, until the end of 2014, a complaint against denial of leave to appeal is only possible where the value of the appeal to the Bundesgerichtshof exceeds EUR 20,000.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

Declaratory relief requires that a legal relationship or the authenticity of a document

is disputed between the parties. Furthermore, the claimant must show a legal interest in a declaratory judgment (Feststellungsinteresse). This means that there must be an uncertainty about the legal relationship in question, and there must be a danger for the claimant's legal position because of that uncertainty and a need for immediate clarification. Furthermore, a declaratory judgment must be suitable to clear up the insecurity. Finally, a declaratory action is only admissible if there is no simpler way to clear up the insecurity. In particular, declaratory relief is generally not admissible if the claimant could also achieve their aim with an action for performance.

Injunctive relief can only be requested if the conduct in question would (allegedly) harm the claimant's individual rights, with the exception of cases where injunctive relief in the public interest is explicitly provided for. Furthermore, injunctive relief requires a real danger that the defendant might commit or repeat the act in question (Begehungsgefahr, Wiederholungsgefahr). The prevailing opinion in Germany is, however, that this is not a matter of admissibility but one of the merits of the claim.

When suing for payment or performance, the claimant need not positively demonstrate Rechtsschutzbedürfnis. Only in cases where an action for a future claim or a claim not yet due is brought, there is a specific positive test of Rechtsschutzbedürfnis (see §§ 257–259 Zivilprozessordnung). Apart from that, there are only certain (exceptional) situations where the Rechtsschutzbedürfnis is deemed to be lacking, e.g. if the claimant already has an enforceable title or if there would be a much simpler alternative way to enforce the right in question. The inadmissibility of a claim because of ne bis in idem is also conceived of as an issue of lack of Rechtsschutzbedürfnis.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

In principle, the requirements are the same for all fields of substantive private law. There are, however, sector-specific rules extending standing beyond individuals pursuing individual rights (see section 6).

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

Generally the requirements of standing do not depend on whether the claimant is a natural or a legal person. But there are some actions where only certain types of entities have standing (see section 6).

Where the State or a State organ acts in a private capacity, the ordinary rules of civil procedure apply. (If, e.g., the State enters into a contract under civil law, disputes concerning the contract are litigated in the civil courts.)

State organs have only very limited power to initiate civil proceedings or to bring appeals in civil cases in the public interest or in the interest of objective legality, mainly in the field of family law and in certain cost matters.

Disputes directly concerning the validity and legitimacy of acts where state

authorities exercise their sovereign power do not fall within the jurisdiction of the civil courts but are for the administrative courts to determine, as these are not matters of private law but of public law. Actions concerning damages arising from unlawful acts of state (*Staatshaftung*) do belong in the civil courts, however. The delimitation of the jurisdictions of civil courts and administrative courts can be difficult in this field.

When talking about actions against the State or its organs (and actions against foreign States and their organs) one should also keep in mind that in certain conditions individuals may be barred from suing or from enforcing a judgment because of sovereign immunity. This can be a serious impediment to law enforcement in some cases, although it is not normally thought of as an issue of standing (see also section 3.7).

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

The situation described in the question would be handled under the rules on *Prätendentenstreit*. A debtor sued by one of several alleged creditors of the same debt can issue third party notice to the other alleged creditors. If they refuse to participate in the proceedings, the results nevertheless become binding for the third parties to whom the notice was issued (§ 74(3) *Zivilprozessordnung* in conjunction with § 68 *Zivilprozessordnung*). If they do participate, the debtor may deposit the amount of the debt in the court and leave the proceedings. These are then continued among the potential creditors in order to determine which of them is the actual creditor.

Another form of interpleader action is the *Hauptintervention* where a third party initiates litigation against both parties in a pending dispute. This is possible if the third party claims that they are really the holder of the right disputed between the original parties (e.g. two parties litigate about assets really belonging to the intervening party). This form of interpleader action is very unusual in practice. The *Dritt widerspruchsklage* where a third party sues a judgment creditor who attached property belonging to the third party can also be characterised as a type of interpleader action.

Legal scholarship and case-law also allow, subject to certain conditions, a *Dritt widerklage* where a "counter-claim" is brought against a party not originally involved in the dispute.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

Yes, with regard to the admissibility of appeals (see section 3.1).

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Access to the courts is regarded as a fundamental constitutional right. It is generally accepted in German doctrine and case-law that this right is not only guaranteed by Article 6(1) of the European Convention on Human Rights but also by the German Constitution.

At the appeals stage a potential violation of basic procedural rights may be a basis for leave to appeal (see section 8.3.3.).

Human rights law is not used, however, as a basis for granting standing to individuals or organisations whose individual rights are not at stake. One should also note that access to justice can sometimes be barred by other procedural requirements than lack of standing. To give an example, cases of (alleged) grave exploitation or even enslavement of private servants by diplomats have excited considerable public attention. Because of diplomatic immunity, such employees cannot sue their employers in German courts. Enforcing their rights before the courts of the sending state is often unfeasible in practice. The regional labour court in Berlin takes the position that it is no violation of constitutional rights if access to German courts is barred by diplomatic immunity in such cases (Landesarbeitsgericht Berlin-Brandenburg, judgment of 9 November 2011, 17 Sa 1468/11).

#### **4. Third party intervention**

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Third party intervention (Nebenintervention – auxiliary intervention) is permitted if the outcome of the proceedings is relevant for the intervening party's legal position (§ 66 Zivilprozessordnung). The third party can intervene at any time during the proceedings, even at the appellate stage, but new allegations or evidence are only admissible as long as the original parties could still introduce them.

There are two types of auxiliary intervention: ordinary auxiliary intervention (where the intervening third party can only assist one of the parties to the action but cannot act against that party's will) and independent auxiliary intervention (streitgenössische Nebenintervention) where the intervening party has a position approaching that of a full party to the proceedings (§ 69 Zivilprozessordnung). Independent intervention is possible if, by law, the judgment is binding on the third party.

Auxiliary intervention can be induced by third party notice (Streitverkündung). The third party notified of the proceedings cannot be forced to participate, but if they don't, the results of the proceedings nevertheless become binding on them.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Any party may challenge the admissibility of third party intervention. But if the third party makes a prima facie case [glaubhaft machen] that the legal conditions for intervention are met, the court must allow the intervention, and the original parties to the dispute cannot prevent it (see § 71 Zivilprozessordnung).

#### **5. Multi-party litigation**

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

German law knows the Streitgenossenschaft (multiple parties on one side of the dispute or on both sides, §§ 59 ff. Zivilprozessordnung). There are, however, no

representative actions (though some cases of *Prozessstandschaft* have a similar function; see also section 5.4 regarding the test-case procedure under the *Kapitalanleger-Musterverfahrensgesetz*). All group members are full parties to the dispute in cases of *Streitgenossenschaft*. One should also note that German law knows no opt-out group litigation, much less compulsory group litigation without the possibility of opting out. Many scholars even argue that opt-out group litigation would be unconstitutional.

There are two basic types of *Streitgenossenschaft*, the *notwendige Streitgenossenschaft* (required joinder of parties) for cases where the dispute must, by law, be decided uniformly, and the *einfache Streitgenossenschaft* for cases where there is a connection between the claims not amounting to indivisibility.

It may be argued that the *Streitgenossenschaft* is not a suitable and practicable instrument for establishing the rights of a large group of litigants, as proper coordination of the proceedings can be difficult in such cases.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

There are no specific rules on standing in actions involving multiple claimants or defendants.

In test-case proceedings under the *KapMuG* (see section 5.4.), further test-case actions are inadmissible if one such action is already pending before the *Oberlandesgericht* (§ 5 *KapMuG*).

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Multi-party litigation under §§ 59 ff. *Zivilprozessordnung* is regulated generally. The *KapMuG* (see section 5.4.) is a sector-specific regulation for cases concerning capital market transactions.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

The *Kapitalanleger-Musterverfahrensgesetz* (*KapMuG*) provides for a test-case procedure for disputes concerning capital market transactions. It was enacted for a limited period of time, which has since been extended to 31 December 2012. There are plans to replace it with a new act with largely similar content but a somewhat expanded scope of application. The main changes envisaged in the recently published government draft (BR-Drucks. 851/11) are the establishment of a time-limit for the decision on the admissibility of the test-case procedure and rules facilitating a settlement in the test-case proceedings.

Under the *KapMuG*, questions of law or fact common to a large group of cases can be decided in a test-case procedure conducted by the *Oberlandesgericht*. All other proceedings are suspended while the test-case proceedings are pending before the *Oberlandesgericht*. The parties to the other proceedings can participate in the test-case proceedings; their position is similar to that of an intervening third party in the case of *Nebenintervention* (see § 12 *KapMuG*).

Apart from the *KapMuG*, German civil procedure law does not contain explicit rules on test-case proceedings, but it is accepted that parties can enter into a contractual agreement under the *Bürgerliches Gesetzbuch* (civil code) to designate one of several similar cases as a test-case.

Note that the actions of consumer associations mentioned in section 6.2. do not, in principle, establish the civil rights and duties of individuals not participating in the

dispute. According to the prevailing opinion, judgments on such actions have no res judicata effect beyond the parties to the dispute. Under § 11 Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (UKlaG), however, third parties can also rely on the nullity of contract clauses proclaimed by a court ruling on the action of a consumer association.

## 6. General (“diffuse”) interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

The safeguarding of general interests is, in principle, the task of the court if an issue in this regard arises in the course of civil proceedings. Often general interests will be embodied in mandatory rules of law. “Diffuse interests” that are not embodied in rules of law are, in principle, altogether irrelevant for the adjudication of civil cases. As regards the initiation of civil proceedings on the basis of an impairment of general interests, this is only possible if specifically provided for by law. Only parties specifically qualified for this (certain organisations) are authorised to initiate such proceedings (see section 6.2.)

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

There are sector-specific regulations.

Actions of associations in the general interest (Verbandsklage) were first introduced in the field of competition law. § 8 Gesetz über den unlauteren Wettbewerb (Act against unfair competition) and § 33 Gesetz gegen Wettbewerbsbeschränkungen (Act against restraints of competition, i.e. the German cartel law) provide for standing of certain associations with regard to actions for injunctive relief in competition and cartel law matters.

The Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act on the law of general terms of contract; no longer in force) introduced rules on injunctive relief for cases of unfair general terms of contract. Subsequently, general rules on injunctive relief in consumer protection matters were created in the UKlaG. § 81 Patentgesetz (Patent act) and § 55 Markengesetz (Trademark act) even provide for an actio popularis in certain cases of patent or trademark nullity.

According to the case-law of the Bundesarbeitsgericht, trade unions can sue for injunctive relief in certain cases where an employer violates a collective labour agreement (the leading case was BAGE 91, 210 – “Burda”). Furthermore, § 23(3) Betriebsverfassungsgesetz (Works council constitution act) gives the works council and certain trade unions standing to sue for injunctive relief and for performance in cases where an employer does not comply with the duties imposed by that act. Collective redress does not, in principle, entail compensatory relief. Only the injured individuals themselves (or individuals/organisations to whom the claim was transferred) can sue for compensation. But the German legislature has authorised organisations to sue for skimming-off of profits generated by purposeful violation of competition regulations and cartel bans (§ 10(1) Gesetz über den unlauteren Wettbewerb; § 34a Gesetz gegen Wettbewerbsbeschränkungen). There is not much incentive to bring such actions, however, as the skimmed-off profits must be delivered to the federal budget.



## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In cases where an individual's own rights are concerned, one could probably call German practice lenient. In cases where collective rights or the "public benefit" are concerned, however, German courts and German doctrine tend to be rather strict (see also section 7.2.3.). The basic consensus is that civil justice should serve the protection of individual rights. Cases where the law provides for the representation of collective interests are regarded as exceptions and not extended beyond their designated field of application.

- 7.2. Are there significant variations in the courts' approach based on:  
7.2.1. the type of remedy requested?

See section 3.2.

- 7.2.2. the field of substantive law at hand?

See section 3.3.

- 7.2.3. the nature of the claimant?

Germany has a rather strict law on legal services. In particular, professional debt collection is classified as a legal service and requires registration under the Rechtsdienstleistungsgesetz (Act on legal services). There is an exception, however, in favour of consumer organisations acting within their scope of duties (§ 8(1)(4) Rechtsdienstleistungsgesetz). With regard to Article 1 § 3 No. 8 of the former Rechtsberatungsgesetz, the Bundesgerichtshof decided that the exception in favour of consumer organisations only applied where the debt collection by the organisation did not benefit only individual consumers. Instead, a collective interest of consumers must be at stake (BGHZ 170, 18). It is doubtful whether this restriction is still relevant, as the new act does not explicitly require that the collective action is "necessary for the interests of consumer protection".

- 7.2.4. the nature of the claim?

See section 7.2.3.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

It is generally recognised that the merits of the claim are not relevant for standing. Even if a claim is obviously not well-founded, this does not lead to inadmissibility of the claim; instead, if a claim obviously lacks merit, the court must take a decision on the merits (i.e., dismiss it as unfounded). Some scholars claim, however, that the distinction is not always sufficiently observed in court practice. Abusive use of procedural instruments may lead to inadmissibility, but the inadmissibility of a claim because of abuse is an exceptional case. One instance where standing was denied on this basis was a case where an insolvent company had assigned a claim on another company but nevertheless sued the debtor as nominal claimant on the basis of a transfer of standing (Prozessstandschaft; see section 2.1.). The Bundesgerichtshof decided that such an action by an insolvent assignor was inadmissible because it put the debtor at undue risk of having to bear the cost of the proceedings even if they should win (BGHZ 96, 151). Another instance was a case where two companies belonging to the same corporate

group and represented by the same counsel each filed an action for injunctive relief against the same defendant. The Bundesgerichtshof took the position that they would have been obliged to coordinate their actions (e.g. by bringing a joint claim) and that suing separately was an abuse of procedural rights (BGHZ 144, 165). Note that §2(3) UKlaG and § 8(4) Gesetz über den unlauteren Wettbewerb contain explicit provisions prohibiting abusive claims for injunctive relief.

- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Courts do not seem to make politics in this way. It is the general opinion in Germany that the Constitution guarantees the right of access to justice in all cases including trivial ones. A decision by the Amtsgericht Stuttgart (NJW 1990, 1054) holding a claim over DEM 0.41 to be inadmissible for lack of Rechtsschutzbedürfnis seems to be isolated and is mostly criticised. Nevertheless, there are legislative restrictions for trivial cases, especially with regard to the admissibility of appeals (section 3.6).

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

Yes, especially the directives on injunctive relief in consumer matters were important in this respect.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

Yes. In the UKlaG, the rules on standing with regard to consumer relief have been generalised; i.e., standing with regard to injunctive relief in consumer matters does not require that a provision contained in an EU directive was violated.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

See section 8.3.3.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

See section 8.3.3.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

I am not aware of cases where this has been held by the courts specifically with respect to EU law. Legal scholarship, however, recognises that EU law and the case-law of the ECJ are becoming increasingly relevant also for the application of national

rules of civil procedure, especially with regard to the access to the courts.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Yes, in particular with regard to the rules that limit the admissibility of appeals to cases of general importance (see section 3.1). Such rules are interpreted in a way as to always permit an appeal where there might have been a violation of a party's fundamental procedural rights.

In a case concerning the declaration of enforceability of a judgment on family maintenance under the 1973 Hague Maintenance Convention, the Bundesgerichtshof held that it was a violation of German procedural public policy if the defendant was excluded from the proceedings as a sanction for contempt of court (BGHZ 182, 204). In its judgment, the Bundesgerichtshof made reference to the ECJ's judgment in *Gambazzi v DaimlerChrysler* where the ECJ had taken the position that exclusion from the proceedings for contempt of court could constitute a ground for refusing recognition and enforcement under the Brussels Convention. German courts tend to refer to the German Constitution (especially its Article 103(1)) rather than Article 6(1) of the European Convention of Human Rights or Article 47 of the European Charter of Fundamental Rights when discussing the right of access to justice and the right to be heard. These other provisions are often only specifically referred to with regard to issues not covered by Article 103(1) of the Constitution.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW (GERMANY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

The German judiciary system consists of five branches: the ordinary jurisdiction (in civil and criminal matters), the labour jurisdiction, the general administrative jurisdiction, the social jurisdiction and the financial jurisdiction. The three last-mentioned jurisdictions represent administrative jurisdictions. At the top of each of the jurisdictions stands a supreme court, so there are five overall: the Federal Court of Justice, the Federal Labour Court, the Federal Administrative Court, the Federal Finance Court and the Federal Social Court. While these five supreme courts are federal courts, all inferior courts belong to the Länder (Region). In the case of the general administrative jurisdiction, there is a three-tier system, the Administrative Courts (Verwaltungsgerichte) generally being the courts of first instance (sec 45 Verwaltungsgerichtsordnung – VwGO – Code of Administrative Court Procedure), the Higher Administrative Courts (Oberverwaltungsgerichte), one in each Land, being competent for appeal (sec 46 no. 1 VwGO) and in special subject-matters for disputes in first instance (sec 47, 48 VwGO), and the Federal Administrative Court (Bundesverwaltungsgericht) as the court of final appeal (sec 49 no. 1, sec 132 VwGO) and of first instance in special subject-matters (sec 50 VwGO). Equally, the social jurisdiction forms a three-tier system, while the financial jurisdiction is limited to a two-tier system, with one financial court in each Land. Therefore, judgments of the Administrative Courts are subject to appeal on points of fact and law (ordinary appeal) before the Higher Administrative Courts (sec 46 no. 1 VwGO). Judgments of the Higher Administrative Courts are in turn subject to appeal on points of law (final appeal) by the Federal Administrative Court (sec 49 no. 1, sec 132 VwGO). Under special conditions, the Federal Administrative Court can directly deal with appeals on points of law against judgments of the Administrative Courts (sec 49 no. 2; sec 134, 135 VwGO). There is no appeal against judgments of the Federal Administrative Court, even if it rules at first (and last) instance (sec 50 para. 1 VwGO).

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

Yes, see point 1.1.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

Yes, see point 1.1.

Finance courts are competent in tax law, sec 1, 33 FGO (Finanzgerichtsordnung – Tax Court Code), and social courts are competent in social security law, sec 1, 51 SGG (Sozialgerichtsgesetz – Social Court Code).

Courts of tax jurisdiction in the German Länder are the Tax Courts (Finanzgerichte),

in the Federation the Federal Tax Court (Bundesfinanzhof), sec 2 FGO. The Tax Courts adjudicate at first instance on all disputes for which recourse to the finance courts is available (sec 35 FGO). The Federal Tax Court is only competent for appeal on points of law against judgments of the Tax Courts (sec 36 no. 1; sec 115 et seqq. FGO).

Courts of social security jurisdiction in the German Länder are the Social Courts (Sozialgerichte) and the Higher Social Courts (Landessozialgerichte), in the Federation the Federal Social Court (Bundessozialgericht), sec 2 SGG. The competences of the different courts within the social security jurisdiction are similar to that of the general administrative jurisdiction with regard to the instances (cf. sec 8, 29, 39 SGG).

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

a) The jurisdiction is divided between (general) administrative and civil courts according to sec 40 VwGO (Verwaltungsgerichtsordnung – Code of Administrative Court Procedure). In principle, public law disputes of a non-constitutional nature can be brought before the general administrative courts, sec 40 para. 1 VwGO: "Access to administrative courts is granted in all public law disputes of a non-constitutional nature to the extent that such disputes are not expressly assigned to another court by a federal statute. Public-law disputes in the field of Land law may also be assigned to another court by a Land statute." Thus, there are generally three conditions for a claim to be brought before an administrative court: (1) The claim has to be a public law dispute, i.e. a dispute ruled by provisions of public law. This prerequisite is fulfilled if a person finds himself/herself in a situation of subordination vis-à-vis the state or/and if the decisive provisions by their nature oblige or entitle exclusively the state to do something. Otherwise, an ordinary court is competent according to sec 13 GVG (Gerichtsverfassungsgesetz – Courts Constitution Act). (2) The claim must not be a constitutional matter, i.e. dealing with constitutional institutions and their constitutional rights or/and posing question that deal primarily with the interpretation of the constitution. (3) There must not be an explicit assignment to another court by statute.

However, certain kinds of administrative claims must be brought before the ordinary courts, i.e. the civil courts, sec 40 para. 2 VwGO:

"Access shall be available to the ordinary courts for property claims from sacrifice for the public good and from public law deposit, as well as for compensation claims from the violation of public law obligations which are not based on a public law contract; this shall not apply to disputes regarding the existence and amount of a compensation claim in the context of Article 14, subsection 1, second sentence, of the Basic Law (Grundgesetz). The special provisions of civil service law, as well as those on legal recourse to compensate for property disadvantages for withdrawal of unlawful administrative acts, shall remain unaffected."

b) According to the open system of actions established in the Code of Administrative Court Procedure, every behaviour, action or omission, can be challenged:

- The action for rescission aims at the annulment of an administrative act (sec 42 para. 1, first alternative VwGO). According to German law (sec 35, first sentence VwVfG – Verwaltungsverfahrensgesetz – Administrative Procedure Act), an administrative act can be defined as a decision of a public authority in an individual case on the basis of public law aimed at binding effects for persons outside public

administration.

- With an action for mandatory injunction, the claimant can seek a judicial order, directed at a public authority, to issue an administrative act which has been refused or omitted (sec 42 para. 1, second alternative VwGO).

- The general action for performance (mentioned in sec 43 para. 2 VwGO) is suitable for all other kinds of behaviour, including a judicial order directed at a public authority to refrain from an action (preventive action for omission).

- A declaratory action may help, if the other kinds of actions are not admissible and the claimant seeks declaration of the existence or non-existence of a legal relationship (sec 43 para. 1 VwGO).

- For specific categories of by-laws and executive regulations, sec 47 VwGO provides a procedure of review which leads to a declaration of a Higher Administrative Court about the validity or invalidity of such regulations with effect *erga omnes*. Generally, administrative courts control executive regulations implicitly with effect *inter partes*, not applying the regulations when they consider that they are infringing upon the law. Parliamentary Acts (statutes) may only be declared unconstitutional by the Federal Constitutional Court and/or, as far as the conformity of a statute of a Land with the constitutional law of the respective Land is to be controlled, by the Constitutional Court of the respective Land (art. 100 para. 1 GG – Grundgesetz – Basic Law).

c) A claimant can seek interim relief in all situations in accordance with the open system of actions. There is a dual system of interim relief: On the one hand, as a rule, a suspensory effect is the automatic consequence of the presentation of a rescissory action (sec 80 et seq. VwGO). On the other hand, the claimant can seek temporary injunctions as a judicial preventive or regulatory order directed at a public authority to act or to omit an act until the end of the main judicial procedure (sec 123 para. 1 VwGO).

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Yes, see point 1.4.

According to art. 19 para. 4, first sentence GG (Grundgesetz – Basic Law), any administrative action or omission can be subject to control by the courts:

"Should any person's rights be violated by a public authority, he may have access to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts."

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Yes, according to sec 42 para. 2 VwGO (Verwaltungsgerichtsordnung – Code of Administrative Court Procedure), "(u)nless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission". Consequently, the violation of a so-called "subjective public right" of the claimant must at least be possible for the action to be admitted ("Möglichkeitstheorie"). This prerequisite is called "Klagebefugnis".

Accordingly, the action is only well-founded to the extent that the administrative act

is unlawful and the claimant's rights have (actually) been violated (sec 113 para. 1, first sentence VwGO).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

The idea of the described requirement (point 2.1.) is to grant access to justice only to persons whose own (subjective public) rights might be violated. In turn, these persons can demand a comprehensive control of the administrative action or omission on the merits; the density of control is very high.

Therefore, the German legal system follows a rights-based model of standing. The requirement for *locus standi* is a characteristic of the decision for a system of subjective legal protection, stipulated in art. 19 para. 4, first sentence GG (Grundgesetz – Basic Law) (see point 1.5.).

Consequently, interest-based claims as well as an *actio popularis* are generally excluded. However, it should be noted that the extent of access to justice depends decisively on the definition of the subjective right and thus on the interpretation of legal provisions by the courts. The definition of the subjective right comprises all legal norms which serve the protection of individual interests (interests of a definable group of persons), even if the relevant norm is equally designed to serve the public interest (see point 7.1).

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

According to sec 68 para. 1 VwGO (Verwaltungsgerichtsordnung – Code of Administrative Court Procedure), in principle, prior to lodging a rescissory action, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. The same is valid for an action for mandatory injunction if the motion to carry out the administrative act has been rejected, sec 68 para. 2 VwGO.

Since the preliminary proceedings fulfil also the function of legal protection (in addition to self-control), they also relate to subjective public rights. However, the control during the preliminary proceedings comprises the expedience of the administrative action or rejection, too, which constitutes an interference of one's rights that does not amount to a violation.

Consequently, the requirement for a "Widerspruchsbefugnis" differs from that for a "Klagebefugnis" as far as discretionary decisions are concerned: The objection shall only be admissible if the objecting party claims that his/her rights have been violated by the administrative act or its refusal (because of its unlawfulness) or have been interfered with (because of its inexpedience).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is

permission of the court a quo or the appellate court required in order to bring an appeal?

§ 42 para 2 VwGO stipulates the principle that an action is only admissible if the claimant claims that his or her rights have been violated; however, the same provision also allows differing provisions by law (cf. point 2.1.). Consequently, the Federation as well as the Länder have made exceptions to the general standing requirement, granting a "Klagebefugnis" notably to representatives of special interest groups, e.g. the Chamber of Handicrafts (sec 8 para. 4 HwO – Handwerksordnung – Handicrafts Regulation Act) or the Chamber of Industry and Commerce (sec 12 HwO), as well as nature conservation organisations (sec 64 BNatSchG – Bundesnaturschutzgesetz – Federal Nature Conservation Act). The aforementioned requirements need to be met in order to bring a case in first instance. They are neither valid in ordinary appeal nor in a final appeal. In contrast, an appeal necessitates a gravamen which exists if the decision of first instance was to the appellant's detriment. The standing requirement of the first instance can be part of the decision on the merits. To bring an ordinary appeal, permission either of the court a quo or the appellate court is required, sec 124, 124a VwGO. A final appeal necessitates primarily permission by the court a quo. If this is denied, the appellant can force a decision by the appellate court via complaint against non-admission, sec 132, 133 VwGO.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

The requirement of standing stipulated in sec 42 para. 2 VwGO only applies to rescissory actions and actions for mandatory injunction explicitly. However, jurisprudence applies it generally to the other administrative actions, as well. This includes general actions for performance as well as applications for ordering suspensory effect (if the automatic suspensory effect was excluded) or a temporary injunction. According to sec 43 para. 1 VwGO, the admissibility of declaratory actions presupposes only a legitimate interest in prompt declaration. In general, however, the jurisprudence applies the criteria for the identification of subjective rights. A special provision exists for applications for judicial review of by-laws and statutory orders in the field of Federal Building Law as well as legal statutes ranking below the statutes of a Land. According to sec 47 para. 2 VwGO, natural and legal persons have to claim that their rights have been or will be violated within the foreseeable future by the legal provision or its application. This part of the provision is interpreted similarly to sec 42 para. 2 VwGO. However, the rights-based requirement does not apply to public authorities. Their application is admitted if the legal provision is relevant within their field of responsibility – a requirement not foreseen by law, but established by jurisdiction. It has to be noted that the court – in contrast to sec 113 para. 1, first sentence VwGO (see point 2.1.) – exercises always an objective control in this procedure. This is also valid, if the judicial review was initiated by a natural or legal person; there is no limitation to subjective rights at this level.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

In principle, the requirement of standing, stipulated in sec 42 para. 2 VwGO, applies



to any field of administrative law, unless a special procedural rule exists. The codes of procedure in the areas of tax law and social security law contain such provisions dealing with standing.

In this regard, sec 40 para. 2 FGO (Finanzgerichtsordnung – Tax Court Code) corresponds to sec 42 para. 2 VwGO. The same is valid for sec 54 para. 1, second sentence SGG (Sozialgerichtsgesetz – Social Court Code) although its wording varies slightly ("gravamen" instead of "violation of rights"). Sec 55a para. 2, first sentence SGG corresponds to sec 47 para. 2, first sentence VwGO with regard to natural persons (cf. 3.2).

There are generally no specific standing rules applicable to certain types of claims brought before the administrative courts.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

In principle, no; but see the differentiation between natural and legal persons on the one hand and public authorities on the other in the frame of applications for judicial review according to sec 47 VwGO, under point 3.2. Exceptions to the general rule exist in special fields of law for special claims, e.g. for NGOs in the field of environmental law, sec 64 BNatSchG (Bundesnaturschutzgesetz – Federal Nature Conservation Act).

Yes, public authorities can initiate an administrative action against another public authority before an administrative court. For this purpose generally no specific standing requirements need to be met. Regarding disputes between different organs of the same public authority, rights in the sense of standing are those rights to which the organ is entitled due to its function within the public authority ("organschaftliche Rechte").

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No other variations in the standing rules are apparent. See, however, point 8.1.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

Yes, human rights law is also used as a basis for standing. The fundamental rights enshrined in the German Constitution (Basic Law – Grundgesetz) are directly applicable subjective rights and so are the rights laid down in the European Convention of Human Rights and other self-executing international treaties in human rights matters. However, international treaties have only the same status in the domestic hierarchy of norms as ordinary statutes.

If an area of law is concretised by statutory law (as usually), courts search for specific subjective public rights which are laid down in statutory law first, taking into account the criteria of the relevant fundamental or human rights. Thus, basic rights serve two functions: Firstly, they influence the interpretation of statutory law with regard to subjective public rights ("norminterne Wirkung").

Secondly, they can serve as subjective public rights directly themselves – if no basis in statutory law exists ("normexterne Wirkung"). In the field of economic administrative law, e.g., the subvention of a competitor can be challenged under reference to the freedom of competition where necessary (BVerwGE 30, 191 (197 et

seq.); 60, 154 (157 et seq.); cf. also BVerwGE 65, 167 (174); 75, 109 (115)). Nevertheless, the direct recourse to basic rights has declined – especially with regard to the right of property. This is also valid for the former prominent example in the area of building law: According to the Federal Administrative Court, a neighbour could bring a rescissory action against a building permit under reference to his right of property granted in art. 14 GG (Grundgesetz – Basic Law) (see BVerwGE 32, 173 (179); 44, 244 (246); 50, 282 (287 et seq.)). Nowadays, he has to refer to statutory law that regulates the content of property (BVerwGE 89, 69 (78); 101, 364 (373)). In this context, it should be noted that, contrary to the provisions about liberty rights, art. 14 para. 1, second sentence GG provides for a prerogative of the legislator to concretise the content of the property right.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Yes, according to sec 65 para. 1 VwGO, "(a)s long as the proceedings have not yet been finally concluded or are pending at a higher instance, the court may subpoena others ex officio or on request whose legal interests are affected by the ruling" (einfache Beiladung). Thus, the ruling must possibly improve or deteriorate the legal position of the third party. "If third parties are involved in the contentious legal relationship such that the ruling can also only be imposed on them uniformly, they shall be subpoenaed (necessary subpoena)", according to sec 65 para. 2 VwGO (notwendige Beiladung). This means that the requested ruling must simultaneously and directly interfere with the third party's rights, i.e. legal grounds demand necessarily a uniform decision.

In principle, there are no further conditions for subpoena. However, an exception exists for the necessary subpoena, if the subpoena of more than fifty persons is considered. According to sec 65 para. 3 VwGO, the court "may order by issuing an order that only those persons are subpoenaed who so apply within a certain period" (first sentence). The deadline period must be at least three months (sixth sentence). Nevertheless, "(t)he court should subpoena persons who are recognisably particularly affected by the ruling, also without request" (ninth sentence).

According to sec 142 para. 1 VwGO, "(...) subpoenas shall not be permissible in the proceedings on appeal on points of law. This shall not apply to subpoenas in accordance with section 65, subsection 2" (necessary subpoena).

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

In principle, no. The decision is at the discretion of the court, respectively a bound decision in the case of the necessary subpoena. According to sec 65 para. 4, third sentence VwGO, "(t)he subpoena shall be incontestable".

However, the "simple" subpoena may be annulled by the court at its discretion at any time – also on request. The necessary subpoena is to be annulled solely if its prerequisites have not been fulfilled.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

No.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

Mainly for reasons of procedural economy and effective judicial protection German administrative law provides for the joinder of parties and model proceedings. As the multiple sets of proceedings remain legally discrete in both cases, there is no modification regarding standing requirements.

With regard to the joinder of parties (*Streitgenossenschaft*), the provisions of sec 59 to 63 ZPO (*Zivilprozessordnung* – Code of Civil Procedure) shall apply *mutatis mutandis*, according to sec 64 VwGO. The "joinder of parties" means that multiple actions, sets of proceedings and procedural relationships are (solely) joined for hearing, taking evidence and decision.

Sec 93a VwGO deals with model proceedings: "If the lawfulness of an official measure is the subject-matter of more than twenty sets of proceedings, the court may carry out one or several suitable sets of proceedings in advance (model proceedings) and suspend the other sets of proceedings", according to sec 93a para. 1, first sentence VwGO. Sec 93a para. 2 VwGO stipulates: "If a final ruling has been handed down with regard to the proceedings that have been carried out, the court may after hearing those concerned rule on the suspended proceedings by order if it holds unanimously that the cases do not have any major particularities of a factual or legal nature in comparison with other finally-ruled-on model proceedings and facts have been clarified. The court may introduce evidence in model proceedings that has been taken; it may at its discretion order the repeated questioning of a witness or a new expert report by the same or different expert witnesses. The court may refuse motions for the taking of evidence on facts on which evidence has already been taken in the model proceedings if its admission in its free conviction would not contribute to proof of new facts that are material to the ruling and would delay the settling of the dispute. (...)"

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

As sec 42 para. 2 VwGO creates a rights-based model of standing, the general rule is that no (collective) defence of general interests is possible. However, the same provision permits statutory exceptions to this rule (cf. point 3.1). Consequently, the

conditions for a (collective) defence of general interests would also be established by the statute itself.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

Since the principle of a rights-based model of standing (and sec 42 para. 2 VwGO) is valid for the whole area of administrative law, the possibility for the defence of general interests has to be provided for by sector-specific regulations.

Thus, nature conservation organisations are granted a remedy in favour of nature conservation, according to sec 64 BNatSchG (Bundesnaturschutzgesetz – Federal Nature Conservation Act) and respective Land law (cf. also point 3.4).

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

German administrative courts are rather rigorous in the control of the locus standi requirement.

Whether the claimant can refer to a (necessary) subjective public right is determined by the so-called "protective norm doctrine" ("Schutznormtheorie"). Thus, the crucial question is whether a legal provision does not only aim at the protection of public interests, but – at least also – at the protection of individual interests, i.e. the interests of the claimant (BVerfGE 27, 297 (307); BVerwGE 1, 83 (83); 107, 215 (220); 111, 276 (280)). However, according to jurisprudence, a crucial evidence for the quality as protective norm consists in the possible delimitation of a specifically protected group of persons that can be distinguished from the general public (BVerwG, NVwZ 1987, 409 (409); 2011, 613 (614); BVerwGE 78, 40 (43); 94, 151 (158); 101, 157 (163); 130, 39 (41)). This leads to a clear distinction between private and public interests – against the wording of the protective norm definition ("at least also").

The consequences can be illustrated by environmental case-law. In practice, the application of the protective norm doctrine leads inevitably to limited enforceability of norms serving environmental protection. This limited access to justice originates from the fact that environmental protection is of public interest. Regarding the law of the protection against harmful effects on the environment, in principle, only norms serving to avert imminent danger are regarded as protective norms (BVerwGE 68, 58 (60); 80, 184 (189)), whereas an individual has no access to justice with regard to precautionary measures (BVerwGE 61, 256 (267 et seq.); 65, 313 (320)).

Moreover, the infringement of procedural provisions generally qualifies to bring an action only if – at the same time – the infringement of substantive law is possible (BVerwGE 61, 256 (275); 75, 285 (291); 85, 368 (375); 88, 286 (288); BVerwG, NJW 1983, 1507 (1508); 1992, 256 (257); NVwZ 1989, 1168 (1168); 1999, 876 (877)).

- 7.2. Are there significant variations in the courts' approach based on:  
7.2.1. the type of remedy requested?

Such variations are not apparent in the courts' approach (cf. also point 3.2). In contrast, academic literature discusses whether a special standing requirement in the sense of sec 42 para. 2 VwGO is necessary for the declaratory action, as sec 43

para. 1 VwGO demands (only) "a legitimate interest in prompt declaration" (for an overview see Wahl/Schütz, in Schoch/Schmidt-Aßmann/Pietzner, VwGO Kommentar, § 42 Abs. 2, para. 24).

7.2.2. the field of substantive law at hand?

Yes.

Referring to the example of environmental law, the courts have been more lenient and affirmed protective norms and therefore standing with regard to precautionary measures in the field of nuclear and radiation protection law (BVerwGE 61, 256 (264 et seq.); 72, 300, (315) – Wyhl). Similar approaches can be found with regard to genetic engineering law (OVG HH, ZUR 1995, 93; VG Neustadt, NVwZ 1992, 1008 et seq.; VG Gießen, NVwZ-RR 1993, 534 (537)).

7.2.3. the nature of the claimant?

In principle, no.

However, sec 47 para. 2 VwGO itself distinguishes between natural and legal persons on the one hand and public authorities on the other (see point 3.2).

7.2.4. the nature of the claim?

In principle, no.

However, regarding disputes between different organs of the same public authority, rights in the sense of standing are only those rights to which the organ is entitled due to its function within the public authority ("organschaftliche Rechte") (OVG Münster, NVwZ 1990, 188 et seq.; VGH Mannheim, NVwZ-RR 1992, 373 et seq.; see also point 3.4).

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

Yes, courts take into account the abusive nature of a claim to refuse standing, e.g. if a piece of land is bought with the exclusive intention to be granted standing ("Sperrgrundstücke"). According to the Federal Administrative Court, such a property "right" deserves no protection due to its abusive origination (BVerwGE 112, 135).

The variations between different fields of law may result from the importance of the subject matter. High risks arising from complex technologies speak in favour of a more lenient practice with regard to standing in certain fields of environmental law (cf. point 7.2.2).

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

One argument that is often brought forward in support of the rigorous control of the standing requirement is its interrelation with the depth of judicial control. Art. 19 para. 4, first sentence GG (Grundgesetz – Basic Law) stipulates a general right to comprehensive judicial review of state acts with regard to both factual and legal considerations. Therefore, factual considerations regarding the sheer capacity of German courts are a common argument in discussions about standing, e.g. against the standing of NGOs in the field of environmental law.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

Yes.

For example, Directive 2003/35/EC transposing the Aarhus Convention required a widening of the standing rules, since standing had been granted to NGOs only in the field of nature conservation, beforehand. Therefore, the federal legislator enacted the Umwelt-Rechtsbehelfsgesetz (Environmental Remedy Act) which has been judged contrary to the directive by the European Court of Justice on May 12, 2011 (case C-115/09 – Trianel), as it restrains standing of NGOs to the control of protective norms granting subjective public rights to individuals.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No.

Firstly, the general provision for standing, sec 42 para. 2 VwGO, has not been affected.  
Secondly, changes in specific fields of law have generally been restricted to the necessary extent.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

Yes, the courts refer to the principle of effective justice as a component of the "effet utile" in order to interpret the national standing rules quite frequently. As sec 42 para. 2 VwGO is open for interpretation, it does not need to be set aside. The frequent reference by the courts may also be due to the increase of applicants referring to EU law. The "effet utile" is regularly referred to within the scope of application of EU law, if standing is refused according to a pure national perspective. The results vary significantly.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

One decision could be found, in which a court used the right to an effective remedy as enshrined in art. 47 Charter of Fundamental Rights to interpret the national standing requirement (VGH München, VRS 120, 49-64 (2011)).

No decision could be found referring to art. 13 ECHR.

In this context, it should be noted that the right to an effective judicial remedy, enshrined in art. 19 para. 4 GG (Grundgesetz – Basic Law), has been concretised during decades by a rich jurisprudence of the Federal Constitutional Court, establishing high standards of protection. Therefore, the administrative courts refer preferably to the constitutional guarantee.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

No decision could be found.

Cf. point 8.3.2., as the right of access to the court is part of the guarantee of art. 19 para. 4 GG.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

No. These principles of European law have not been used by German courts in order to set aside or interpret the standing rules also outside the scope of application of EU law.

However, there is a broad discussion in scholarship, whether obligatory rules of interpretation in the scope of application of EU law should be extended to national law – which is rather a question of legal policy.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

It should be added that German academic literature has been discussing the rights-based standing requirement stipulated in sec 42 para. 2 VwGO for quite a long time – especially in the context of European Union law. There are strong voices in favour of a wider access to justice, e.g. with regard to environmental law. Furthermore, some administrative courts start to be more lenient in establishing subjective public rights.

However, the majority adheres to the strict rights-based approach as the whole system of legal protection is geared to it (cf. art. 19 para. 4, first sentence GG), e.g. the density of judicial control is very high. A modification of the standing rules would thus affect the whole system.

With regard to Directive 2003/35/EC, the following should be mentioned additionally:

Subsequent to the ECJ's judgment in case C-115/09 – Trianel, the OVG Münster (Higher Administrative Court of North Rhine-Westphalia) annulled the questionable authorisation for the construction and operation of a coal-fired power station, on December 1, 2011 (reference no. 8 D 58/08.AK).

Furthermore, the Federal Administrative Court requested the ECJ to give another preliminary ruling with regard to the directive and the German Environmental Remedy Act (Umwelt-Rechtsbehelfsgesetz), on January 10, 2012 (reference no. 7 C 20.11).

Meanwhile, the German legislator discusses the necessary changes to the Environmental Remedy Act. A draft by the (opposition) faction "BÜNDNIS 90/DIE GRÜNEN" (BT-Drs. 17/7888) will probably be rejected by the parliamentary factions of the government parties (BT-Drs. 17/8876). The government has announced an own draft.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(GERMANY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

The Act on the Organisation of the Judiciary (*Gerichtsverfassungsgesetz – GVG, "AOJ"*) refers criminal jurisdiction to courts on four different levels: District Courts (*Amtsgerichte – AG, "DC"*), Regional Courts (*Landgerichte – LG, "RC"*), Higher Regional Courts (*Oberlandesgerichte – OLG, "HRC"*), and finally the Federal High Court of Justice (*Bundesgerichtshof – BGH, "FHCJ"*). The FHCJ is a federal court; the others are state courts, and the German states (*Laender*) are responsible for financing and staffing (etc.) these courts. However (and unlike the situation in the United States of America) Germany does not recognise distinct "state" and "federal" criminal prosecutions before "state" and "federal" courts; rather, there is a uniform federal legal framework governing criminal prosecution, and state courts apply federal law, in particular the Criminal Code (*Strafgesetzbuch – StGB, "CC"*) and the Code of Criminal Procedure (*Strafprozessordnung – StPO, "CCP"*).

- The DC is the regular court of first instance for low- and mid-level criminality. Misdemeanours will regularly be heard in front of a single professional judge. In more serious cases, one professional judge sits with two lay jurors. DC judgments can be appealed to the RC (*Berufung*, appeal of fact) or the HRC (*Revision*, appeal of law). There are 663 DCs in Germany.
- The RC hears appeals of fact (*Berufung*) from the DC and is the regular court of first instance for grave crimes (e.g. murder or rape). As a court of first instance, the RC decides with either two or three professional judges and two lay jurors, depending on the particularities of the case. RC Judgments can be appealed to the FHCJ (*Revision*, appeal of law). There are 116 RCs in Germany.
- The HRC hears appeals of law (*Revision*) from the DC and is the regular court of first instance for national security cases (e.g. terrorism). As a court of first instance, the RHC decides with three or five professional judges, depending on the particularities of the case. Judgments can be appealed to the FHCJ (*Revision*, appeal of law). There are 24 HRCs in Germany.
- The FHCJ hears appeals of law (*Revision*) from the RC. Decisions are normally rendered by a panel of five federal judges (*Strafsenat*); there are five such panels (with competence for different German regions). For cases of special significance, an *en banc* procedure exists, which is used only sporadically. Decisions are final and are not open to ordinary judicial review; extraordinary remedies can be brought before the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG, "FCC"*) or the European Court of Human Rights (ECtHR).



1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

Generally speaking, the victim is no longer the "object" of a criminal proceeding and a (often central) witness under present German law. Rather, victims have standing as "procedural subjects" (*Prozesssubjekte*) and "independent parties to the proceedings" (*selbstaendige Verfahrensbeteiligte*) and enjoy specific procedural rights stipulated in the CCP as amended by a series of acts focusing on victims' standing, in particular:

- Victims' Protection Act of 18 December 1986 (*Opferschutzgesetz*), Official Journal (*Bundesgesetzblatt – BGBl.*, hereinafter: O. J.) 1986 part I pages 2496 seq.
- Witnesses' Protection Act of 30 April 1998 (*Zeugenschutzgesetz*), O. J. 1998 part I pages 820 seq.
- Act on the Reform of Victims' Rights of 24 June 2004 (*Opferrechtsreformgesetz*), O. J. 2004 part I pages 1354 seq.
- Second Act on the Reform of Victims' Rights of 29 July 2009 (2. *Opferrechtsreformgesetz*), O. J. 2009 part I pages 2009 seq.

The constitutional background of victims' standing can be found in the constitutional principles of human dignity (*Menschenwuerdeprinzip*, Art. 1 § 1 Basic Law [Grundgesetz – GG, hereinafter: BL]) and rule of law (*Rechtsstaatsprinzip*, Art. 20 § 3 BL) but also in the principle of social solidarity (*Sozialstaatsprinzip*, Art. 20 § 1 BL) which requires the criminal justice system to protect and assist crime victims (*Fuersorgepflicht*).

1.2.1. Is there a possibility of private prosecution?

Private prosecution is an exception to the general rule of public prosecution by public prosecution services (*Staatsanwaltschaften*), so-called principle of public or "official" prosecution (*Offizialprinzip*). German law recognises two different forms of private prosecution:

(A) Private prosecution *sensu strictu* (*Privatklage*)

Sec. 374-394 CCP lay down the rules on private prosecution *sensu strictu* (*Privatklage*). It is admissible – only – for offences listed in sec. 374 § 1 CCP (*Privatklagedelikte*), in particular for

- trespass;
- defamation;
- (simple) bodily injury;
- threats;
- (simple) stalking;
- criminal damage to property;
- several economic offences such as taking or offering a bribe in business transactions, offences pursuant to the Act against Unfair Competition, Patent Act, Trade Mark Act etc.

These are minor offences which, as a rule, require the respective victims' request to be prosecuted (see sec. 77 seq. CC, *Antragsdelikte*). The general idea is that, as a

rule, such offences do not merit a public interest in prosecution and may be left to private prosecution. If, exceptionally, there is a prevailing public interest in public prosecution (e. g. in a major case of criminal unfair competition), private prosecution is excluded (see sec. 376 CPP). In all cases, the public prosecution service must or may take over if the court requests it to do so or if it seems appropriate.

The private prosecutor must qualify as an "aggrieved person" (*Verletzter*). For details, see infra 2.2. and 3.2.

In cases of trespass, defamation, (simple) bodily injury, threats and criminal damage to property, a private prosecution may only be brought after a conciliation attempt has failed (sec. 380 § 1 CCP).

The private prosecutor must furnish security for the accused costs and advance fees (sec. 379, 379a CCP).

In all other respects, the private prosecutor must comply with the rules applicable to the public prosecution service. For instance, the written charges must comply with the requirements laid down in sec. 200 CCP, see sec. 381 second sentence CPP. As a matter of fact (not of law), a successful private prosecution requires representation by a professional criminal lawyer which is not covered by legal aid.

In cases of minor or negligible guilt, the court may terminate the proceeding at any stage (see sec. 383 § 2 CCP).

During trial, the private prosecutor may not testify as a witness.

See *Lutz Meyer-Goßner: Strafprozessordnung*, 54<sup>th</sup> ed. Munich: C. H. Beck 2011, note 6 ante sec. 374 with references.

In practice, there are hardly any private prosecutions. Rather, public prosecutions services deal with cases of trespass, defamation, bodily injury etc. by leaving them to the private prosecutor under sec. 376 CCP – in the almost certain expectation that hardly any victim will bring a private prosecution.

#### (B) Private accessory prosecution (*Nebenklage*)

In stark contrast, private accessory prosecution (*Nebenklage*) is an important and widely used instrument of German criminal procedure law. The private accessory prosecutor (*Nebenklaeger*) does not substitute the public prosecution service which remains competent (and is bound) to prosecute. Rather, the private accessory prosecutor supplements the public prosecution and is vested with quite an impressive set of procedural rights enabling him or her to highlight the victim's perspective and to pursue the victim's interests.

It is true that defendants must cope with two (or more) prosecutors if private accessory prosecutors join the proceeding which might raise issues of fairness, effective defence and "equality of arms". However, the German Federal Constitutional Court has consistently rejected constitutional complaints based on these issues.

See FCC, Decision of 3 June 1969 – 1 BvL 7/68, Official Series vol. 26 (1970), p. 66 seq.

The rules on private accessory prosecution are laid down in sec. 395-402 CPP. It is admissible – only – for offences listed in sec. 395 § 1 CCP, in particular

- rape and other sexual offences;
- murder and homicide;
- (grave) bodily injury;
- offences against the personal freedom such as trafficking in human beings, kidnapping etc.;
- (grave) stalking;
- offences pursuant to the Act against Unfair Competition, Patent Act, Trade Mark Act etc.

and offences mention in sec. 395 § 3 CCP, in particular

- (grave) infamations [?];
- (grave) thefts and robbery offences,

if the offence has led to serious consequences (e. g. serious trauma).

The private accessory prosecutor must qualify as an “aggrieved person” (*Verletzter*). For details, see infra 2.2. and 3.2. In murder or homicide cases, children, parents, siblings, spouses or civil partners qualify as private accessory prosecutors, see sec. 395 § 2 no. 1 CCP. Who has successfully compelled public charges under sec. 172 CPP (see infra 1.2.2.) will also qualify, see sec. 395 § 2 no. 2 CCP.

A private accessory prosecutor may join the proceeding at any stage by written declaration of joinder, see sec. 396 CCP.

Following the joinder, a private accessory prosecutor will have more or less the same rights as a public prosecutor including the rights (see sec. 397 § 1 CCP)

- to be present at the trial;
- to make statements;
- to challenge a judge or an expert and object to judicial orders;
- to ask questions;
- to apply for evidence to be taken;
- to appeal the judgement independently of the public prosecution service. However, an appeal is inadmissible if the private accessory prosecutor simply seeks harsher punishment (sec. 400 § 1 CCP).

The private accessory prosecutor may be represented by an attorney. Upon application of the private accessory prosecutor, the court will appoint an attorney as counsel in specifically grave cases which include (see sec. 397a § 1 CCP)

- rape and trafficking in persons;
- murder and homicide;
- grave offences which caused (or are expected to cause) serious physical or mental harm;
- grave offences against minors.

Costs will be paid by the State regardless of the victim’s economic situation. In all other cases, it is possible to grant legal aid for a counsel if a victim cannot afford an attorney and if the case requires representation by an attorney (see sec. 397a § 2

CCP).

1.2.2. Can a victim request review of a decision not to prosecute?

German public prosecutors are, in principle, bound to prosecute a criminal case, so-called principle of mandatory or "legally bound" prosecution (*[prozessuales] Legalitätsprinzip*), see sec. 152 § 2 CCP. However, a formal charge requires "sufficient ground" (*genügenden Anlass*) which means that a conviction is the probable outcome of a trial. If the public prosecutor cannot affirm such a probability (be it for factual or legal reasons), he or she has to terminate the proceeding, see sec. 170 § 2 CCP.

Germany introduced some sort of prosecutorial discretion in 1975, the so-called "principle of opportunity" (*Opportunitätsprinzip*). Under sec. 153 CCP, a public prosecution service may dispense with prosecution if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. Under sec. 153a CCP, public charges may be dispensed with after instructions have been imposed upon the accused (e. g. to pay a fine) if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. Today, these provisions play a major role in keeping public prosecution services functioning, and 10 to 15 % of all proceedings will be settled under sec. 153, 153a CCP.

Decisions to dispense with criminal prosecution under sec. 153, 153a CCP are, in principle, reviewed *ex officio* by the court that would be competent for the trial of the case because that court must expressly state its consent. However, the victim cannot appeal the decision, see sec. 172 § 2 third sentences CCP, which is in conformity with German constitutional law.

See FCC, Decision of 5 November 2001 – 2 BvR 1551/01, *Neue Juristische Wochenschrift* 2002, p. 815-816.

In contrast, the decision to terminate a prosecution under sec. 170 § 2 CCP can be reviewed on the victim's appeal, so-called "proceeding to compel public charges" (*Klageerzwingungsverfahren*), sec. 171 seq. CCP. The proceeding is meant to safeguard the principle of mandatory prosecution and to make allowance for the lack of an effective private prosecution *sensu strictu* (see supra 1.2.1. A). Indeed, the proceeding is not available insofar as private prosecution is admissible – so that the public prosecutor's decision to leave a case to private prosecution (see sec. 374 CCP) cannot be reviewed under sec. 171 seq. CCP. On the whole, it cannot be said that the proceeding is meant to serve victims' interests, and the German Constitution does not imply a victim's right that an offender will be prosecuted (*kein Anspruch auf Strafverfolgung*).

See FCC, Decision of 28 March 2002 – 2 BvR 2104/01, *Neue Juristische Wochenschrift* 2002, p. 2859-2860.

As a matter of fact, proceedings to compel public charges are lengthy, complicated and rarely successful.

The public prosecution office must notify the victim of the decision not to prosecute but only if the victim is also "applicant" (*Antragsteller*) which means that he or she has formally requested a criminal prosecution, see sec. 171 CCP.

The next step is the victim's formal complaint against the decision not to prosecute, see sec. 172 § 1 CCP. The complaint must be lodged within two weeks in writing. It will be dealt with by the general public prosecutor who, as a rule, will dismiss the complaint.

The victim who does not accept the dismissal must apply for a decision by the HRC. The application must be lodged within a month, must be signed by an attorney and must indicate the facts and the evidence which is brought in favour of a public charge. The victim has a cost risk and must furnish security (see sec. 176, 177 CCP).

Given an admissible application, the HRC proceeds and, as case may be, investigates the case. The court may order preferment of public charges (sec. 175 CCP), or, as a rule, dismiss the application (sec. 174 CCP).

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

(A) Compensation

Following a model found in Austrian law, Germany introduced the so-called "adhesion proceedings" (*Adhaesionsverfahren*) in 1943. Under sec. 403 CCP, the aggrieved person or his or her heir may, in criminal proceedings, bring a claim for compensation of damages arising out of the offence against the accused if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court. In other words, the victim has the choice whether to sue the perpetrator before a civil court or bring the compensation claim before the competent criminal court. However, it turned out that criminal courts were not able or willing to deal with civil claims, and the "adhesion proceedings" remained law in the books – which is true until today although it must be admitted that recent reforms removed several practical obstacles, e. g. by admitting settlements in respect of the claims.

It is not easy to identify the reasons for the practical irrelevance of the "adhesion proceedings". Legal scholars argue that the very structure of the German criminal proceedings which follow a "mixed inquisitorial model" is incompatible with the principles of German civil proceedings which follow an "adversarial model", and that civil law and civil procedure comprehend concepts (such as reversals of the burden of proof) which are incompatible with criminal law and criminal procedure. Criminal court magistrates say that they hesitate to enter into a debate of extent of damage or contributory negligence or, as case may be, complicated civil law problems (such as joint obligation of parties to the offence).

The aggrieved person must apply for compensation in writing or recorded by the registry clerk and specify the subject of, and the grounds for, the claim and the evidence (see sec. 404 CCP). As a matter of fact, representation by an attorney is essential, and legal aid may be granted according to civil proceedings rules (see sec. 404 § 5 CCP).

Provided that both aggrieved person and accused consent, a settlement in respect of the claim may be included in the court record. Such a settlement has the effect of

a (final) judgement in a civil litigation.

If a settlement cannot be achieved, the criminal court must formally decide on the application if it is "suitable to being dealt with in criminal proceedings" (sec. 406 § 1 fourth sentence CCP) – that being not the case where the examination of the claim "would considerably protract the proceedings" (fifth sentence). The court's decision may be limited to the ground for, or part of, the asserted claim. The decision can be appealed even without contesting the part of the judgement which concerns the criminal offence (see sec. 406a § 2 CCP).

The execution of a (positive) decision on a compensation claim in criminal proceedings or a settlement is governed by the provisions which apply to the execution of judgements or settlements in civil litigation, that is to say by the Code on Civil Procedure.

(B) Other measures

(B1) Witness protection

Victims will often be central witnesses against defendants, and defendants can be dangerous persons. Therefore, witness protection is an important part of victim protection. The German CCP offers various possibilities, among them

- recording the witness examination on an audio-visual medium (see sec. 58a CCP) which can substitute the witness interrogation during trial (see sec. 255a CCP),
- revealing wholly or in part the witness' identity or place of residence or whereabouts if otherwise the witness' or another person's life, health or liberty would be endangered (see sec. 68 §§ 2-5 CCP),
- rejecting questions concerning degrading facts and, as case may be, prior convictions (see sec. 68a CCP),
- assigning legal counsel to a victim (see sec. 68b CCP).

(B2) Freezing defendant's assets

Freezing defendant's assets has become a standard prosecution measure in order to enforce the confiscation rules applicable in many criminal cases (see sec. 73 seq. CC). An asset freeze can also be in the victim's interest because it facilitates the execution of compensation claims or even, in the first place, makes it possible. Therefore, public prosecution services may seize and freeze assets if there are grounds to assume that the victim has a compensation claim, see sec. 111b § 1 and § 5 CCP. On the other hand, seizures effected by victims through civil courts have priority over criminal seizures (see sec. 111g, 111h CCP).

(B3) Return of movable assets

Where movable assets which have been stolen, robbed etc. have been seized, such assets shall be returned to the victim if his or her identity is known, if the claims of third persons do not present an obstacle and if the assets are no longer required for the purpose of the criminal proceedings (e. g. as evidence), see sec. 111k CCP.

(B4) Notification of the outcome of the criminal proceedings

Until 1986, a victim learnt about the outcome of the criminal proceedings either through own efforts (e. g. by attending the trial) or by chance. It was a major progress when, in 1986, Parliament introduced sec. 406d CCP which stipulates that a victim (aggrieved person) must, upon application, be notified of the outcome (including a possible termination) *ex officio*. Since 2004, the notification also includes the termination (or relaxation) of custodial measures (see sec. 406d § 2 no. 2 CCP).

(B5) Access to files

Access to files may be useful for victims, in particular if they plan to claim compensation before civil courts. Under sec. 406e CCP, victims have, in principle, a right to inspect the files (and also the evidence) through an attorney at any stage of the criminal proceedings. Access to files can be refused if the investigation would be tainted or if the accused's or third parties' legitimate interests outweigh the victim's legitimate interests. An interesting problem is if holders of copyrights can inspect the files in criminal proceedings for copyright infringements where thousands of file-sharers are identified through their IP-addresses. The majority of German courts hold that it is disproportionate to grant access to the criminal files insofar "petty offences" – that is to say the occasional download of copyright-protected material – are concerned.

See *Lutz Meyer-Goßner*, op. cit., sec. 406e note 6c with references.

(B6) Legal counsel

Victims (aggrieved persons) may avail themselves of the assistance of an attorney or be represented by such attorney, see sec. 406f § 1 CCP. That is also true for victims who are entitled to join the criminal proceeding as private accessory prosecutors even if they decide not to join the proceeding, see sec. 406g CCP.

(B7) Information

See *infra* 1.3.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

Civil courts have jurisdiction on any claim arising from criminal offences because such claims are of a civil law character, see sec. 823 § 2 German Civil Code.

Criminal courts have a concurrent jurisdiction on such claims in the framework of the "adhesion proceedings" under sec. 403 seq. CCP, see *supra* 1.2.3. (A).

Conflicts of jurisdiction do not arise because the principles of *lis pendens* and *res iudicata* apply: Once a claim is brought in a civil responsibility criminal court, the criminal responsibility civil court can no longer exercise its jurisdiction; and once a final decision is taken, neither another civil nor criminal court may be seised.

As a matter of fact, most compensation claims in Germany are dealt with by civil

courts. Civil courts are not legally bound by decisions taken by criminal courts: Even if a criminal court has convicted, a civil court may or may not be convinced that the defendant is guilty of a criminal offence. Indeed, there have been cases where civil courts dismissed victim's claims arguing that a criminal offence could not be proven and thus enforcing the re-opening of the criminal case.

On the other hand, it should be noted that German law allows victims to (ab-)use the criminal justice system as an investigation tool which – free of costs – delivers facts and evidence needed in a civil litigation.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

Under sec. 406h CCP, aggrieved persons shall be informed as early as possible, as a rule in writing, and as far as possible in a language they understand, of their rights and also of the fact that they may

- join the public prosecution as private accessory prosecutors and thereby apply to have legal counsel appointed for them or to have legal aid granted for calling in such counsel;
- assert a property claim arising out of the criminal offence in criminal proceedings;
- assert a claim for benefits in accordance with the Crime Victims Compensation Act;
- apply for the issue of orders against the accuse accordance with the Act on Civil Law Protection against Violent Acts and Stalking;
- obtain support and assistance through victim support institutions, e.g. in the form of counselling or psychosocial support during the proceedings.

Where the prerequisites for a certain right have obviously not been fulfilled in a particular case, the information concerned may be dispensed with. There shall be no duty to inform aggrieved persons who have not specified any address to which documents can be served.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

"Standing" or "locus standi" is a somewhat facetious and not universally acknowledged common law concept meaning the right to bring an action, to be heard in court, or to address the court on a matter before it. Traditionally, standing requires injury, causation and redressability. In contrast, third parties' interests and generalised grievances do not give rise to standing; for instance, a taxpayer does not (at least not in principle) have standing to enforce taxes to be spent adequately or even legally before a court.

As a matter of terminology, we do not find an equivalent in German law and/or legal doctrine (and, as far as I know, nor in most continental jurisdictions). As a matter of substance, German law and/or legal doctrine do offer functional equivalents such as the procedural concept of *Klage-* or *Prozessfuehrungsbefugnis*. However, these concepts do not play a distinct role in the field of victim rights. Once it is established



that a person an aggrieved person (*Verletzter*), the procedural instruments on such persons will apply regardless of an additional requirement of *Klage-* or *Prozessfuehrungsbefugnis*. In the terminology used in United States of America legal doctrine, a victim's resp. aggrieved person's "standing" or "locus standi" would be "automatic". On the other hand, such instruments are not available to persons who do not qualify as aggrieved regardless of their "standing" or "locus standi". Indeed, the idea that any citizen – "quivis ex populo" – or, as case may be, pressure groups acting in public or private interest might intervene in criminal proceedings on behalf of victims is alien to German legal thought. "Popular action" (*Popularklage*) is deliberately excluded in German criminal procedure law; the same is true for any kind of "class action" in the criminal context. Rather, German lawmakers have trust in public prosecution services and believe that those services will take adequate choices when deciding which cases to prosecute, and that they will also act in the interest of any victim resp. aggrieved person.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

A victim's standing follows automatically from the status as a victim. However, "victim" (*Opfer*) is not a technical legal term in German criminal procedure law (although it is used in the titles of the respective acts). Rather, victims' rights and remedies depend on being an "aggrieved person" (*Verletzter*).

There is no statutory definition of who is an aggrieved person. It is also noteworthy that the EU victim definition in Art. 1 (1) Framework Decision 2001/220/JHA does not play a significant role in interpreting the concept of aggrieved person (see *infra* 5.).

However, there is an almost universally accepted jurisprudential definition:

See the references in: *Lutz Meyer-Gobner*, *op. cit.* sec. 172 note 9.

Aggrieved person is a person who – assuming that the offence has been committed as stated by that person – has suffered direct (*unmittelbar*) harm in a legal interest protected by the respective criminal prohibition (*geschuetztes Rechtsgut*). A person who has suffered indirect harm will not qualify as aggrieved person – e. g. an employer who suffers pecuniary damage because his employee has been assaulted and cannot meet an urgent deadline for a contract –, or a person who has suffered harm in a legal interest not protected by the respective criminal prohibition – e. g. an honest tax payer would not qualify as an aggrieved person in respect of tax fraud committed by a dishonest tax payer.

Per se, the victim's family members do not qualify as aggrieved persons. However, family members who are the deceased victim's heirs have standing to apply for compensation in criminal proceedings (see sec. 403 CCP), and they may join a criminal proceeding as private accessory prosecutors (see sec. 395 § 2 no. 1 CCP).

Legal persons can qualify as aggrieved persons if they meet the general

requirements. For instance, a defrauded corporation would qualify as aggrieved person in respect of fraud. However, German law does not recognise non-governmental organisations as aggrieved persons even if such organisations promote the affected legal interests. And German courts are hesitant to recognize governmental organisations as aggrieved persons even if their task is the administration of the respective legal interest. For instance, environmental authorities are not aggrieved persons in respect of environmental offences, nor are state authorities aggrieved persons in cases of corruption.

See, for details, *Lutz Meyer-Goßner*, op. cit., sec. 172 note 12.

The idea of legal persons (including governmental or non-governmental organisations) representing the interests of victims before a criminal court has not (yet) been considered by German law and legal doctrine.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

German legal doctrine underlines that there is no uniform concept of "aggrieved person" but that the specific meaning of that concept is a question of interpretation and depends – in particular – on the specific type of remedy.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

- review of a decision not to prosecute:

Standing requires qualification as aggrieved person and a report of the offence to state authorities. The review proceedings will be launched even if there is no evidence at all for the victim status of the person seeking a review.

- private prosecution:

Standing requires qualification as aggrieved person and an offence listed in sec. 374 CCP (see supra 1.2.1.). A trial will follow if there is sufficient evidence that a conviction seems probable (*hinreichender Tatverdacht*).

- private accessory prosecution:

Standing requires qualification as aggrieved person and an offence listed in sec. 395 § 1 CCP (see supra 1.2.2.). The joinder requires a formal accusation by the public prosecution service which means that there is sufficient evidence so that a conviction seems probable (*hinreichender Tatverdacht*).

- compensation claim

Standing requires qualification as aggrieved person and possibility of a compensation claim. In contrast to the general legal concept of aggrieved person (see supra 2. ), indirect harm which caused pecuniary damage is sufficient. For instance, a company that has rented premises would be able to raise a

compensation claim in a criminal prosecution for arson if the offence would have resulted in losses in production.

See *Lutz Meyer-Goßner*, op. cit., sec. 403 note 2 with references.

- access to files

Standing requires qualification as aggrieved person without any evidentiary basis which has led to abusive access request (See *Lutz Meyer-Goßner*, op. cit., sec. 406e note 3 with references.)

and raised difficult legal questions, for instance whether an investor who claims damages in a market manipulation case is "aggrieved person", ( see FCC, Decision of 4 December 2008 – 2 BvR 1043/08.)

- 3.3. Are there specific standing rules applicable to certain types of claims?

The type of claims does not play a role under German law.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

See supra 2. 2. Legal persons do not have standing insofar legal interests of a highly personal nature are concerned. For instance, a medical relief organisation would not have standing in a criminal proceeding against terrorists who killed a member or employee of the organisation.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

cannot be identified.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

Human rights law has no marked influence on locus standi requirements under German law.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

On the whole, courts share the victims-friendly attitude which lies at the base of current German victim rights law. However, we find certain variations (see below).

- 4.2. Are there significant variations in the courts' approach based on:

- 4.2.1. the type of remedy requested?

- review of a decision not to prosecute

It is generally said that German courts are quite lenient to qualify a victim as aggrieved person under Art. 172 CCP because the review proceedings serve the principle of procedural legality. In practice, the formal requirements stipulated in sec. 172 CCP are not easily met, and many review requests are inadmissible for formal reasons.

- private prosecution

See supra 1.2.1. (A). In court practices, private prosecution *sensu strictu* hardly exists.

- private accessory prosecution  
is a quite normal proceeding if its requirements are met.

4.2.2. the nature of the claimant?

See supra 3.4.

4.2.3. the nature of the claim?

See supra 3.3.

4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

Complexity of civil law matters plays a major role in the decision whether to admit a civil compensation claim in a criminal proceeding.

4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

German courts (and public prosecution services) are aware that lenient standing requirements imply a higher level of victims' participation which might result in a certain burden for the criminal justice system. However, and setting the critical question of access to files aside, there is no tendency towards strict standing requirements to ease the workload.

The idea that civil compensation should be dealt with in a criminal proceeding in order to ease the workload for civil courts is not alien to German courts. However, many criminal judges feel that civil law questions should be dealt with by the competent and experienced civil courts.

## 5. Influence of EU law

5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

At an academic level, the (possible) influence of EU law – for the time being, in particular Framework Decision (FD) 2001/220/JHA of 15 March 2001 (O. J. L 83 p. 1) – on German victims' rights law has been recognised in various articles, among others

*Christoph Safferling: Die Rolle des Opfers im Strafverfahren, Zeitschrift fuer die gesamte Strafrechtswissenschaft (ZStW) vol. 122 (2010) p. 87-116 (in particular 91-93).*

Lawmakers have been aware of EU law's influence since 2001. However, it has not really been a decisive moment of the German victims' rights reforms 2004 and 2009:

- In the travaux préparatoires for the 2004 reform, it has been said that the drafts would take up the "momentum" created by the FD

2001/220(JHA, see German Federal Parliament (*Deutscher Bundestag*), Doc. 15/1976 of 11 November 2003 p. 1, 7. However, no specific draft rule referred to any specific article in the FD.

- In the travaux préparatoires for the 2009 reform, the "momentum"-formula has been repeated, see German Federal Parliament, Doc. 16/12098 of 3 March 2009 p. 9. However, only a minority of the specific draft rules referred to specific articles in the FD 2001/220/JHA:
  - o (Draft and final) sec. 158 § 3 CCP is a transposition of Art. 11 § 2 FD 2001/220/JHA.
  - o (Draft and final modification of) sec. 406h CCP is a transposition of Art. 4 FD 2001/2001/JHA.

Insofar German criminal procedural law protects "children", the classical definition was "persons younger than 16 years". Since the 2009 reform, it is "persons younger than 18 years" – a modification which relied on EU law expressly.

#### 5.1 --

See supra 5. German victims' rights law has been developed largely without specific reference to EU law. In substance, many rules we find in today's German law are required by EU law, in particular by FD 2001/220/JHA. The following list is not exhaustive:

- Art. 2 § 2 FD – sec. 58a, 68, 255a CCP
- Art. 3 § 2 FD – sec. 68a CCP
- Art. 4 § 1 FD – sec. 406h CCP
- Art. 4 § 2 FD – sec. 406d CCP
- Art. 7 FD – sec. 471-472a CCP
- Art. 8 FD – sec. 58a, 68, 255 CCP
- Art. 9 FD – sec. 403 seq. CCP
- Art. 10 FD – sec. 46a CC
- Art. 11 FD – sec. 158 § 3 CCP

#### 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

See supra 5. The victims' rights reform 1986 was not (yet) required by EU law, and neither were many aspects of the 2004 and 2009 reforms.

#### 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

As EU principles and rights, these principles and rights do not play a significant role in German legislation or jurisprudence or even academic doctrine regarding victims' rights and victims' locus standing.

Rather, the discussion focuses at the national constitutional law level. Insofar, victims have a right to effective judicial protection of fundamental rights, the right to an effective remedy if such rights have been infringed upon and the right of access to court, see Art. 19 § 3 BL. However, there is no constitutional victim's right to participate actively in a criminal proceeding and enforce criminal prosecution.

See FCC, Decision of 28 March 2002 – 2 BvR 2104/01, Neue Juristische Wochenschrift 2002, p. 2859-2860.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Victims' rights and victims' protection are firmly rooted in today's German criminal policy and discourse. It goes without saying that victims may actively participate in criminal proceedings and must be protected from unwarranted burdens or secondary traumatisations.

There is a German national victim support organisation founded in 1976 – *Weisser Ring. Gemeinnütziger Verein zur Unterstützung von Kriminalitätsopfern und zur Verhütung von Straftaten e. V.* – which is very active and highly influential.

And there are many lawyers (barristers) who have specialised in victims' representation.

On the other hand, a certain criticism is on the rise both in German legal doctrine and practice but also in politics and public discourse. Defence lawyers and criminal law professors have long argued that victims' rights might be a Trojan horse to reduce or even abolish defendants' rights, and that the precarious equality of arms

between prosecution and defence in a criminal proceeding might suffer if the victim's position would be too strong. Following recent spectacular criminal proceedings (such as the Dominique Strauss-Kahn case or the Joerg Kachelmann case\*), it has become very clear to the German public that a person reporting to be victim of a crime need not be a real victim and must – as long as the presumption of the defendant's innocence is in place – only be assumed to be a victim, and that such an assumed victim might turn out to be guilty of lies, defamation and (attempted) fraud.

The central locus standi problem of allocating rights and standing to persons on the mere assumption that they are victims – a problem much discussed in international criminal procedure – has just begun to be discussed in Germany.

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\* Joerg Kachelmann is a well-known Swiss TV presenter who was charged with grave rape by the Mannheim public prosecution service but finally acquitted on 31 May 2011 after the reporting woman's credibility had severely suffered before and during trial. Afterwards, Kachelmann sued the reporting woman and also boulevard media. He has achieved a remarkable victory when *Oberlandesgericht Koeln*, Judgement of 14 February 2012 – 15 U 123/11, 15 U 125/11 und 15 U 126/11 (not final) convicted the leading German tabloid Bild that its coverage of the Kachelmann proceeding was intrusive and illegal.

## HUNGARY

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (HUNGARY)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

As a result of the justice reform of 2011, the names of courts have changed in Hungary (Act CLXI of 2011 on the Organisation and Administration of Courts). In addition, the reform has also brought about some structural changes in the court structure. Thus, beginning from 1 January 2012, the Hungarian court system continues to have four levels and the system of civil remedies ensures one level of appeal. The lowest level courts are the **local courts** (*helyi bíróság*), the name of which will change to district courts (*járásbíróság*) with effect from 1 January 2013. In the 23 districts of the capital, Budapest, there are six district courts (*kerületi bíróság*), each serving as proper venue for several districts of the capital. There are, at present, 111 local courts. The second level is constituted by the 19 **courts of justice** (*törvényszék*) and the Metropolitan Court of Justice (*Fővárosi Törvényszék*). Before the justice reform, the courts of justice were called county courts (*megyei bíróság*) and the Metropolitan Court of Justice Metropolitan Court (*Fővárosi Bíróság*). The five **courts of appeal** (*ítélőtábla*) were inserted in the court system in two stages (in 2003 and 2005) as the third level. And finally, at the top of the hierarchy is the **Curia** (*Kúria*), which replaced the Supreme Court following 1 January 2012. Cases are tried at first instance by the local courts (district courts after 2013), the courts of justice or the labour courts (for more details about these specialised courts see: 1.2). In civil cases, local courts have general first instance jurisdiction. Appeals against the first instance decisions of local courts and labour courts are decided by the courts of justice as courts of second instance. Cases falling within the first instance jurisdiction of the courts of justice can be appealed to the courts of appeal. Review petitions are heard by the Curia [Section 10 of Act III of 1952 on the (Hungarian) Code of Civil Procedure; hereinafter: HCCP]. However, the Curia may also serve as a forum of appeal within a narrow circle of cases. In addition, the Curia ensures the uniformity of judicial practice and, as of 1 January 2012, has a supervisory function over the legislative activities of the local governments (municipalities).

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

**Labour courts** (*munkaügyi bíróság*) have functioned as first instance courts since 1973. Despite the fact that their area of jurisdiction (venue) extends to a whole county, they exclusively try cases at first instance. The adjudication of appeals against the decision of labour courts forms part of the tasks of the courts of justice. Labour courts try cases arising from employment relations and employment contracts, review social security decisions and specific administrative decisions relating to employment, and proceed in other cases falling within their subject-matter jurisdiction by provision of law. After 1 January 2013, labour courts will continue to function as administrative and

labour courts (*közgazgatási és munkaügyi bíróság*). The jurisdiction of those specialised courts will extend to matters currently falling within the jurisdiction of labour courts (labour matters) and cases of judicial review of administrative decisions. Appeals submitted against the decisions of the administrative and labour courts will be tried by the courts of justice.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

Traditionally, the following cases fall within the jurisdiction of civil courts: civil law disputes, family law disputes, employment disputes, cooperative disputes and the review of administrative decisions as well as other legal disputes specified by law (e.g., legal disputes relating to the exercise of the right of assembly or to the economic management of political parties, etc.). As a result of the justice reform, this list has been supplemented by the following matters: review of the decrees (bye-laws) of local governments and establishing the local government's failure to fulfil its obligation to legislate, make a decision or carry out its tasks. In the case of some civil law disputes (e.g., trespass, indemnification for expropriation, damage caused by wild animals, damage caused by mining activity, specific cases of industrial property rights protection, etc.), in response to the practical needs, the legislator permits other authorities to proceed in the first place. However, following the decision of the dispute by those authorities, parties are generally able to submit the dispute for final resolution to a court, if necessary.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

As a rule, there are no special standing requirements in Hungarian civil procedural law. Pursuant to Section 3(1) HCCP, the court shall decide the parties' dispute only if so requested; unless otherwise provided for by law, such request may only be submitted by a party interested in the dispute. Despite the explicit requirement of being interested in the dispute, for the institution of an action it is in fact sufficient if the claimant alleges that he has a right or legal interest which has been prejudiced (or is threatened) by the defendant (i.e., if he alleges that he has an interest in the outcome of the dispute). Whether or not the claimant indeed has a claim against the defendant based on the alleged injury of (or threat to) his right or legal interest is a question on the merits. Standing [*locus standi*] is thus, apart from some exceptions, not a distinct procedural requirement and is not conditioned on the actual existence of a material right or an interest in the enforcement of the claim. The actual existence of a material right and the need for protection of that right are only necessary for winning the case. The right to bring an action is accordingly regarded to be an abstract right. The roots of this conception go back to Hungarian civil procedural theory (see: 2.2).

The HCCP enumerates all of the obstacles in the presence of which the court shall dismiss the claim *a liminelitis*, without examining it on the merits (Section 130(1) HCCP). Obstacles to bringing an action are generally of procedural character, such as, for example, the court's lack of jurisdiction or the case of *res judicata*, but such obstacles may also be of substantive law character, such as, for example, the premature institution of an action. Under Section 130(1) HCCP, the lack of standing is an obstacle to the examination of the claim on the merits only if, in the given case, there are certain special standing requirements that have not been met. More

specifically, if an action may be brought only by a person defined by law and the action was brought by another person, the court shall dismiss the claim without issuing a writ of summons. Similarly, if an action may be brought only against a person defined by law or specific persons must be involved in the proceedings (either as claimants or as defendants), and the claimant fails to involve this person (persons) in the action, in spite of being so ordered, the court shall dismiss the claim without issuing a writ of summons. In such cases, standing is a distinct procedural requirement. For instance, an action for dissolution of a marriage may only be brought by the spouses against each other or in the case of an action for the termination of joint ownership of immovable property all of the co-owners must be involved in the lawsuit.

Under Hungarian law the general rule is that everyone is entitled only to enforce his own rights and interests before the court. In certain cases, however, a third person, who is not involved in the dispute, may (also) bring an action to enforce the claim of a person who is directly involved in the dispute, provided that such third person is authorized to do so by law (e.g., in some cases, the public prosecutor, certain organisations of interest representation, certain public authorities, etc.) (see Supreme Court, BH1997. 199).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

The greatest influence on Hungarian legal theory was exerted by Sándor Plósz' theory of the abstract right of action (1876). Plósz regarded the right to bring an action as a public (procedural) law right based on which the state may be required to institute proceedings and the defendant may be obliged to engage in the lawsuit. For the institution of an action, the private (material) right does not have to exist, it is enough if the claimant alleges its existence. Plósz' theory may also be transposed into present-day judicial practice: if the statement of claim complies with the statutory requirements, the court is obliged to proceed in the case regardless of whether the claimant has an enforceable substantive right or not. If the claimant has suffered no real rights injury caused by the defendant, the court shall dismiss his claim on the merits (i.e., in its judgment), which will result in *res judicata*. In cases where the law defines special standing requirements (i.e., the action may be brought only by and/or against certain specific persons), standing is generally related to both the nature of the claim and the relation between the parties (e.g., an action for dissolution of a marriage may only be brought by the spouses against each other).

*Locus standi* in the case of an appeal causes no difficulty either for academic legal literature or legal practice as a result of the unambiguous formulation of the HCCP. An appeal may be lodged by any of the parties and the intervener against the whole decision, or a part thereof, or, finally, by any other person to whom any provision of the decision may be of concern, against that very provision (Section 233 HCCP). Parties are entitled to an independent right of appeal, which does not depend on the appeal of the other right holders. In the case of a joinder of parties, each claimant or defendant has a separate right to appeal. In contrast, the intervener is entitled to a contingent right of appeal, which depends on the party supported by him. The intervening party may appeal only to cover for the party's omission to do so and if it does not contradict the party's appeal. In the opposite case, the intervening party's appeal is without any legal effect. However, these rules are not applicable to the so-called independent intervener (see: 3.5), whose acts are valid even if contradicting

those of the party supported by him (57 HCCP). The prosecutor's right of appeal is adjusted to his right to bring an action (see: 3.4.).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Under Hungarian procedural law, standing (i.e., the right to bring an action) is related to, but is not necessarily identical to (active and passive) legitimation. Legitimation is mostly a matter of substantive law and is thus decided on – affirmed or denied – in the judgment. The claimant has active legitimation and the defendant has passive legitimation if the claimant is entitled to the right that he is enforcing against the defendant, or to put it in a different way, if the substantive law relationship does in fact exist between the litigants and the subject-matter of the lawsuit (substantive law aspect of legitimation). In order for the claimant to win the case, both the active and the passive legitimation must be given. In contrast, in order to bring an action (i.e., to have standing), it is usually sufficient if the claimant alleges that he is entitled to the right that he is enforcing against the defendant. The most-often cited example for this is when, in an action for damages, the court declares that it was the defendant who caused the damage to the claimant, the amount of which is not disputed, but in spite of this, the court rejects the claim because the damage was caused by the defendant as an employee, in connection with his employment, and, therefore, the employer is liable for the damage under Section 348(1) HCC. In this case, the defendant turned out not to have passive legitimation, but this did not affect the claimant's standing, that is, his right to bring an action for damages against the defendant.

However, less frequently, legitimation may be a question of procedural law as well, not only a question of substantive law (procedural legitimation). This is the case when an action may be brought only by a specific person authorised by law to do so and/or against a person specified by law; such restrictions are more often encountered in connection with actions relating to personal status (see: point 3.3). In such cases, legitimation qualifies as a precondition for bringing an action, and the court must examine already at the time of the filing of the statement of claim whether the action has been brought by a person authorised by law to do so or whether it has been brought against a person against whom the law permits to bring such an action. The lack of legitimation in these situations results in the dismissal of the claim without the issue of summons or in the termination of the proceedings. Standing and procedural legitimation are the same and they are an issue only if an action may be brought only by a specific person authorised by law to do so and/or against a person specified by law.

The rules relating to the **right of appeal** are contained in Section 233(1) HCCP. In accordance with this subsection, an appeal may be filed by the party, the intervener, and by any person to whom any provision of the decision may be of concern, against that very provision (for more details, see: point 2.2).

No permission of the court a quo or of the appellate court is required in order to bring an appeal.

A **review petition** may be filed by the party, the intervener, and by any person to whom any provision of the decision may be of concern, against that very provision.

A petition for review may not only be submitted against the final judgment or, in non-contentious matters, a final order made on the merits of the case but also against specific court orders including an order dismissing the claim without the issue of summons or an order terminating the proceedings.

The so-called "negative" list enumerating the matters excluding review has been slightly altered. Here, in the majority of cases, restriction is linked with the subject-matter of the case. In standard civil law cases [i.e., in proceedings that are not subject to any such special procedural regimes as, e.g., the ones adopted for family law cases, actions for the judicial review of administrative decisions, etc.], where the amount disputed in the review petition does not exceed one million Forints (ca. 3200 EUR), review is not possible. The Constitutional Court has examined the constitutionality of setting a value limit as a condition for the review, being an extraordinary legal remedy, several times and it has not found the earlier value limits of 200.000 Forints (ca. 640 EUR) and 500.000 Forints (ca. 1.600 EUR) unconstitutional.

In certain matters, review is possible only if the first and second instance courts have taken a different stand on the case. Thus, for instance, in lawsuits concerning the rights of neighbours or the protection of property possession, in certain enforcement cases and actions relating to the custody and change in the custody of children and the regulation of visitation rights review is not possible – if the decision of the first instance court has been upheld by the second instance court.

The HCCP makes the **re-trial** procedure possible on the following grounds (Section 260 HCCP):

- a) if the party refers to a fact or evidence or a final decision of a court or other authority, which was not considered during the lawsuit by the court, provided that – in case of consideration – it would have resulted in a decision more favourable for the party (*novum*);
- b) if the party lost the case contrary to the law owing to a criminal act committed by the judge participating in the passing of the judgment or by the opposing party or some other person (*crimen*);
- c) a final judgment had previously been adopted relating to the same right (*res judicata*);
- d) if the statement of claim or any other document were served upon the party by way of public notification in violation of the rules on service of process by public notification.

Act XLV of 1999 supplemented the grounds for retrial with a further case, the aim of which was to provide the party with legal remedy in the particular case when the Constitutional Court grants a constitutional complaint and retroactively excludes the applicability of a legal provision declared to be unconstitutional in the given case. The court shall examine *ex officio* whether the conditions for re-trial are satisfied. The court may address the admissibility of the re-trial during the re-trial hearing on the merits, as a preliminary question. However, if it appears more reasonable, the court shall hold a hearing separately regarding the admissibility of the retrial and shall decide by way of a separate order on this preliminary question. [Section 266 HCCP]

3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

As discussed above (see: 2.1, 3.1), as a rule, Hungarian civil procedural law does not provide for special standing requirements, the claimant's allegation of an injury of his right by the defendant suffices. In cases where an action may be brought only

by and/or against certain persons, the standing requirements are dependent on the subject-matter of the action rather than on the type of remedy requested. However, depending on the type of remedy requested, there may be certain special substantive law requirements, in addition to the standing requirements. The non-compliance with those requirements results in the rejection of the claim on the merits, except for the case of prematurity of an action for performance.

Three basic types of action are distinguished in Hungarian civil procedural law.

**Actions for performance** – directed at giving something (*dare*), doing or refraining from doing something (*facere* or *non facere*) or fulfilling warranties or other commitments (*praestare*)– are admissible only to enforce overdue claims. In case of lawsuits pertaining to maintenance, benefits or other periodical performances, an action for performance may also be brought with regard to performances that have not become due yet. The claim for the return of a flat or other premises or some other immovable property may be submitted before the date when the obligation to return becomes due provided that premises shall be returned on a specific date [Section 122 HCCP].

An **action for declaratory judgment** is permitted by law only if the declaratory judgment sought is necessary for the protection of the claimant's rights against the defendant and the claimant cannot seek performance by the nature of the legal relationship or because the deadline for performance of the obligation has not yet expired, or for some other reason [Section 123 HCCP].

By instituting a **constitutive action**, the claimant requests the court to establish, modify or terminate some legal relation. A constitutive action may be brought only in cases where it is expressly permitted by law.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

A special characteristic of **actions relating to personal status** is that such actions may only be brought by specific persons authorised by law to do so. If the claimant cannot verify his right to bring the action, the court will dismiss the claim without the issue of process (see also: 2.1, 3.1). Thus, for example, an action for the dissolution of a marriage may only be brought by one of the spouses against the other spouse; an action for the annulment of a marriage may be brought by the spouses, the public prosecutor, and any other person who has a legal interest in the annulment of the marriage. The spouse must bring the action for annulment against the other spouse, the public prosecutor and any other entitled person must bring such an action against both of the spouses. Similarly, the HCCP strictly defines the group of persons entitled to bring an action and the persons against whom an action may be brought in proceedings for the establishment of paternity and origin, and in proceedings relating to parental custody and guardianship.

Concerning **employment actions**, the HCCP contains no special provisions relating to the parties and the filing of the claim; the right to bring an action and the persons to be involved in an action are governed by the Labour Code [as of 1 July 2012, the old Labour Code (Act XXII of 1992) will be replaced by a new one (Act I of 2012)]. In accordance with Section 285 of the new Labour Code, the employee and the employer shall have the right to enforce their claims arising from an employment relation or under the Labour Code before the court. The trade union and the works council shall have the right to enforce their claims arising under the Labour Code or from a collective agreement or an employer/works council agreement, respectively, before the court.

Concerning **actions for the judicial review of administrative decisions**, the HCCP defines the circle of claimants in line with the notion of client as applied in the administrative proceedings. The person who was allowed to participate as a client in the administrative proceedings has an unquestionable right to bring an action. As defendant, the HCCP defines the administrative organ that took the decision the review of which is being requested [Section 327 HCCP].

Concerning **cases relating to consumer protection**, see: point 3.4.

The right of access to the courts is not curtailed by the fact that the law lays down certain preconditions that must be met in order to bring a court action (for example, if the law provides for application to another organ or the conduct of proceedings by another authority prior to the court action). In recent years, more and more regulations have required or, at least, encouraged parties to negotiate with each other or take advantage of mediation prior to the court proceedings. Thus, for example, Section 102 of Act LXXVI of 1999 on Copyright provides for the setting up of a conciliatory body in order to promote the resolution of specific legal disputes. A similar provision is contained in Section 103 of Act LX of 2003 on Insurance Institutions and Insurance Activities relating to legal protection insurance. In accordance with Section 121/A(1) HCCP – effective from 1 March 2011 –, in legal disputes between business undertakings vested with legal personality, parties are required to make an attempt at the out-of-court settlement of their dispute prior to the filing of the statement of claim.

In the Part on Special Procedures of the HCCP (which contains special procedural regimes for certain lawsuits defined by their specific subject-matters), one may also come across rules restricting the right to legal remedy. However, these restrictions typically concern extraordinary remedies (for example, in the case of matrimonial proceedings, paternity suits and press rectification proceedings). The only exception is the action for the judicial review of administrative decisions, in which, as a result of the comprehensive modification of the HCCP in 1997, first instance judgments can be appealed only exceptionally.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

Between the standing [*locus standi*] of natural and legal persons, there is no essential difference in the Hungarian jurisdiction. As a result of the "generosity" of the Hungarian regulation, even organisations which otherwise do not have legal personality may become claimants or defendants. Thus, for example, as it is apparent from Section 30 HCCP, even those economic operators may become party to a proceeding that are not vested with legal personality. A similar but more restricted possibility is ensured by the HCCP concerning administrative lawsuits, where even administrative bodies lacking legal capacity may be sued (Section 327 HCCP), and concerning press rectification proceedings, where it is also possible to bring an action against a press organ lacking legal capacity (Section 343 HCCP). However, it must be emphasised that the procedural law doctrine in Hungary draws a sharp distinction between the parties' capacity to sue and to be sued, on the one hand, and the requirements for standing (*locus standi*), on the other.

Out of public authorities, the standing of the **public prosecutor** must be dealt with in more details. In socialist law, the public prosecutor had been entitled to a general right to bring an action and to enter the proceedings already pending between the parties. In 1994, this general right of action was restricted by the Constitutional Court to one single case [see Decision N<sup>o</sup> 1/1994. (I. 7.) AB]. In accordance with the regulation developed based on the decision, the public prosecutor may institute an action with due regard to the parties' right of disposition if the right-holder is not capable of protecting his rights for any reason. The public prosecutor is not allowed to bring an action with respect to any right that may be enforced only by a specific person or organisation [Section 9 (1) HCCP].

As a result of newer legal developments, the public prosecutor may also act to protect the public interest in certain matters. Such matters include, for example, consumer protection. In accordance with Section 39 of Act CLV of 1997 on Consumer Protection, the consumer protection authority, non-governmental organisations for the protection of consumers' interests and the public prosecutor may file an action against any person causing substantial harm to a wide range of consumers by illegal activities in order to enforce the interests of consumers and eliminate that substantial harm. Such action may be brought even if the identity of the injured consumers cannot be established.

Other cases of bringing an action in the public interest include the following: the court may be requested by a public prosecutor, a minister, a notary or chief notary, an economic chamber, an organization of interest representation or a social organization representing the interests of consumers to establish the invalidity or unfairness of general contract terms and to issue an injunction prohibiting any further application of the unfair contract terms (Section 5 of Law-Decree N<sup>o</sup> 2 of 1978). The Hungarian Competition Authority may bring an action for the enforcement of the civil law claims of consumers if the business entity's illegal activity results in a grievance that affects a wide range of consumers that can be established based on the circumstances of the infringement. The Hungarian Competition Authority shall be entitled to bring such an action only after the opening of a competition control proceeding in connection with the infringement in question (Section 92 of Act LVII of 1996).

There are no special rules for bringing an action against the State. In accordance with Section 28 HCC, the State, as the subject of private law relations, shall be deemed to be a legal person. Unless otherwise provided for by law, the minister responsible for the supervision of state property shall represent the State in private law relations. He may exercise that authority of representation through other State agencies designated by law (e.g., through the Hungarian State Holding Company).



- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Hungarian civil procedural law does not know the notion of interpleader action. No one can bring an action in order to compel two or more other persons to litigate a dispute. However, third parties can join an action already pending between other parties as a new party (e.g., if the third party raises a claim for the subject-matter of the dispute between the parties, the defendant may give notice to such third party and the third party may enter the proceedings as a new defendant). In addition, in the case of a null and void contract, a third person who is authorised by law to do so or has a legitimate interest in the establishment of the nullity of the contract, may sue the parties to the contract to have the contract declared to be null and void by the court. In this case, all parties to the contract must be involved in the lawsuit, either as defendant or as claimant.

In addition, Hungarian jurisdiction permits the participation of third parties in the civil action in the form of intervention and third party notice. In these cases, the third party is not involved as a party but only as an intervener. Accordingly, the regulation does not follow the solution offered by the Romanistic legal systems (e.g., an action on a warranty or guarantee), but that given by the Germanic model (*Nebenintervention, Streitverkündung*).

Any person who has a legal interest in the outcome of an action pending between two or more other persons may intervene in the action – prior to the closing of the trial preceding the passing of the first instance judgment – in order to help the party having the same interests win the action (Section 54 HCCP). The intervener shall be entitled to carry out all acts – except the entering into a settlement, the recognition and the waiver of a right – which the party on whose behalf he is intervening is entitled to carry out. However, his actions shall have legal effect only if the party omits to carry out the action in question, or if the intervener's actions do not contradict the actions of the party on whose behalf he is intervening (Section 57 HCCP). If the judgment delivered in the litigation between the parties is binding upon the intervener in his relationship to the opposing party, the intervener's actions shall be effective even if contradicting the actions of the supported party. In this case, the court shall ascertain the influence of such contradicting actions on the outcome of the litigation taking other data and information available in the proceedings into account. Such an intervener is referred to as an independent intervener in academic legal literature.

Intervention may be voluntary, if the intervener joins the proceedings on the intervener's own initiative, or it may also take place through a so-called third party notice. The party who wants to assert a claim against a third party in case he loses the lawsuit, or who feels threatened by a possible claim of a third party in that case, may give a notice to that third party before the closing of the trial preceding the passing of the first instance judgment. A third party may be given a notice even by an intervener (Section 58 HCCP). If the third party accepts the third party notice, he may join the party who has given the notice as an intervener. The acceptance of the third party notice does not mean that the third party acknowledges his obligation towards the party giving the notice. The legal relation between the third party and the party giving the notice cannot be settled within the framework of this lawsuit (Section 60 HCCP).

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No minimum value limit is applicable in Hungarian civil procedural law to the enforcement of claims. However, it is expected by the act to attempt to enforce certain claims by way of an order for payment procedure first. Act L of 2009 provided the order for payment procedure with completely new foundations. The cases in which an order for payment may be issued have been defined by the legislator in conformity with the regulation relating to small claims procedures. Diverging from the earlier Hungarian tradition, only pecuniary claims that have become due may be enforced within this procedure. The Act sets a statutory limit of one million Forints. Claims not exceeding this amount can be enforced exclusively by means of an order for payment procedure. If in his action the claimant is exclusively asserting a claim that may only be enforced by way of an order for payment procedure, upon dismissing the claim without the issue of summons, the court will inform him about the possibility and ways of starting an order for payment procedure. Previously the Act did not lay down a maximum value limit, pecuniary claims of any amount could be asserted by way of the order for payment procedure. From 2012 a maximum value limit of 400 million Forints (ca. 1.250.000 EUR) is introduced. However, in practice, claims of a lesser value were typically enforced this way.

In connection with the availability of extraordinary remedies, the HCCP sets a minimum value limit only for the review procedure. In standard civil law cases [i.e., in proceedings that are not subject to any such special procedural regimes as, e.g., the ones adopted for family law cases, actions for the judicial review of administrative decisions, etc.], where the amount disputed in the review petition does not exceed one million Forints (ca. 3200 EUR), the review is not available. (See point 3.1.).

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

In the case of the violation of human rights that may be connected with the requirement of equal treatment (right to freedom of religion, rights of national and ethnic minorities, right to freedom of conscience and religion, right to work, etc.), it is possible to pursue a public interest claim. The Equal Treatment Authority, the public prosecutor or social organisations and organisations of interest representation may assert a personal rights claim or bring an employment action if the violation of rights concerns a rather large group of people that may not be defined precisely. A further condition for filing a lawsuit is that the violation of the requirement of equal treatment should be based on a characteristic that may be considered an essential feature of personality or the violation should be directly connected with the essence of personality (Sections 14 and 20 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Chances). The Constitutional Court has so far considered religious or other ideological persuasion and national or ethnic belonging as such essential features of the personality. However, this does not prevent the courts from classifying other characteristics as being closely connected with the essence of personality too.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

If a person has a legal interest in how a lawsuit pending between other persons should be resolved, he may intervene in the action in order to contribute to the winning of the lawsuit by the party with the same interests. He may do so before the closing of the trial preceding the passing of the first instance judgement. [Section 56 HCCP] Two types of intervention are distinguished in Hungarian civil procedural law: the not independent and the independent intervention. In the first case, the intervener is entitled to perform all acts (except for settlement, recognition or waiver of a right) that may be performed by the party supported by him, but his acts have legal effect only if the supported party fails to perform an act and if the intervener's acts are in conformity with the party's acts. If the legal effect of the judgment rendered in the lawsuit extends also to the legal relation between the intervener and the opposing party, the intervener has an independent status meaning that his acts are legally effective even if they conflict with the acts of the party supported by him. The influence of such conflicting acts on the resolution of the case is adjudged by the court with regard to the other data of the lawsuit. The intervener may enter the proceedings either in his own initiative or upon a third party notice issued by one of the parties. However, it is always up to the intervener to decide whether to intervene; he is never obliged to do so.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

It is up to the court to grant the permission to intervene. The order granting the permission to intervene is not subject to appeal. The intervener may appeal against the order dismissing his application for permission to intervene or excluding the intervener from the action. Until the appeal is finally decided, the intervener may continue to participate in the lawsuit. [Section 56 HCCP]

#### 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

In Hungarian civil procedure, there is no class action. Any collective rights or interests can be enforced separately, or several claimants may bring a joint action and several defendants may be jointly sued (joinder of parties) in the cases specified under 6.1.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

In Hungarian civil procedure, class action or other multi-party actions do not exist. Therefore, the question is not applicable to the Hungarian legal system.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

In Hungarian civil procedure, class action or other multi-party actions do not exist. Therefore, the question is not applicable to the Hungarian legal system.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

In special cases (see 6.2), there is a possibility for organisations authorised by the law to act in order to ensure the interests of large groups of persons, but they cannot act to establish the civil rights and duties of larger groups of claimants and defendants (see also 3.4 and 3.7).

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

Collective defence of public interests is usually not possible in the Hungarian legal system. In the absence of class action (see point 5.1.), only rules governing the joinder of parties are applicable.

Section 51 HCCP allows the joinder of parties in two cases. Accordingly, several claimants may bring a joint action and several defendants may be jointly sued if, on the one hand, the subject-matter of the lawsuit is a joint right or obligation which can only be adjudged uniformly (i.e., in one proceeding), or the decision made in the lawsuit would affect the joint litigants even without their participation in the lawsuit (necessary/compulsory joinder of parties), such as in an action filed for the termination of joint ownership. On the other hand, the joinder of parties is also allowed if the claims to be asserted originate from the same legal relationship, or if the claims to be asserted are founded on a similar factual and legal basis (non-compulsory joinder of parties). This latter type of joinder of parties is grounded on expedience, the former, as indicated by its name, is grounded on necessity.

In the second case (non-compulsory joinder), there is a possibility to assert diffuse interests collectively. Such attempts have been made recently by the persons adversely affected by the event referred to as the "Red Mud Disaster" occurred in a region in West-Hungary as well as by the persons who have suffered damage as a result of their bank loans made in Swiss Franc. However, the legal frames provided by the non-compulsory joinder of parties are not satisfactory for that purpose (Section 53 HCCP): the court shall adjudge the claims of the joint litigants separately. At the same time, with respect to their effectiveness in the enforcement of interests, "joinders of parties" organised by lawyers fall behind class actions.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

In some sectors, there are also other possibilities apart from the joinder of parties for the collective enforcement of public interests or the interests of a larger group of persons. These possibilities have already been set out at 3.4 and 3.7 (consumer protection, unfair contract terms, equal treatment).

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In our view, in some situations, in particular, in the types of cases cited in point 7.2.2 (in respect of the nullity of contracts, see Supreme Court Decisions BH 1997.439), court practice interprets the requirements of *locus standi* rather narrowly (compare 7.3.). In other situations, including, for example, the permissibility of retrial, the HCCP itself is rigorous. It can be stated that Hungarian law restricts the field within which a retrial is permissible too much. It is solely aimed at eliminating the factual deficiencies of the contested judgment, contrary to the earlier Hungarian solution and the solutions of some European states. A re-trial may not be founded on the serious violation of a rule of procedural law.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

In the range of actions for declaratory judgment one may come across some noteworthy statements while reviewing case-law.

In a lawsuit relating to a lawyer's liability insurance, the question arose whether the aggrieved person was entitled to bring an action for a declaratory judgment against the insurance company. The court held that the insurance company may pay the established amount of compensation only to the aggrieved person. However, the aggrieved party cannot enforce his claim directly against the insurance company. The first provision of the decision is unambiguously intended to prevent the insured party from withholding the funds from the aggrieved party. At the same time, the second provision prevents the aggrieved party from suing the insurance company for compensation right from the beginning, instead of suing the tortfeasor. In such a case, the "claim" of the aggrieved party must be interpreted as a claim for the payment of the amount of compensation (amount of insurance), in other words, as an action for performance. On the other hand, the HCC prohibits only the direct enforcement of the claim. Consequently, following the judgment ordering the tortfeasor to pay, it will also become possible to bring an action for performance against the insurance company, if it refuses to pay. The position of the insurer that the respective rule of the HCC [Section 559(2)] would also preclude the injured person from bringing an action against the insurer for a declaratory judgment was held to be mistaken by the Supreme Court. This rule cannot be interpreted as a special provision that would automatically exclude the application of Section 123 HCCP, which is a general rule relating to the bringing of an action for a declaratory judgment. Therefore, the second instance court that proceeded in the case was right when it examined the preconditions contained in Section 123 HCCP relating to the possibility of bringing an action for a declaratory judgment (see 3.2). These preconditions were unambiguously met, since the claimant had not yet been able to bring an action for performance against the insurer as a result of the above-discussed provision of Section 559(2) HCC. At the same time, the declaratory judgment requested was necessary for the protection of the claimant's rights, as the insurer had refused to intervene in the action for the very reason that it contested the existence of its risk-bearing obligation. The claimant was thus entitled to bring an action for a declaratory judgment. Therefore, the court was obliged to adjudge the claim on the merits. (Supreme Court Decision, EBH 2002.633)

In another noteworthy case, the public prosecutor brought an action against the

defendant under his authority granted by Section 109(2) of Act LIII of 1995 on Environment Protection. The public prosecutor requested the court to issue an injunction prohibiting the defendant from pursuing his environmentally dangerous activity. During the lawsuit, the defendant completed his investments connected with a cleaning plant. Consequently, in 1998, the emission of waste-water exceeded the threshold limit value only slightly. Having regard to this, the public prosecutor modified his claim and applied to the court for a declaration that in 1996 and 1997 the defendant had exceeded the threshold limit value relating to water pollution and, thereby, had caused danger to the environment. Originally, the public prosecutor had filed the action for an injunction prohibiting the dangerous activity. However, he would not have been entitled to bring such an action. (EBH 200.321)

#### 7.2.2. the field of substantive law at hand?

In accordance with a Supreme Court decision of 1990, in actions for the declaration of nullity of a contract, legal standing is based either on a legitimate interest (legal relationship) or the law (a statutory authorisation). "As opposed to this, the claimant did not directly refer to any interest; neither did he cite any law that would have empowered him to bring an action. In the absence of these, he has no *locus standi*, and, therefore, his request for the declaration of nullity of the declaration of intent referred to in his statement of claim must be rejected." (Court Decision BH 1991.107.)

The quoted Supreme Court decision, despite the court's intention to clarify notions, could not, in the opinion of academic literature, delimit, with full unambiguity, the right to bring an action from *locus standi*. In spite of this, it has become a point of reference for later court decisions relating to *locus standi*: ...the provision of § 234(1) of the HCC, according to which one may invoke the invalidity of a null and void contract without any time limitation, does not at the same time mean a right to bring an action. The possibility to bring an action relating to a null and void contract may only be founded on a legitimate interest or a statutory authorisation expressly granting the right to bring an action." (Court Decisions BH 1997.439.)

Distinction must be made between the claimant's capacity to sue (which constitutes a precondition for the right to bring an action) and *locus standi* relating to the enforceability of the claim to be asserted by the action, since the former is a question of procedural law, and the latter is – usually, but not necessarily – the concern of substantive law. The Supreme Court summarised its position – expounded in earlier cases – in its decision N<sup>o</sup> EBH 2005.1227: "In accordance with Section 48 HCCP, any person who may have rights and obligations under the rules of civil law may become a party to a lawsuit (legal capacity to sue and to be sued). At the same time, Section 49 HCCP provides that any person having full capacity to act under the rules of civil law or having the right to validly dispose of the subject-matter of the lawsuit under the rules of civil law may act as a party in legal proceedings either personally or by way of counsel (admissibility as a party in court). The capacity to sue and to be sued and the admissibility as a party in court regulated in Sections 48 and 49 HCCP, respectively, are not identical with the right to bring an action, also referred to as active legitimation or the right to a favourable judgment. The lack of the capacity to sue results in the dismissal of the claim without the issue of process [Section 130(1)(e) HCCP]. On the other hand, the legal consequences of non-admissibility as a party in court are laid down in Section 49(2) HCCP. As opposed to this, legitimation concerns the substantive legal relation between the party and the subject-matter of the lawsuit, in other words, whether the claimant is entitled to and whether it is the claimant who is entitled to the right

that is being enforced by the claim against the defendant. As a rule, legitimation is a question of substantive law; in this case, the absence of legitimation leads to the rejection of the claim on the merits. However, legitimation may also exceptionally be a question of procedural law if the action may only be brought by a person authorised by law to do so, or against specific persons defined by law. In the latter case, and only then, the absence of active or passive legitimation has the legal consequences laid down by Section 130 (1)(g) or Section 157(a) HCCP." [i.e., dismissal of the claim without the issue of summons or termination of the proceedings].

#### 7.2.3. the nature of the claimant?

An organisation of interest representation – including an association – may initiate proceedings before an administrative authority for the protection of public interest and may act in a specific case relating to its members only if it is expressly empowered to do so by law. In an administrative action before the court, in the absence of such authorisation, the court shall dismiss the claim, because the claimant could not have participated as a party in the administrative proceedings either, and, therefore, it has no *locus standi* in the action. (Supreme Court Decision EBH 2004.1086)

Being a competitor cannot be regarded a direct legitimate interest serving as a ground for *locus standi*. According to the consistent practice developed in administrative lawsuits, "an administrative action may be brought by a person whose right or legitimate interest is concerned by the case that has given rise to the proceedings, and in addition to it, who verifies that he is directly concerned by the case. In the final judgment, during the examination of the existence of the claimant's *locus standi*, the court correctly evaluated the circumstance that the claimant was a licensed investment service-provider, while the party intervening on the defendant's side was an organization carrying out clearing agency activity. However, the court came to a mistaken conclusion when it stated that being a competitor served as a ground for the claimant's *locus standi*. This is explained by the fact that a claimant's legitimate interest to act is based on a direct connection between the subject-matter of the lawsuit and the claimant. In its review petition, the defendant correctly pointed out that the claimant's economic interest could not be deemed a direct legitimate interest." (Supreme Court Decision EBH 2004.1100)

#### 7.2.4. the nature of the claim?

The Administrative Department of the Supreme Court formed an opinion concerning the question as to whether a person should necessarily be considered to have *locus standi* as a result of the fact that during the administrative proceedings the second instance authority erroneously regarded him as a party and adjudged the appeal on the merits. This question is also dealt with in law uniformity decision N° 2/2004. KJE. In accordance with point IV of the law uniformity decision, in an administrative action, the condition for having the right to bring an action is the party's legal capacity, as well as that the matter giving rise to the proceedings should concern the party's right or legitimate interest. The party's concern is realized in the *locus standi*. *Locus standi* presupposes direct concern and a specific interest relation (e.g. in a construction case the neighbour's *locus standi* extends to contesting the violation of law directly affecting his right or legitimate interest). *Locus standi* in administrative actions is basically a question of substantive law, it concerns the party's substantive law interest in the dispute and therefore, it may be adjudged when deciding on the merits of the dispute. Its absence results in the dismissal of

the claim in a judgment. Thus, in this case the party's right to bring an action does not at the same time mean *locus standi*, moreover, based on a petition to this purpose the court may also establish that the administrative organ erred when it regarded the appellant as a party. However, this must be established by judgment and it is not possible to dismiss the claim without the issue of process or to terminate the proceedings. [Opinion of the Administrative Department of the Supreme Court on Current Issues Relating to the Application of Law, Resource: *Bíróági Határozatok (Court Decisions) 2005/3-4.*]

In an administrative action, it is justified to recognise the local government's *locus standi* if the administrative case concerns local government powers and their lawful exercise. (BH 2011.295)

Press rectification may be requested by the person who has been referred to in a press communication – with the indication of his name or in another way – or who may be identified based on the contents of the press communication (Opinion N<sup>o</sup> PK 13 of the Civil Department of the Supreme Court). Such a procedure may also be initiated by a person who disputes that he has made the declaration attributed to him by the press (Decision of the Supreme Court EBH 2004.1021).

If the matrimonial action is brought by a person other than the persons authorised by law to do so or the action is brought against a person other than the ones specified by law, the statement of claim must be dismissed without the issue of process, or in the absence of such dismissal, the proceedings must be terminated. If, in spite of this, the court (erroneously) passes judgment, this cannot result in a factual change in personal status (Court Decision BH 1956.405).

In accordance with judicial practice, an action for the rebuttal of the presumption of paternity may also be brought by a person who has made a declaration of full effect recognising his fatherhood (Court Decision BH 1977.495).

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

Judges do not share a uniform position concerning the relationship between contracts for the concealment of funds and fictitious contracts. Based on one view, if the party refers to the concealment of funds, the nullity of the contract caused by its fictitiousness cannot be examined either *ex officio* or at the party's request, because the applicability of the special rule excludes the applicability of the general rule. According to another position – also represented by Opinion 2/2010 (VI. 28.) PK of the Civil Department of the Supreme Court – the examination of invalidity shall precede the examination of the fund-concealing nature, and nullity must be declared even if the party might not refer to it. A third opinion is that, even besides the fund-concealing nature, it is possible for a third person not being a party to the contract to refer to the nullity of the contract caused by its fictitiousness. However, if the concealment of funds may be established, he will not have a legitimate interest in the declaration of invalidity. Therefore, his claim for the declaration of invalidity must be dismissed due to the lack of a legitimate interest to act. In connection with this, it has been mentioned that parties often refer to invalidity as a legal ground in cases relating to the concealment of funds with the sole purpose of registering the fact of the existence of proceedings in the Land Registry. A solution to such a demand could be to expand the range of cases justifying the ordering of security provisions. (Bulletin of the Administrative Department of the Supreme Court on the Conference of the Heads of Civil Departments of 23-25 February 2011)

If in his claim for the declaration of the nullity of a contract the claimant refers, as a factual basis of immorality, to circumstances that serve as a legal ground for a



separate claim of avoidance, the invalidity of the contract cannot be established on this ground. (BH 2011.44)

- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

The rule that monetary claims not exceeding the amount of one million Forints are enforceable by way of an order for payment procedure (see: point 3.6) can by all means be considered such a tool. As a matter of fact, order for payment procedures have been transferred to the scope of authority of notaries public. This, without doubt, reduces the caseload of courts, since only cases challenged by a statement of opposition come before the courts. (The procedure is transformed into a lawsuit as a result of the statement of opposition.)

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

The transposition of some of the EU norms into Hungarian law started as early as the 1990s. Hungary was well-prepared for the accession, which did not lead to significant changes in the field of civil procedure. Unfair market behaviour was restricted by Act LVII of 1996 and the institutional system of consumer protection was established by Act CLV of 1997. As a result of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, the right to institute an action has become extended in both fields.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

The legal institutions transposed into Hungarian law, such as, for example, the right of specific authorities or civil organisations to institute an action to enforce public interests can be applied outside the scope of application of EU law as well.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

After Hungary's accession to the EU in 2004, the building up of effective legal protection started in cases falling within the scope of application of EU law. From this ramifying process, some significant moments – relating to *locus standi* – will be highlighted. The two most important principles of effective judicial protection are the equivalency of procedures and the principle of the actual implementation of Community law. Since 2004, the implementation of these principles has been promoted by several judgments of the European Court of Justice, the opinions of the Supreme Court and amendments of national law. Following the judgment [ECR 2006 I-10115] passed in the joined cases C-290/05 and C-333/05 *Ákos Nádasdi v Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága and Iлона Németh v Vám- és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága*, Act CXXX of 2006, which provided for the refund of registration duty incompatible with Community law, ensured a 180-day time limit for right holders to enforce their claims. Applications were to be submitted to the first

instance administration authority. This act also opened up the possibility to bring an action, since the second instance decision could be challenged before a court. The standing of defendants in consumer protection lawsuits was improved essentially by Act L of 2009, which modified Section 41(5) HCCP so that where the choice of forum clause forms part of the general contract terms, the chosen court shall transfer the case – upon the defendant's request presented during the first hearing at the latest – to the court of competent jurisdiction designated by the defendant to hear and decide the case

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

An essential change in the Hungarian system of legal remedy was caused by the judgment passed in the *Cartesio* case C-210/06. The European Court of Justice held:

“Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.”

The consequence of this conclusion was that Act LXVIII of 2009 modified Section 155/A(3) HCCP, which had previously permitted a separate appeal against the order for reference for a preliminary ruling. In accordance with the new rule, such an order is no longer subject to appeal.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

The fundamental principles of the Hungarian CCP were modified in 2000 already with respect to Article 6 of the European Convention on Human Rights. In accordance with Section 2(1) HCCP, the court shall seek to enforce the parties' right to reach a settlement in disputes and respect their right to a fair trial, and to reach a conclusion within a reasonable time period. In the event of the court's non-compliance with its obligations relating to the fair conduct of lawsuits and their resolution within a reasonable time, the party affected may seek reasonable compensation provided that the injury to his right cannot be cured by way of legal remedies. This rule ensures the implementation of the right of access to courts both within and outside the scope of application of EU law.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Those contained in points 8.3.1 and 8.3.3, as rules of Hungarian law, are also applicable outside the scope of application of EU law.

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW (HUNGARY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

The structure of the judiciary is now determined by Act CLXI of 2011 on the organisation and administration of courts (Court System Act, "CSA"), while the competencies of courts in administrative cases are regulated by Act III of 1952 on Civil Procedure Code ("Civil Procedure Code"). All the levels of the court system - with the exception of local [from 2012 'járási' (subregional)] courts - also act as administrative courts: 20 courts of the 19 counties and Budapest [from 2012 'törvényszék' (court of law)] decide at first instance. According to the general rule of the administrative jurisdiction, first instance judgments of the county courts in administrative cases are not subject to appeal, so the judicial process normally finishes at this level (a '2+1' procedure - a two-level administrative and single-level judicial procedure, or - if there is no administrative appeal - a '1+1' procedure). The exception is when there is no administrative appeal, but the administrative resolution can be amended by the court. In this case, an appeal against the court judgment can be initiated (a '1+2' procedure). These resolutions principally include those of the Hungarian Competition Authority, Hungarian Financial Supervisory Authority, National Media and Communication Authority, Hungarian Energy Office except for cases of refugee administration (where neither ordinary or extraordinary legal remedy can be further sought) and for public procurements where the possibility of appeal is rather limited; an appeal can be dealt with if the resolution is amended at the first instance by the court. The review of the appeals of the first instance judgments can exclusively be carried out by the Regional Court of Budapest (CPC.326.§ /9/). The Curia, the highest court organ (formerly known as the Supreme Court) also employs administrative judges, as it is responsible for the supervisory procedures and the theoretical control over the whole judiciary. The Curia can only carry out extraordinary legal review procedures against binding judgments and they can solely decide on legal matters. A limited number of administrative cases (such as the supervision of labour safety and social security decisions) are now handled by the separately organised labour courts (see 1.3. for details) which are considered on the same level as the local (sub-regional) courts.

There are more significant changes on the way: according to the Court System Act, 20 administrative and labour courts will be formed on 1 January 2013, which practically means that the administrative cases will be placed at lower courts, at the same level as the local (sub-regional) courts. Thus, reviewing appeals - in cases when appeal itself is possible at all - is placed at the courts of law. Consequently the regional courts, especially the Regional Court of Budapest cease to exist as a forum for seeking legal remedy in administrative cases.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

At the time of the submission of the questionnaire the Hungarian judicial system does not have specialised administrative courts: administrative law claims are judged by the courts of general jurisdiction. However, there is a level of specialisation within the courts: there is an administrative collegium (i.e. board) organising the professional activity of judges at the Regional Court of Budapest, the Metropolitan Court of Budapest and the Curia dealing with administrative cases (as described under 1.1.).

Provincial courts of law (previously 19 county courts) have no separate administrative collegium until 1 January 2013. However, from this date on – according to the new rules – regional administrative and labour collegiums are to set up on the courts of law which are the headquarters of the given collegium leader. All administrative and labour judges as well as court of law judges dealing with such cases in the region are members of each regional collegium. The relative autonomy – within the organisation – of the administrative jurisdiction terminates since the administrative collegiums of the Regional Court of Budapest, the Metropolitan Court of Budapest and the Curia are replaced by the unified administrative and labour collegiums/courts. The unified administrative and labour collegium of the Curia came into existence as of 1 January 2012. The procedural and subject-matter provisions are to be amended by June, but the exact consequences are not yet foreseeable.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

There are no specialised courts for certain administrative cases. Labour courts are responsible for the supervision of the administrative decisions in the following cases: labour and labour safety control, approving the sectoral effect of collective contracts, unemployment aids, social security transfers and services. The system will be reunified with the establishment of the administrative and labour courts. From 1 January 2013 onwards, all administrative cases will uniformly fall within the subject matter (i.e. competence or jurisdiction) of the administrative and labour courts.

The Constitutional Court had jurisdiction over regulatory acts (decrees) of local municipalities since 1990, but that task also belongs to the administrative jurisdiction of courts (the Curia) from 2012. The jurisdiction has been divided. If the decrees of local municipalities clash with the new Fundamental Law of Hungary they are dealt with by the Constitutional Court (primary unconstitutionality). In case of clashing with any other acts the review belongs to the administrative and labour collegium of the Curia, it is dealt with by the specifically set up Panel of Local Municipality cases (CSA Art. 45/1/) and – as Article 32 (4) of the Fundamental Law exclusively provides the right to start these procedures to the county level government offices – this procedure cannot be initiated by the claimant.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

Since the political changes in 1990 (Act XXVI of 1991, Art. 3 in effect as of 27 July 1991) comprehensive judicial reviews of administrative resolutions are provided for. It has to be noted that offences (colloquially referred to 'minor criminal law') are not considered as administrative cases and therefore their review could be ensured only after the provisions came into effect on 1 March 2000 of the Act LXIX 1999 on the violation of administrative offences as a consequence of the 63/1997 (12 December) resolution of the Constitutional Court. These cases can be delegated to the assistants of the judges (i.e. judicial clerks) instead of judges since 2010. As for the delegation of work at courts these offence cases belong to the criminal department of the law. The difference between administrative cases and offences are ambiguous dogmatically and depends on a special procedural regulation (for instance, traffic offences used to belong to the scope of offences, nowadays they are part of the administrative cases). The administrative cases are the judicial procedures for the supervision of all the administrative decisions under Act CXL of 2004 on the general rules of administrative authority procedures and services (Administrative Procedure Act, "APA").

In case of omission there are two legal procedural means at disposal. If the administrative authority fails to keep its procedural obligations and to come up with a resolution within the set time deadline, legal remedy can be sought at a superior authority. In case this superior authority fails to act the judge of the county court can oblige the authority in a non-litigation procedure to deal with the case (APA Art.20.). This resolution can be appealed against at the Regional Court of Budapest (Act XVII of 2005 on certain issues of non litigation administrative cases). In case of other types of omission the prosecution can take the initiation and in case the authority fails to act in certain cases – not in all – the prosecution can go to court where an administrative judge deals with the case. Judges for administrative cases are to be appointed by the President of the National Judiciary Office since 1 January 2012 (up until that date they were appointed by National Judiciary Council).

The definition now also includes the supervision of the regulatory acts (decrees) of local municipalities, which was delegated to general courts by the new Fundamental Law of Hungary from 1 January 2012. Claims for damages against administrative authorities and persons acting in their name can be placed in at county courts to judges of civil law who can randomly be an administrative judge in the countryside or judges of civil collegiums in the capital. Therefore, administrative judges in the capital (judges of the administrative collegium) are excluded so they are not familiar with the practice of these procedures. In compliance with the EU guidelines concerning public procurements civil law procedures are partly delegated to administrative judges (for instance the nullification of a binding contract) (Act CVIII of 2011, Art.161), thus the civil and the administrative cases are dealt with in a unified procedure. Similarly, in case of contracts with authorities – which can replace resolutions in certain cases – the infringement of a contract is dealt with by an administrative judge in the scope of a civil judicial procedure. Authority contacts are increasing and they are mainly applied in state aids cases.

Of course the situation will be changed with the existence of the administrative and labour courts because claims for damages against administrative authorities and persons acting in their name are delegated to the civil collegiums of county courts,

whereas it is the judges of administrative and labour regional collegiums who deal with administrative cases.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Omissions of administrative authorities can be remedied in two types of procedures (except the damages out of such omissions, see 1.4.).

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Legal standing is a procedural requirement in administrative law claims: Article 327 (1) of Civil Procedure Code limits the capacity to start a judicial procedure to clients of the administrative case and other participants of the administrative case (as regards those resolutions of the decision with direct effect on the participant) since 1 January 2009. Any other party affected – for instance the witness or the expert – cannot go to court in the merit of the case, only to claim their own direct interests (their travel fare or expert fee). Article XXVIII (7) of the New Fundamental Law also limits the constitutional right to seek legal remedy against administrative decisions for the violation of rights and lawful interests.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

The general idea (with some specific exceptions) is the following: only the person whose legal status in a broader sense is affected by the administrative decision or procedure is entitled to submit a claim. The model is closer to the interest-based approach: not only existing (or newly created) rights and duties can form the basis of the claim, but also other interests (such as remainders) if they are not against the law. These standing requirements are connected to the sense of *recours subjectif*: not the courts, but higher administrative authorities and public prosecutors carry out procedures of the general control of legality. Nevertheless, once a claim is submitted, the court *quo* is entitled to examine the validity of the administrative decision *ex officio*.

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

The claimant is generally defined by Article 15 (1) of Administrative Procedure Act as a (natural or legal) person or an entity without legal personality (a) whose rights or lawful interests are affected by an administrative decision or an administrative contract with an authority, (b) the person under the control of an authority and (c) whose data are in the registers of the authority. The right of administrative appeal can also be exercised by the claimant. The administrative appeal is a prerequisite

of the judicial supervision (if it is not ruled out by an act of Parliament), but if there was an administrative appeal, a claimant who has not participated in the administrative procedure (or in a part of it), is generally still entitled to initiate the judicial procedure.

There is specific legislation which limits the concept of claimant. The cited definition of claimant status (APA, Art. 15) can be widened and restricted by separate acts on certain administrative procedures (examples described below). Typically not every person can be a claimant whose right or lawful interest is affected by the case, but the claimant is the person who the case was initiated against. In such cases a specific rule is also necessary to decide who can go to court. This rule still has to ensure that anyone whose right or lawful interest is infringed can go to court. Without respecting this principle, the right to legal remedy would be infringed as expressed in Article XXVIII (7) of the Fundamental Law.

This is a relatively new problem: for decades until 1 January 2009 the Article 327 of the Civil Procedure Code had stated that anyone (not only the claimant) whose right or lawful interest was infringed in a case could seek legal remedy. Since 1 January 2009 – under the rule described under 2.1. above – it has happened, on occasion, that as a legislative error the special procedural rule has limited the status of claimant and failed to define the wider circle of parties who could seek legal remedy. Such failures in legal procedures are unambiguously against the new Fundamental Law and the proceeding judge in this case can turn to the Constitutional Court for a remedy.

There are no judicial review organs which are not part of the judiciary: although there are authorities with a significant, court-like level of independence (such as the Competition Council of the competition authority or the council of the media authority), those are considered to be administrative authorities as well and their decisions are also subject to judicial review.

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

As noted at 2.1. above, the standing is based either on claimant status or in case of other persons obliged by an administrative decision (such as experts or witnesses), the fact that such obligation exists.

As far as the right to (ordinary) appeal and the right to submit the case to the Curia for supervision can only be exercised by the parties and other participants of the judicial procedure of first instance [Article 233 (1) and 270 (1) of Civil Procedure Code], the only difference as regards standing in appeal procedures is the fact that claimants of administrative procedures (including those who have exercised their rights) will not be able to appeal, if they did not participate in the first instance judicial procedure (at least as a result of an intervention see 4.1). At the same time, however, if the authority fails to recognise the claimant's rights in an administrative procedure, there is a possibility of appeal to the superior authority and then a consecutive one instance judicial procedure in a non-litigation case at the county courts. These 'non-litigation' judgments cannot be appealed and no extraordinary legal remedy can be sought at the Curia.



- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

With respect to the "requirements of standing" there is no difference between the action for annulment and the action for performance. As regards actions for damages there are no specific requirements for legal standing, which means the general rule applies: every person or entity without legal personality can act as a party before court, who can make valid decisions on the subject of the trial – § 49 (1) of Civil Procedure Act. That means that those persons who (directly or indirectly) suffered damages from an administrative action are eligible to submit their claims to the court. This also means that practically the persons entitled to request actions to annulment or to modify decisions are also the ones who are able to sue for damages.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

Administrative Procedures Code opens the possibility for specific acts and government decrees to give cliental rights to persons without the checking the applicability of the general claimant definition [Article 15 (1)]. This method is primarily used to involve owners of real estate in the area affected by the case. Few regulatory acts contain such provisions, for example the rules on the building permits of transport facilities. Administrative Procedures Code provides for a possible standing restriction: Article 15 (6) enables separate acts to require the involvement (submission of documents or statements) of the claimant in the first instance administrative procedure (carried out by a non-judiciary authority). Without this the claimant cannot exercise its rights in further stages of the procedure, including the judicial phase. This is a relatively new rule, also applicable only in complex permit cases. In academic references the constitutionality of this rule is controversial, therefore it can occur that judges who apply it during their proceedings turn to the Constitutional Court to seek advice. This relatively strict regime of only two exceptions does not mean that other restrictions to the concept of claimant rights does not exist. The Administrative Procedures Code provides for full freedom to derogate from its general rules in a number of cases [Article 13 (2)], such as taxation, financial services, budget administration and commercial services. The number of cases significantly increased since 1 January 2012, which now includes media administration, social security services and as well as data protection cases. This gives the legal possibility to adopt restricted standing rules, although the most important taxation and social security legislations do not contain such rules. However, there are examples for special ex officio procedures, which do not give cliental rights for the persons affected by the procedure, or they do it with limited effect. The most notable examples are the supervisory procedures of the Hungarian Financial Supervisory Authority, National Media and Communication Authority and the newly formed National Data Protection and Freedom of Information Authority: those independent bodies all have ex officio administrative procedures, where the complainer is not treated as a client and the authority is not obliged to make a formal decision on the basis of the complaints. However, this solution only treats the level of the protection of individual rights in the case of National Data Protection and Freedom of Information Authority, because Act CXII of 2011 on the

right of informational self-determination and freedom of information and does not provide an alternative procedure where the authority is obliged to issue a formal decision which is justifiable at court.

Finally, as in most legal systems, contradictions between the general procedural rules and special legislation for certain sectors also exist: e. g. Article 3 (3) of the Government Decree 193/2009. (IX. 15.) on constructing authority procedures and constructing authority control states that the constructing authority is obliged to decide ex officio on the claimant status of the direct neighbours. This rule can be a basis for leaving all the other possible claimants unnoticed in construction cases, if the authority understands it in a way, as there is no obligation for similar consideration in the case of other possible claimants.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

There are no specific rules on legal persons and other legal entities, private or public organisations. Nevertheless the involvement of public authorities in administrative court procedures is exceptional: although they can be in a claimant's position in very specific cases (as in their quality as employer), under the rule of law principle in public law matters they are only entitled to initiate any action if they are given specific competencies to do so. The most notable examples for this activity are the regulatory authorities of different markets, the Equal Treatment Authority and the public prosecution services. In these cases, the court only examines whether the requirements of the specific legislation (usually competencies) are met.

Administrative Procedures Code also provides the rights and standing of the claimant to the public authorities, which are not responsible for the decision-making in the given case, but whose competencies are affected by the case [Article 15 (4)]. While this theoretically opens the possibility for a public authority to refer public debates with another public authority to court, in practice it is only used to obtain information from ongoing administrative and court procedures.

Finally the defendant of the administrative trial (the public authority) has the unilateral right to involve its cooperating authority (whose consent was required to adopt the administrative decision) of the given case to the court procedure as another defendant.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

There are no other variations in the standing rules.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

Article XXVIII (7) of the Fundamental Law of Hungary (the new Constitution in effect since 1 January 2012) states that "[e]very person shall have the right to seek legal remedy against any court, administrative or other official decision which violates his or her rights or lawful interests". This rule (which is almost identical - and with the deletion of the words "as prescribed by law", even stronger - to the related rule in the former Constitution) means that there is a direct constitutional basis for the current idea of standing as well. The practice of the Constitutional

Court interpreted the former Constitution as this rule means the right to have an effective judicial remedy in all substantive administrative decisions of the public authorities [first relevant decision: 5/1992. (I. 30.) AB, the latest decision on this basis: 114/2010. (VI. 30.) AB]. Other requirements such as the duty to justify the decisions of public authorities derive from these rules as well. Nevertheless, there is no particular court practice on the basis of these constitutional rules and Constitutional Court decisions, whereas there is a strong tradition in Hungarian jurisdiction to relate to the more detailed legislation instead of pure constitutional requirements. The main source of this practice is that the Constitution cannot be directly referred to as opposed to an inferior statute. The judge cannot set aside the inferior statute applicable in the case with respect to the fact that one of the parties involved finds the statute unconstitutional. It is only the Constitutional Court which can act this way by abolishing the statute which contradicts the Constitution (Fundamental Law). However, in practice, in many cases referring to the provisions of the Constitution relate to interpretation. Positive changes might rise in the longer term in this respect, as the extension of the use of constitutional complaints submitted to the Constitutional Court under the Fundamental Law gives the opportunity to file such a complaint if the court rejects the claim on the basis of the standing rules. But as far as the standing rules in legislation are coherent with the constitutional rules, this can only serve as a final theoretical guarantee and not as a regular practice. Directly filed constitutional complaints can also be important if, under unconstitutional specific rules, there is no judicial remedy for a given administrative decision.

#### **4. Third party intervention**

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

The Civil Procedure Code knows the institution of intervention, which technically gives all the rights of either the claimant or the defendant to intervene, but their exercise is secondary to the actions taken by the supported primary party of the trial (only the actions that do not contradict with the actions of the supported party are valid). Interventions can only be made by a person, who has a lawful interest affected by the outcome of the court procedure. The motion for obtaining such position has to be made until the last hearing of the first instance procedure. The only specific rule for the intervention in administrative claims is that the other clients and other authorities involved in the administrative procedure are informed by the court about the possibility of the intervention. Furthermore, the administrative bodies have to notify each party involved in the procedure about the commencement of the administrative suit simultaneously with the petition of the complaint to the court.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

The intervention has to support one of the primary parties explicitly, though it does not require consensus of the given party. The court decides on the admission of the intervention under the criteria described under 4.2. This decision can be challenged by the primary parties.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

There are no class action or group action claims, although the claimants of the same case are able to submit their claim and to choose their representative(s) jointly. It is also possible for the courts to unify cases initiated on the same legal basis.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

In the event of two or more claimants, the same conditions have to be met in each case.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

General rules (the Civil Procedure Act) regulate the status of multiple claimants.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

There are no alternative ways with such effect. Nonetheless, public authorities can issue decisions containing obligations on several claimants, which indirectly leads to joint claims as well. Claims by organisations representing the general interest often also have an indirect impact on a high number of administrative clients, although judgments based on such claims cannot have the effect of *res iudicata* in the individual cases of persons who did not participate in the procedure.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The Administrative Procedures Act enables other acts to assure the rights of claimants for economic interest groups and NGOs. Environmental, consumer protection and equal treatment cases are the most important among the ones with provisions granting the rights of client to NGOs (on the basis of Act LIII of 1995 on environment protection, Act CLV of 1997 on consumer protection and Act CXXV of 2003 on equal treatment and the enhancement of equal opportunities, respectively).

Public prosecutor services are responsible for the control of legality of the actions of the administration, so the actions of the prosecutors can also be considered as measures to defend general interest.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

Sector-specific rules and practice are by far more typical. A newly adopted modification of the Administrative Procedure Act provides for the general possibility to submit a notice to the competent authority (with no obligation to take this into consideration) from 1 February 2012.

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

I would describe their approach down-to-earth and strictly relying to the text of legal acts, but client-friendly in general. This is obviously in connection with the fact, that when the situation is dubious, the favourable decision means much less risk from the view of following judicial remedies.  
Examples for denying claimant status include: in 1996, the Supreme Court published an opinion (Nr. 3/1996), which inter alia refused to give claimant status to persons with only lawful interest in the expropriation procedure, on the basis of the strict and restrictive interpretation of the detailed rules. The cases EBH2008/1839 and EBH2004.1089 of the Supreme Court refuse to include environmental NGOs as a client in constructing and in land registry procedures, whereas there were no special rules in the given legislation to make the granting of such status possible. BH 2008/49 states that environmental NGOs cannot use their right to sue the environment user to substitute the administrative procedure where the NGO was not active in the earlier administration procedure.

- 7.2. Are there significant variations in the courts' approach based on:  
7.2.1. the type of remedy requested?

No.

- 7.2.2. the field of substantive law at hand?

Yes, but only as far as the substantive legislation itself is varied. The only case I found where the Supreme Court went further than the grammatical and structural interpretation of specific legislation was the refuse of client rights from child protection authority in the administrative cases on the parental rights over common children (case BH2004.392).

- 7.2.3. the nature of the claimant?

No.

- 7.2.4. the nature of the claim?

No. The fact that the administrative decision refusing to give the rights of the client is also subject to judicial supervision was originally derived from court practice (Supreme Court decision BH 2004.488), but that is now explicitly included in the Administrative Procedures Act.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

There is no evidence for the existence of any such trends, but doubt often leads to favourable decisions even in complex cases: an unfounded decision can easily lead to the repeal of the decision and to the restart of the procedure.

- 7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Nothing refers to that, as the rejection would require an elaborated reasoning. If there is a will to get rid of the case, it usually comes by the substantial assessment

of the claim, as there is no obligation to hold a hearing before the decision in either way, so the judge does not have to face more administration if s/he goes into the substance of the case.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

Act LIII of 1995 on environment protection gives the right to environmental NGOs to participate in administrative procedures since the Act's adoption. Therefore neither the Aarhus Convention itself, nor the relevant EU secondary legislation led to substantial changes.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

They did not and other rules adopted during the transposition of EU law as regards the legal standing also remained without effect to other sectors. The notable exception might be equal treatment legislation: equal treatment NGOs obtained cliental rights as a result of the transposition of the two specific EU equal treatment directives, but it is applicable to discrimination cases based on all grounds.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

The Hungarian constitutional requirement (as described in 3.6.) is broadly in parallel with the ECJ concept, but neither of them are used directly too often in practice. During the interpretation of the broad codified definitions of standing, these questions rarely emerge.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

Nothing refers to that.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

The Hungarian constitutional requirement (as described in 3.6.) is broadly in parallel with the ECtHR and ECJ concept, but reference is not made too often in practice. During the interpretation of the broad codified definitions of standing, these questions rarely emerge.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Nothing refers to this principle, as parallel constitutional requirements are better known (but still not cited in judgments). There were some instances in sector specific cases of the regulated market at the Metropolitan Court of Budapest, but the Regional Court of Budapest which dealt with the case at second instance did not agree with the judgments.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

1. The procedures of the Hungarian administrative authorities are widely considered slow and often said to be especially vulnerable to corruption risks. When it came to have a chance to change this situation in the last decade, one of the reasons repeatedly cited by politicians and policy analysts was the great number of claimants and the wide procedural possibilities of NGOs in certain cases. This, and the fact that (mainly for constitutional and EU law reasons) there is no room to significantly restrict claimant's rights, puts the pressure on the regulators to find solutions like the separate legal regime on the 'priority cases for national economy' (Act LIII of 2006), which in fact now means that (on the basis of the decision of the Government) any complex permit case in relation to a development project can be handled by a simplified and faster process with less (but higher level) authorities concerned. This indirectly restricts claimant's rights as it is significantly harder to exercise them (e. g. the territorial authorities are left out from the process, so local environmental protection NGOs and inhabitants find harder to exercise their rights, the deadlines are shorter while the cases are complex), while the initial problem is not the legislation, but the unreasonably complex system of powers, the lack of cooperation and the low level of the problem sensibility of the authorities.

2. The constant changes of legislation (especially the laws and bylaws on the procedures for different sectors) had led to an unprecedented level of uncertainty, where even finding the relevant piece of legislation is a conquest. The general rules on administrative procedures are rewritten once a year since 2009, which created lengthy technical amendments to the specific laws and (where the ministries found time to it) bylaws. This now comes with the judicial reform and the structural reform and the cut of the local administration, which actually deals with administration cases. I think even the changes of the best intent are secondary to regain the minimal level of stability.

3. Compared to the legal regulation, the judicial practice further limits the legal standing. The claimant can go to court in vain, since judges do not deal with arguments which have no direct connection with the claimant's own right and lawful interests. This judicial practice has no specific legal grounds, it simply relies on a dogmatic approach (deducing from the concept of trial capacity). So, therefore the claimant might turn to the court but he cannot dispute a given, specific issue and in this case the judgment dismisses the petition. This limitative practice is often applied at complex cases which require vast expertise mainly in the practice of the Regional Court of Budapest, whereas in the practice of Curia these instances are

very rare. The reasons for the restriction of legal standing are court congestion in the central regions such as Pest County or Budapest as well as the lack of expertise. Since the central region of the country is considered as the most congested with cases which are at the same time the most complex of all (competition, bank sector, financial supervision, energy law, media and telecommunications), therefore the practice of the Regional Court of Budapest is the strictest in this respect. As a consequence of the new regulations, the Regional Court of Budapest terminates to play a role in administrative cases. As long as the reorganisation goes hand in hand with personal changes it is possible that the wider interpretation of the legal standing by the Curia will strengthen, especially in the light of the new provision that the Curia has to set up legal practice monitoring teams. These teams will orientate the practice with their "non-compulsory" reports already 2012. Better practice can only be achieved however if the workload of the administrative and labour courts decreases and their expertise improves. The effect of the new system on the implementation of the above mentioned problem cannot be judged yet. The reform might not worth anything, as placing the first instance administrative cases at the lower tier of the legal system and the termination of the relative separation of the administrative judicial procedures in the capital will not necessarily have a positive effect over the development of expertise



## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(HUNGARY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

The criminal procedure has four phases: the investigative phase, the prosecution phase, the court phase and the implementation phase. The investigative phase of the Hungarian criminal procedure is predominantly inquisitorial with elements of the adversarial system, while the court phase is mainly adversarial with certain inquisitorial elements. The court delivers a decision on the charges, either convicting or acquitting the accused. The court shall acquit the accused of the charges, if the guilt of the accused cannot be ascertained beyond reasonable doubt and the procedure is not terminated by the judge for reasons set out in the law (e.g. death of the defendant, *res iudicata*, lack of a lawful charge, etc.).

An appeal may be lodged by the prosecutor, the defendant or his/her advocate against the first instance court decision based on legal or factual reasons. The appellate court is bound to decide on the basis of the facts of the case as established by the first instance court, unless the first instance judgment is not properly substantiated, or the appeal states new facts or refers to new evidence. If the accused has been acquitted by the first instance court, the punishment may only be aggravated if the appeal by the prosecutor specifically requests this. The appellate court shall uphold, alter or repeal the judgment of the court of first instance.

Appeals may be submitted to the third instance court, if the court of second instance violated the provisions of criminal law and consequently a defendant, who was acquitted in the first instance, was convicted in the second instance, or the other way round. The third instance court shall decide based on the facts of the case as established by the court of second instance. The court of third instance shall uphold, alter or repeal the judgement of the court of second instance.

Extraordinary remedies against the final and binding judgments include the reopening of a case and review by the Curia. The judgment of the third instance court may be reviewed by the Curia only if fundamental provisions of the criminal procedure were infringed (judgment without legal prosecution, against bias, without jurisdiction). Improper application of substantive law cannot lead to review of judgement of the third instance court.

The Hungarian legal system includes certain special proceedings. In the case of an expedited hearing the prosecutor may decide to take the defendant to court without formal indictment within thirty days after the first interrogation if the criminal offence in question is punishable with a maximum of eight years' imprisonment, the case is simple, the evidence is at hand, and the defendant was caught in the act or admitted the commission of the criminal offence.

In trial waiver cases the maximum sanction that can be imposed on the defendant is significantly lower than the one applicable in a normal procedure. If the defendant makes a well-informed decision to request a waiver of trial and admits the commission of the crime, the court adjudicates according to the indictment,

sentences the defendant and applies the relevant measures. The prosecutor may also initiate the trial waiver process.

In a fast track procedure, upon the motion of the prosecutor the court may sentence the defendant, without hearing him/her, to a suspended imprisonment, fine, or certain supplementary sanctions. Alternatively, the court may apply measures if the criminal offence is punishable by a maximum of five years' imprisonment, and (i) the law allows for these sanctions in relation to the given offence; (ii) the facts of the case are simple; (iii) the accused has confessed to the offence; and (iv) the objective of the punishment can be achieved without trial. Imprisonment exceeding two years may not be imposed in a fast track procedure (in fact, only suspended imprisonment may be imposed). The ruling is not subject to an appeal; instead, upon the request of the participants in the proceeding, the court shall hold a trial. The private prosecutor may also request the court to hold a trial.

In the latter two types of procedure the Court may not refuse the claim of the civil claimant, it may sustain the aggrieved party's civil claim or has the opportunity to refer the enforcement of the civil claim to a civil court.

Aggrieved parties may not initiate these types of procedures. Professionals still argue that the special proceedings listed above are beneficial to victims, because they are significantly shorter than ordinary proceedings.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

**Aggrieved party**

Victims of crime join the proceedings as aggrieved parties in the course of the judicial phase of the proceedings. Act XIX of 1998 on the Criminal Procedure ("CCP") uses the term 'aggrieved party' instead of 'victim', and, as a general rule, victims are referred to as aggrieved parties in the course of the criminal proceedings. According to the CCP, aggrieved parties are persons whose rights or lawful interests have been violated or jeopardised by the crime being investigated. It needs to be noted that aggrieved parties can participate in the criminal proceeding already in the investigation phase. For the purpose of this study we will use the term "aggrieved party" instead of victim, as it used in the Hungarian criminal procedure. The term "victim" will only be used when we write about a wider scope of persons than the aggrieved parties as understood by the CCP.

It is to be noted that the aggrieved party can play different roles in the criminal procedure as:

- Aggrieved party with no further standing;
- Witness;
- Private prosecutor;
- Substitute private prosecutor;
- Civil claimant.

- Prior to the commencement of the trial phase the aggrieved party may propose to separate or unify the given criminal proceedings (if related offences are tried in separate proceedings or unrelated offences are tried in one proceeding), to exclude any member of the judges panel, the prosecutor and the registrar, and may point out any other circumstance that may prevent the holding of a court hearing or that needs to be taken into consideration before starting the hearing.
- Mediation procedures may be initiated in the course of criminal procedures for certain crimes against the person or crimes against property and traffic offences, provided that the crime is punishable with a maximum of five years imprisonment.

Mediation may be initiated by the aggrieved party (or the defendant respectively), and may be conducted with their voluntary consent. However, there is no place for penal mediation if the defendant is a habitual criminal or a qualified recidivist; if the defendant committed the crime as a member of a criminal organisation; if the crime resulted in death; if the defendant committed a deliberate crime while he/she was on probation, sentenced to suspended imprisonment, or – if sentenced to imprisonment because of a deliberate crime – before the termination of imprisonment, while released on parole, or under the suspension of the indictment. Mediation may be initiated only once in the course of the criminal proceedings. Mediation is only possible if the defendant confesses to committing the crime before the filing of the indictment.

(ref.: Article 221/A (1) of CCP. For the detailed rules on penal mediation see Act CXXIII of 2006 on Mediation Activity Applicable in Criminal Cases [2006. évi CXXIII. törvény a büntetőügyekben alkalmazható közvetítői tevékenységről, adopted by the Parliament of Hungary, promulgated on 21 December 2006, in force since January 2007, available in Hungarian at: [http://www.complex.hu/jr/gen/hjegy\\_doc.cgi?docid=A0600123.TV](http://www.complex.hu/jr/gen/hjegy_doc.cgi?docid=A0600123.TV)]).

#### Aggrieved party's rights

- Aggrieved parties shall be notified of the date and time of hearings.
- Aggrieved parties are entitled to receive information about their procedural rights.
- Aggrieved parties (irrespective of their role as a party to the proceedings) may be present at court hearings, even if the trial is not public. The representative of the aggrieved party may also be present at private court hearings. If the aggrieved party does not have a representative, s/he may file a motion to the court requesting that a person named by her/him (already present at the site of the court hearing) be allowed to take part at the in camera court hearing (persons to be interrogated in the course of the hearing may not be named as such). If an in camera hearing is ordered due to protection of state or official secrets, this kind of a motion may not be filed.
- Those attending the court hearing may, as a main rule, file motions; and aggrieved parties and private parties (see the definition later in this section) may file motions and observations concerning the matters affecting them in the course of the evidentiary proceedings. The aggrieved party and the private party may ask questions from the defendant, the witness and the expert concerning the matters affecting them, after their interrogation/hearing is concluded, thus witnesses and experts may be cross-examined by the aggrieved parties or by their representatives. The aggrieved party may also give a testimony as a witness if the court deems it necessary. It is also set out by the CCP that the aggrieved party may submit a motion to the court requesting to record procedural actions by technical means (audio or video recording) or by stenography, and that the private prosecutor, the substitute private prosecutor and the aggrieved party may submit a motion aimed at issuing a restraining order.
- Indigent aggrieved parties have the right to legal aid free of charge in the course of the criminal proceedings.
- The aggrieved party may inspect the case files without any restrictions in the absence of an express legal provision excluding this possibility; case files are handed over to her/him at the official premises of the court for inspection upon his/her request, and may be read at the official premises of the court.
- The aggrieved party and the private party may have the floor before the court delivers judgment; procedurally after the prosecutor's closing. Aggrieved parties

may declare whether they want the defendant to be held liable and punished; private parties may justify the sum of the damages claimed by them.

- Aggrieved parties may propose at any stage of the criminal proceedings to refer the case to penal mediation if the conditions of that possibility prevail. The procedure is suspended by the court for a maximum duration of six months in order to make penal mediation possible.
- Treating personal data confidentially may be ordered by the court with respect to witnesses (thus also aggrieved parties acting as a witness).
- Personal protection may be granted to aggrieved parties, their representatives, and also other persons out of consideration for the aggrieved party and her/his representative. Witnesses and aggrieved parties may be protected in the framework of the so-called Protection Program, which shall be applied during and after the criminal proceedings if it is conducted due to an outstandingly serious crime under certain circumstances. Family members of the person protected and, in exceptional cases, other persons may also take part in the Protection Program out of consideration for the protected person.
- As a main rule, aggrieved parties and private prosecutors may be represented by an attorney, by their adult relatives and other persons entitled to representation by law.

#### Substitute private prosecutor

Aggrieved parties may pursue private prosecution and act as a substitute private prosecutor before court if (i) the investigation has terminated and (ii) the prosecutor has decided not to file an indictment against the defendant or has decided to drop the case during court hearings because a) the act in question is not considered as a criminal offence, (b) the criminal offence was not committed by the alleged perpetrator, (c) it may not be established that the alleged perpetrator had committed the criminal offence (d) the alleged perpetrator is not punishable by law due to certain circumstances or , (iii) the prosecutor has not filed an indictment, since in her/his opinion the offence in question is punishable solely on the basis of a private motion, or (iv) if the prosecution has not been taken over by the prosecutor in an investigation conducted on the basis of a private motion etc. If the prosecutor decides to partially drop charges against the defendant, the aggrieved party also has sixty days to stand in as a substitute private prosecutor.

- Unless provided otherwise by law, the substitute private prosecutor shall enjoy the rights of the prosecutor, including the right to submit a motion for a coercive measure entailing the restriction or deprivation of personal liberty of the defendant.
- The substitute private prosecutor has the right to legal representation free of charge if s/he meets certain indigence criteria.
- The substitute private prosecutor may appeal against the first instance court decision. The substitute private prosecutor may appeal against second instance court decisions as well if the conditions prescribed by the CCP for such an appeal are in place.

#### Private prosecutor

In the case of certain crimes of a lesser magnitude (such as light bodily harm, infringement of private or postal secrecy, defamation, libel and irreverence) proceedings shall be initiated by the aggrieved party as private prosecutor by a private motion. The private prosecutor exercises all the rights of the public prosecutor.

The private prosecutor may appeal against the first instance court decision, but only for convicting the defendant or for a more severe sanction to be imposed. S/he may

also appeal against the second instance court decision, again only for the same reason.

Civil claimant or private party

Aggrieved parties enforcing a civil law claim arising as a consequence of the offence being the subject of the accusation in the course of the criminal proceedings are called private parties in the CCP. If an aggrieved party has sustained damages as a consequence of the offence, s/he can act as a civil claimant and claim compensation from the offender.

Civil claimants may appeal against provisions of the first instance court decision ruling on the merits of their civil law claims.

#### 1.2.1. Is there a possibility of private prosecution?

Yes. In the case of light bodily harm, infringement of private secrecy, infringement of postal secrecy, defamation, libel and irreverence the aggrieved party shall initiate the proceedings as a private prosecutor, provided that the perpetrator is punishable on the basis of a so-called private motion (thus these criminal offences are punishable solely if proceedings are initiated by the aggrieved party through a private motion). In these cases the private prosecutor may exercise all the rights that the public prosecutor is entitled to.

If the private prosecutor is a natural person and is deceased, her/his adherent (lineal relative, spouse, companion, or legal representative) may exercise the private prosecutor's rights in the criminal procedure. (For the special case when more than one person may exercise the rights of the private prosecutor please see 3.2.)

The public prosecutor may take over the representation of the prosecution from the private prosecutor throughout the procedure, thus in such cases the private prosecutor will be part of the procedure as an aggrieved party. If the prosecutor drops the charge, the aggrieved party may again take the case over as private prosecutor and is no longer entitled to drop the indictment.

Aggrieved parties have thirty days to submit a report about such a crime once the identity of the offender is known.

#### 1.2.2. Can a victim request review of a decision not to prosecute?

Yes. If the prosecutor has terminated the investigation, aggrieved parties may file a complaint against the termination of the investigation within eight days after the decision has been communicated. If the aggrieved parties' complaint is rejected, the aggrieved party has the right to act as substitute private prosecutor within sixty days of communicating the rejection of the complaint. However, aggrieved parties have the possibility to act as substitute private prosecutors only under certain circumstances, e.g. if the investigation has been terminated because (i) the act in question is not considered as a criminal offence, (ii) the criminal offence was not committed by the alleged perpetrator, or this may not be established, or because (iii) the alleged perpetrator is not punishable by law due to certain specified circumstances, etc. If the prosecutor decides to partially drop charges against the defendant, the aggrieved party also has sixty days to stand as a substitute private prosecutor.

#### 1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

Yes, victims have the right to ask for compensation. For details regarding compensation requests please see 1.2.4.

#### Return of property

If the aggrieved party has suffered financial damages s/he may claim compensation for the damages until the first instance court's council meeting aimed at deliberating. If the aggrieved party has a well-grounded reason to believe that efforts for compensation might be frustrated by the perpetrator, s/he may submit a motion in the report to secure/seize the perpetrator's property.

Property seized in the course of the criminal procedure should be returned to its owner by the criminal court if the owner can duly justify her/his ownership and there is no room for confiscation. If the owner cannot be established, the property shall be given to the person who can file a duly justified claim for the return.

#### Reimbursement of expenses

Expenses for aggrieved parties, private prosecutors, substitute private prosecutors, private parties and their representatives to be reimbursed are the following:

- Travel and accommodation expenses
- Costs of expert opinion prepared by the expert invited by the party, with the consent of the prosecution (or the court subsequently)
- Expenses relating to the recording of the proceedings wholly or partly (video or audio recording, stenography)
- Expenses relating to one copy of the case files
- Communication expenses (phone, fax, postal expenses, other).

Private parties', private prosecutors' and substitute private prosecutors representative's fees shall also be reimbursed.

Generally, out-of-pocket expenses of aggrieved parties and their (legal) representatives, and the fee of the latter shall be advanced by the aggrieved party irrespective of participating as private party, private prosecutor, substitute private prosecutor or solely as an aggrieved party in the criminal proceedings.

The expenses incurred as a result of the participation of the aggrieved party in the proceedings as a witness shall be reimbursed upon request by the proceeding authority; the witness shall be informed of that possibility in the summons and at the conclusion of her/his testimony as well. There are no formal conditions laid down concerning the request (time limits are missing as well). The reimbursement can be received on the day it was requested; the expenses may be reimbursed on the basis of a detailed list of expenses and the justification thereof. If the latter documents are not submitted, reimbursement will be decided on the basis of the documents of the proceedings. Four kinds of expenses of witnesses are to be reimbursed: travel expenses, accommodation expenses, per diem and expenses related to taking days off.

Costs related to travel and accommodation expenses, costs of expert opinion prepared by the expert invited by the party, with the consent of the prosecution (or the court later on), expenses of recording the proceedings wholly or partly (video or audio recording, stenography), expenses of one copy made of case files and communication expenses (phone, fax, postal expenses, other) are also reimbursed.

Private parties', private prosecutors' and substitute private prosecutors representative's fee shall also be reimbursed.

(Generally, out-of-pocket expenses of aggrieved parties and their (legal) representatives, and the fee of the latter shall be advanced by the aggrieved party irrespective of participating as private party, private prosecutor, substitute private prosecutor or solely as an aggrieved party in the criminal proceedings.)

#### Measures for physical protection

In exceptionally justified cases the chair of the court presiding over the case, the prosecutor or the investigating authority may provide protection to the victims (aggrieved parties) or their representatives. This means, more generally, that family members, relatives and partners of aggrieved parties and their representatives may also be granted personal protection.

In many cases aggrieved parties are heard as witnesses in the criminal procedure. In order to protect the life, physical integrity or personal liberty of witnesses, as well as to ensure that they fulfil the obligation of giving testimony and the testimony is given without any intimidation, witnesses shall be provided with protection. The CCP ensures the possibility of treating the personal data of the witness confidentially. According to the relevant provisions, it may be requested by the witness or the attorney acting on behalf of the witness or may be ordered ex officio by the prosecutor, the investigating authority or the judge that the personal data of the witness is handled separately and confidentially among the documents. In such cases the data of the witness may only be inspected by the court proceeding in the case, the prosecutor and the investigating authority. From the time of ordering the confidential treatment of the personal data of the witness, personal data shall be deleted from copies of case files received by participants of the proceeding.

Witnesses and aggrieved parties may be protected in the framework of the "Protection Program". According to Act LXXXV of 2001 on the Protection Program of those Participating in Criminal Proceedings and Supporting Jurisdiction, the Protection Program shall be applied during and after the criminal proceedings if it is conducted due to an outstandingly serious crime within the meaning of the given law and if

- the person to be protected has made or will make a testimony relating to important features of an outstandingly serious crime, relating to the structure or activity of a crime organisation, or crimes committed or planned by them;
- the testimony of the person to be protected contributed or may contribute to a great extent to revealing and proving the facts of the case and to identifying the perpetrator and it can be reasonably assumed that obtaining the same evidence would require disproportionate difficulties;
- a violent crime or a crime endangering the public has been committed or would presumably be committed against the person to be protected in order to prevent her/him from exercising her/his rights and fulfilling her/his obligations in the criminal proceedings; and
- the person jeopardised cannot be protected by means of simple personal protection, and measures of special precaution are therefore necessary to be taken.

Family members of the person protected and, in exceptional cases, other persons may also take part in the Protection Program out of consideration for the protected person, if it is reconcilable with the aim of the protection and if it is justified by the situation of the person jeopardised. Participation in the Protection Program includes application of measures of special precaution such as change of domicile or residence, change of identity, personal protection, making personal data of the protected aggrieved party registered in public informational sources inaccessible for the public, changing the name, participation in international cooperation and any other measure necessary for the protection of the aggrieved party. Furthermore, the aggrieved party protection service of the Police operating the Protection Program is also responsible for taking measures in order to contribute to the reintegration of the aggrieved party into society in close cooperation with other victim support

organs.

The CCP also sets out rules concerning those participating in the Protection Program. According to the relevant provisions, those participating in the program shall be summoned or notified by way of the body responsible for their protection; furthermore, official documents may only be delivered to them by way of the body responsible for their protection. Persons participating in the program shall submit their original personal identification data during the criminal proceedings, but shall submit the address of the body responsible for their protection as their place of residence or stay. No one – including the authorities – may be provided with a copy of documents containing the personal data of persons participating in the program and any information regarding such persons, unless it is permitted by the body responsible for the protection of such persons. Witnesses may refuse to give testimony regarding data that imply their new identity or new place of residence or stay.

There is jurisprudence claiming that a burial company may not act as a civil claimant even if it repaired at its own expense the tombs damaged by the defendant. According to a judgment an insurance company cannot act as a civil claimant in the criminal procedure although the claim was ceded to it by the aggrieved party. In this case the insurance company had to turn to civil court to enforce its claim.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

If the victim has suffered damages s/he may act as a civil claimant (see also 1.2.) and claim compensation for the damages in the report initiating the criminal procedure. The CCP does not provide detailed rules regarding the procedure of enforcing a civil claim in the criminal proceeding, it refers to Act III of 1952 on the Code of Civil Procedure. The criminal court shall apply the CCP and the Code of Civil Procedure when it adjudicates the civil claim. These procedures are the “adhesive procedures” in the Hungarian law. Except for the courts situated in very small towns, courts employ specialised judges separately dealing with civil, criminal and administrative cases as a consequence they become familiarised either with the CCP or the CPC therefore they may face some difficulties as well in applying the law of the other field of expertise.

According to the CCP the criminal court shall adjudicate the civil claim on its merit, accepting or rejecting it. If it significantly delays the accomplishing of the procedure or if the accused is acquitted or if the adjudication of the motion on its merits is precluded due to other conditions, the court shall refer the enforcement of the civil claim to a civil court. The procedure of the civil court is not automatic, it must be initiated by the private party. The fact that the aggrieved party did not act as a private party in the criminal proceedings does not preclude the possibility of enforcing her/his civil claim by other legal means.

If the criminal court finds that ruling on the civil law claim is beyond its competence, it shall order the claim to be considered by a civil court. This decision is not subject to an appeal. In practice the criminal courts tend to refuse to determine the compensation to be awarded to aggrieved parties if the claim is considered to be complex because either the legal basis or the amount of the compensation is doubtful. (See also 4.2.3.)

The civil claim filed in the first instance procedure may not be extended and its amount may not be raised in the course of the second instance procedure. The



criminal court may not approve an agreement concluded by the defendant and the private party (as opposed to a civil court, which has this authority). If the criminal court does not refer the enforcement of the civil claim to a civil court, it adjudicates the civil claim on its merits: it either accepts or rejects the claim. If there is a final and binding criminal judgment also containing the adjudication of the civil claim, it creates a *res iudicata* situation, and the claim cannot be re-examined in civil proceedings. In case the adjudicated claim does not cover the entire loss or does not adequately compensate the aggrieved party, the aggrieved party may initiate a civil proceeding.

If the guilt of the defendant is established, but the civil claim is filed with the civil court (either because the criminal court referred the adjudication of the claim to a civil court or because the victim has decided to enforce the claim separately), the decision of the criminal court is in practice submitted by the victim. Under the Code of Civil Procedure, if the financial consequences of a criminal offence shall be adjudicated in a civil proceeding, the civil court shall not come to the conclusion that the convict has not committed the offence of which he/she has been found guilty by the criminal court. Therefore, it is in the basic interest of the victim to make the civil court aware of the condemning decision of the criminal court. Furthermore (and also as a result of the above quoted provision of the Code of Civil Procedure), it is the consistent practice the civil court suspends the procedure in case the civil claimant (plaintiff) initiates a civil procedure without awaiting the final judgment of the criminal court. (It needs to be added that if the criminal court acquits a defendant, the civil court may still establish that he/she is liable, so in this direction the civil court is not bound by the criminal court's decision.)

1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

The CCP sets out as a general rule that aggrieved parties are entitled to receive information on their procedural rights. Furthermore, as far as information on the rights and entitlements of aggrieved parties are concerned, the Victim Support Act sets out that the Victim Support Service shall inform clients (thus not only victims) requesting information on the following:

- the rights and obligations they have in criminal proceedings,
- the forms of support available to them and the conditions for application thereof,
- any available benefits, allowances and opportunities to assert their rights other than those provided for by the Victim Support Act,
- the contact details of state, local government, civil and church organisations involved in helping victims of crime, and
- the opportunities to avoid secondary victimisation with a view to the type of the criminal offence.

If proceedings are initiated by the aggrieved party as a private prosecutor, the investigation authority shall provide information on aggrieved party's rights. If it turns out after the commencement of the investigation that the criminal offence in question is punishable only on the basis of a private motion, aggrieved parties are informed and a statement shall be obtained from the party entitled to file a private motion.

If the prosecutor or the police have terminated the investigation, the prosecutor informs the aggrieved party of the termination and on the aggrieved party's right to file a complaint against the termination of the investigation. If the aggrieved party's complaint is rejected, the prosecutor informs the aggrieved party that s/he has the

right to act as substitute private prosecutor if the law provides this opportunity in the given case. In these cases aggrieved parties are also informed that as substitute state prosecutors they shall be represented by an attorney unless they have a law degree and have completed the Bar Exam. If the criminal offence was not reported by the victim, but her/his identity is known, s/he shall be informed of the ordering of the investigation. Those submitting a report or a private motion shall be informed about the rejection of the report/private motion. Besides these notifications, there is no further possibility for a follow-up for the aggrieved party at this stage of the criminal proceedings.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Yes it is. The CCP defines who is regarded as a victim ("aggrieved party", in Hungarian: "sértett") for the purposes of the criminal procedure (an aggrieved party is the person whose right or lawful interest has been violated or endangered by a criminal offence) and uses this term throughout the law, making it clear that for a person to exercise the rights the CCP infers on victims of crime, she/he shall meet the criteria set by this definition. The definitions of the different roles a victim may play in the criminal procedure (civil claimant, private prosecutor, substitute private prosecutor) are also formulated in such a way that they contain the previously defined term "sértett", so only a person regarded as a "sértett" can perform as a civil claimant, a private prosecutor or a substitute private prosecutor. In line with this, there is jurisprudence claiming that the person filing a report with the police about a criminal offence may not act as a substitute private prosecutor if she/he is not an aggrieved party herself/himself. In the given case the person who had filed a report with the police for malpractice by the local mayor (resulting in loss in the municipality's property) wanted to act as a substitute private prosecutor after the prosecution terminated the investigation. The court established that since the victim is the municipality (the legal entity that had suffered the loss), the person filing the report (who had no official links to the municipality) shall not be entitled to act as a substitute private prosecutor, since he has no standing as a victim (case no. BH2007. 79).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

As set out above, under the CCP, aggrieved parties are those legal or natural persons, whose rights or lawful interest have been violated or endangered by the crime investigated. The law claims that if the aggrieved party was deceased prior or after the commencement of the criminal procedure, her/his lineal relative, spouse, companion, or legal representative may exercise the rights of the aggrieved party. (If the aggrieved party is deceased without lineal relatives and s/he was a member of a church, where celibacy is a discipline the church may exercise the victim's rights.) Given that the legal standing of family members is acknowledged only for the case that the direct victim dies, it can be inferred argumentum a contrario that the victim's family, as a rule, is not included in the definition. It is important to note

that the siblings of the aggrieved party may not exercise her/his rights in the criminal procedure.

According to Hungarian law, governmental and non-governmental organisations are considered legal persons. There is jurisprudence making it clear (see the above quoted decision) that non-governmental legal persons are regarded as victims and can exercise the rights the CCP grants for victims. Governmental organisations are excluded by a judgment of the Constitutional Court (Decision 42/2005.) hence their interest is (and can only be) represented by the public prosecution service.

As a main rule, aggrieved parties and private prosecutors may be represented by an attorney, or by their adult relatives (lineal relatives of the victim, their spouses or registered partners; adoptive parents and foster parents of the victim; adopted children and foster children of the aggrieved party; sisters and brothers of the aggrieved party; the spouse, the registered partner, the partner and the fiancé or fiancée of the aggrieved party; lineal relatives, brothers and sisters of the aggrieved party's spouse or registered partner; the spouses and registered partners of the aggrieved party's brothers and sisters). An authorisation on behalf of the aggrieved party is required in all cases, and adult relatives shall also attach a clear criminal record. Substitute private prosecutors shall be represented by an attorney, unless the aggrieved party willing to act as substitute private prosecutor has completed the Bar Exam, as mentioned under 1.3 above. Aggrieved parties, private prosecutors and substitute private prosecutors may also be represented by an attorney as a legal aid provider.

Legal persons can represent victims only under special circumstances. An aggrieved party or parties, or, if the criminal offence affects a larger group of persons that cannot be determined accurately, a group of persons may be represented by an NGO falling under the law as non-profit organisations, established for the protection of the interests of the aggrieved parties or a certain group of them. The CCP does not provide an exhaustive list of criminal offenses where NGOs may represent aggrieved parties, however court practice provides some guiding principles. NGOs can represent victims in case of crimes like damaging the nature or the environment, the pollution of water, air or soil. A group of aggrieved parties whose property has suffered damage may establish an organisation of public benefit status representing their interest. The locus standi of such an organisation does not depend on the approval of the court or the investigation authority. The right to represent is enabled ex officio, the organisation shall only display that it has a public benefit status and that it represents the rights of the aggrieved parties; consequently no authorisation is required.

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

The general standing requirement is set out by the above quoted definition according to which the victim is a party whose rights or lawful interest have been violated or endangered by a criminal offence. As described above, aggrieved parties can satisfy different procedural positions with different rights and obligations.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

In addition to the general standing criteria pertaining to all victims in the criminal proceeding (see above), certain additional criteria need to be fulfilled for a victim to be able to act as a private prosecutor, a substitute private prosecutor or a private party.

A victim can act as a private prosecutor in cases where the criminal offence is punishable on the basis of a private motion (light bodily harm, infringement of private or postal secrecy, defamation, libel and irreverence). In such cases it is a general requirement that a so-called private motion shall be filed within thirty days from the date that the victim is informed about the identity of the perpetrator, or (if the fact that the offence is punishable upon a private motion is revealed only after the commencement of the investigation) thirty days from the date on which the investigating authority calls on the victim to make a statement on whether he/she wishes the continuation of the proceeding. A private motion is defined as any statement from the victim in which he/she expresses that he/she wishes that the perpetrator be sanctioned.

The possibility to request the review of a decision not to initiate an investigation or not to carry on with the investigation of a case is open to all victims. If the request is rejected or the charges are dropped by the prosecutor, then the victim may act as a substitute private prosecutor. However, as it was set out at section 1.2.2., this possibility depends on the reason for not launching the investigation or terminating a running investigation: for example, if the investigating authority refuses to start an investigation on the basis that the suspicion of a criminal offence is lacking in the case, no substitutive private prosecution is made possible by the CCP. So in this case, the standing depends on the reasons provided by the public prosecutor's office for the decision not to prosecute.

A special situation is when there are more victims and therefore more than one person is entitled to act as private prosecutor or substitute private prosecutor. In such cases the concerned parties shall agree who will exercise the rights attached to the given legal position. If no agreement can be reached, the court shall appoint the person acting as private or substitute private prosecutor. Therefore, the appointment by the court or the agreement of the parties applies here as a special requirement for that particular legal standing.

If a party enforces a civil claim in the criminal proceeding s/he becomes a private party in the criminal procedure (see 1.2.4.). Here the only additional condition is that the private party may only assert such claims vis à vis the perpetrator that have occurred as a direct result of the committed criminal offence.

3.3. Are there specific standing rules applicable to certain types of claims?

Yes, some. See 3.2.

3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

No. The requirements of standing are not in any way dependent on the claimant's nature (with the exception of governmental bodies, see: 2.2.).

3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No, there are no other variations in the standing rules.

3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

The definition of an aggrieved party (a person whose right or lawful interest has been violated or endangered by a criminal offence) obviously enables the enforcement of human rights (as a right violated or endangered by an offence) through the standing of the victim. According to practising lawyers and judges, using human rights laws as a special basis for standing has not been raised in the jurisprudence as a separate issue.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

There is no relevant case-law available. The answers provided for the questions below (4-5) are based on the opinion and experience of lawyers representing aggrieved parties before the criminal courts; of a member of the Victim Support Service; and of a former criminal law judge currently working in the academia. The requirements of locus standi are set forth quite precisely in the CCP. The courts act in compliance with the legal regulations and generally apply a strict interpretation if margins are allowed by law. In general, the control or establishment of the locus standi is not a distinct legal question of the court procedure, therefore the court does not formally decide on this issue. The locus standi is most frequently established in the investigation phase of the criminal procedure by the responsible authorities. The police or the prosecutor's office carrying out the investigation defines those persons whose rights were violated or jeopardised by the crime; these are the aggrieved parties, and the courts tend to accept the assessment of the prosecution in this regard. A Hungarian Helsinki Committee's lawyer had a case in which the murder victim's sister could not participate in the court procedure as a substitute private prosecutor because the CCP precisely defines the relationships based on which "succession" of the aggrieved party's rights is possible and being a sister is not included.

- 4.2. Are there significant variations in the courts' approach based on:

- 4.2.1. the type of remedy requested?

As stated above, the requirements of locus standi are defined in the CCP, and courts are very rarely in the position when they need to make a formal decision on whether a party claiming to be an aggrieved party has a legal standing (this most often happens when it needs to be decided whether someone has the right to act as a substitute private prosecutor when an investigation is terminated). Since aggrieved parties have rights in the pre-trial phase, the issue as to whether someone can be regarded as an aggrieved party is already decided by the time a case gets to the court (and courts tend to accept the assessment of the investigating authority). Consequently, no variations could be detected in the approach of the courts based on the type of remedy requested.

- 4.2.2. the nature of the claimant?

What is stated under 4.2.1. also applies here. There are no differences in the courts' approach based on the nature of the claimant. Issues that interviewed practitioners raised here were not so much related to the assessment of legal standing, but to the approach of the courts towards aggrieved parties wishing to actively participate in the proceedings and to exercise their rights

stemming from their legal standing.

Practitioners have claimed that the court's approach is significantly more involved and favourable to the client if a lawyer represents the aggrieved party. It seems that courts are more receptive if claims are professionally formulated and could be discussed among lawyers. Courts are likely to prefer omitting "civil" parties from these "professional" argumentations.

#### 4.2.3. the nature of the claim?

What is stated under 4.2.1. also applies here. No significant differences have been detected in the court's approach based on the nature of the claim.

One particular area is the assessment of civil law claims. Under the law, the criminal court may decide upon the civil law claim in a so-called "adhesive procedure" (see under 1.2.4.). If the criminal court adjudicates the civil claim it has to apply the Code of Civil Procedure, though criminal law judges are not acquainted with the civil procedural law as thoroughly as the civil law judges. For example, a civil claim of an aggrieved party cannot be simply declared to the court, but a formal civil law statement shall be submitted by him/her. In this case the criminal law judge has to decide first of all if the claim is admissible or not, further on he/she has to apply the Code of Civil Procedure as well. Since criminal law judges are not specialised in the civil law procedures they usually refer the claim to the civil court. As a consequence of the fact that there exists no legal remedy against the decision of referral, adhesive procedures occur very rarely in the Hungarian legal practice.

In other words in practice this latter route (civil law claims are not adjudicated by the criminal court) is taken in the vast majority of cases: the criminal court only orders the compensation of the victim pursuant to a civil law claim if; (i) the opinion of a forensic expert proves the amount of damage; (ii) neither the aggrieved party nor the defendant challenges it; (iii) the defendant confesses to committing the crime. This practice engenders extreme delays in civil law claims' enforcement before the civil courts. It is evident that such approach by criminal courts is not in favour of the aggrieved parties.

(ref.: Cserei, Gyula: The implementation of the aggrieved party's rights. [A sértetti jogok érvényesülése.] In.: Belügyi Szemle 2003/2.)

According to a research study by the Chief Prosecutor's Office, another element that hampers decisions relative to civil law claims is an inappropriate position held among judges that the civil law claim put forth in the investigation phase of the criminal procedure is no longer valid before the court. Therefore, the courts often do not decide in such cases.

(ref.: Cserei, Gyula: The implementation of the aggrieved party's rights. [A sértetti jogok érvényesülése.] In.: Belügyi Szemle 2003/2.)

In terms of legal sociology, this practice of the criminal courts can be explained by the substantial caseload the courts must handle. Criminal procedures are based on the principle of legality: each crime the authorities are informed about shall be investigated and assessed by the prosecutor's office and the court regardless of the seriousness of the crime. Hence criminal courts are extremely overburdened with cases of low gravity and they prefer to stay away of issues not entirely falling under the competence of the judge (i.e. adjudication in civil claims).

#### 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

As referred to in 4.1, courts are generally not in a position to grant standing to aggrieved parties.

According to the law an aggrieved party may act as substitute private prosecutor if he/she is the victim of the offense as discussed above. According to court practice in general, the aggrieved party may act as a substitute private prosecutor if he/she has been directly affected by a criminal offence. Recently, a very restrictive jurisprudence has started to evolve in this respect excluding substitute private prosecution if the primary purpose of sanctioning a given behaviour is the protection of the state, the social or economic order. By way of example, according to recent decisions false accusation or perjury (false testimony) are considered as offences not directly affecting the person who is falsely accused (as the protected legal value of that offence is the purity of the justice system), therefore he/she may not act as substitute private prosecutor.

Based on practical experience in cases where courts have a certain role in granting standing (i.e. the court becomes aware of the existence of a previously unknown aggrieved party), judges mainly take into consideration the merits of the case: they assess whether the person demanding the standing of the aggrieved party is able to provide valuable information for delivering a judgement in the case. If they estimate that the person is able to present additional information that was previously unknown then judges are favourable to refer the case to the prosecutor's office in order to assess whether or not to grant standing to the aggrieved party.

- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

No. Rather, courts consider the participation of aggrieved parties in the court's procedure to be a hampering element. The courts normally treat the aggrieved party of a crime as one of the usual witnesses, i.e. as a source of information. The most important goal of the judges is to deliver a judgment as quickly and efficiently as possible. This interest effaces the adequate treatment of the aggrieved parties. According to practitioners, judges commonly ignore the possible psychological or emotional harm the crime might have caused to the aggrieved party. They do not concern themselves with speaking to the aggrieved party, and do not take into consideration that aggrieved parties may be frightened of the defendant or that it may be painful to recall the events linked to the crime. This negligence is a characteristic of the whole criminal justice system (e.g. there are no separate rooms installed for the aggrieved parties and defendants, they have to wait in the corridors of the court's room until being called by the judge – this requirement is not prescribed by law) and is not solely the practice of certain individual judges. Another characteristic hindering active participation in the criminal procedure is that provisions in the CCP relating to the aggrieved party are not collected under a single section of the code, rather dispositions are found scattered in the code. In 2000 a research study of the Chief Prosecutor's Office found that when the (prosecuting) authority required the presence of the aggrieved party in the procedure its main motivation was the advancing of the procedure rather than the enhancement of the exercising of the aggrieved party's rights. The research also revealed that the authorities would not inform the aggrieved party of procedural events if the aggrieved party did not have to participate actively at that given stage of the procedure. According to the CCP, it is the obligation of the authorities to properly inform the aggrieved party about her/his rights, however in practice non-compliance with this requirement was observed. Unfortunately parties rarely have legal representation; therefore they only have the possibility to receive information

from the authorities in question.

According to Róth's study, in practice the requesting of evidence initiated by the aggrieved party remains very limited. However, aside from submitting civil claims, aggrieved parties do have more extended possibilities to request evidence (e.g. the testimony of a concerned person, expert's opinion, etc.) before the criminal court. (ref.: Róth, Erika: The standing of the aggrieved party in the criminal procedure. [A sértett helyzete a büntetőeljárásban.] In: Zsuzsa, RÓZSAHEGYI (edit.): Victim Support in Europe. Studies, documents prepared for the drafting of the Act on the Support of Victims of Crime and State Compensation. [Áldozatsegítés Európában. Az áldozatok segítéséről és az állami kárenyhítésről szóló törvény előkészítéséhez készült tanulmányok, dokumentumok.] Ministry of Justice, National Crime Prevention Board, Budapest, 2005.

Cserai, Gyula: The implementation of the aggrieved party's rights. [A sértetti jogok érvényesülése.] In.: Belügyi Szemle 2003/2.)

## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

The transposition of secondary EU law principally required the implementation of the provisions set out in the Council Framework Decision of 2001/220/IB. In order to provide support and legal assistance for victims of crime, and to make the mediation possible between the aggrieved party and the offender, the Act on the Support of Victims of Crime and State Compensation and the Act on Legal Aid were introduced into the Hungarian legal framework. The CCP was amended in order to introduce penal mediation into the criminal procedure and the Parliament also adopted the Act on Mediation Activity Applicable in Criminal Cases. However, the transposition of the EU law did not necessitate the modification of the provisions concerning standing rules of the aggrieved party before the criminal court.

Based on a study by Erika Róth, international soft law (Council of Europe, UN documents) has been a long-term influence on the Hungarian legal system and its principles have initiated numerous modifications to the CCP. Also, the harmonisation of domestic law with EU law began in the mid 1990s. Therefore it is difficult to precisely identify which influences resulted in the amendment of the legal system, especially in relation to the obligatory transposition of the secondary EU law. The only exception is the introduction of the penal mediation in the legal system, because it is evident that the 2001/220/IB Framework Decision triggered its application.

(ref. Róth, Erika: The standing of the aggrieved party in the criminal procedure in the light of the European Union's requirements. [A sértett helyzete a büntetőeljárásban az európai unió elvárásainak tükrében.] [http://www.mjsz.uni-miskolc.hu/201102/12\\_rotherika.pdf](http://www.mjsz.uni-miskolc.hu/201102/12_rotherika.pdf))

Although EU law was transposed into the Hungarian legal system the standing of the aggrieved party remains problematic before the criminal court. The Victim Support act applies the term "victim" according to the Framework Decision: it covers any natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss caused by a crime. Contrary to this, the CCP's scope of the victim of a crime is narrower, it exclusively grants the standing of a victim to those whose rights or interests were directly harmed or jeopardised by the crime in a way that the Penal Code exactly stipulates it (e.g. family members who



suffer from a mental injury caused by a crime cannot act as aggrieved parties in a criminal procedure), but extends the standing to legal persons as well. As a consequence it may be possible that someone receives services from the Victim Support Service but cannot act as an aggrieved party before the criminal court.

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

As stated under 5.1., a constant development of the Hungarian legal regulation could be detected, however the source or initiator of the changes remain undetectable. The standing rules are outside of the main field of interest of the practitioners and the academic professionals. The standing rules are rarely touched upon or influenced by scientific debates or converging interpretations.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

According to the experience of the experts interviewed for the present research the court's main interest is to adjudicate as quickly and efficiently as possible. The application of any international law, principle or case-law would be obstacles to these interests. Therefore, courts generally rely on the application of domestic rules and do not use principles developed in the international case-law. Unfortunately this is the case, however – as we described it above under 5.1. – with the application of the term "victim" developed by the Framework Decision, which is not identically applied by the CCP and the criminal courts. Criminal courts (and legal representatives) do not use any reference to international law or case-law.

According to the opinion of criminal law experts interviewed, the level of application of international norms or principles is generally negligible especially with a question deemed as marginal as the standing of the aggrieved party.

Four years before the accession of Hungary to the EU intensive training on EU law was provided to judges, including criminal law judges. The attitude of judges towards getting acquainted with the new legal regulation was rather negative – according to the study by Andrea Kenéz, Metropolitan Court judge – since they did not have the capacity to process significant amounts of new information.

Consequently, the series of training had an alienating affect relative to the application of EU law. The author of the study considers that this unenthusiastic attitude has not disappeared in recent years. The large majority of criminal law judges are not familiar with EU law and most of them do not possess the necessary foreign language skills required to establish direct contacts with courts in the Member States of the EU.

A telling example of the application of international norms is that in the first five years of membership in the EU Hungarian criminal law judges submitted only two preliminary questions to the Court of Justice of the European Union.

(ref.: Kenéz, Andrea: The impact of the Hungary's adhesion to the European Union on the administration of justice. Or has the Hungarian criminal law judge become a judge of the Community since 1 May the adhesion of Hungary to the European Union? [Az európai unió tagság hatása a jogalkalmazásra. Avagy közösségi bíróvá lett-e valóban a magyar büntetőbíró 2004. május 1-je, hazánknak az Európai Unióhoz való csatlakozása óta?] In. Concepts and their implementation in the criminal politics after the change of the regime. [Koncepciók és megvalósulásuk a rendszerváltás utáni kriminálpolitikában.] Hungarian Society of Criminology, Miskolc, 2009.)

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

See 5.3.1.

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

See 5.3.1.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

See 5.3.1.

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

It has to be underlined again that according to the terminology of the CCP the aggrieved party may participate in the criminal procedure. The term "aggrieved party" refers exclusively to the most direct victims of the crime and ignores those who were indirectly (psychologically or emotionally) affected by the crime (e.g. family members). This concept is not in compliance with the wording and the spirit of the Council Framework Decision on the standing of victims in criminal proceeding (2001/220 JHA). However, the Victim Support Act is in full compliance with the framework decision to offer various services to all persons affected by the crime. According to the Victim Support Act, victims of crime are entitled to state compensation and victim support services. Once a criminal procedure is initiated, the victim shall be entitled to victim support services and state compensation. If the relevant authorities finally decide that, in the given phase of the criminal proceedings, no criminal offence happened then the victim shall refund the compensation to the state. However, the Victim Support Act provides that a victim of crime shall be entitled to state compensation and instant financial aid even if

- charges are rejected, investigation is terminated, the proceeding is dismissed or the defendant is cleared of charges for reasons such as status as a minor, mental incapacity, coercion or duress, mistake, lawful self-defence, extreme necessity or superior's command; or
- charges are rejected or the proceeding is dismissed on any grounds for the termination of punishment as defined in the Criminal Code.

Certain victims are not entitled to victim support service. These are victims of crimes who

- have already received support in an earlier phase of their case,
- have provided false data in a previous application for victim support services, for a period of two years following the final resolution,
- obstruct the examination aimed at verifying the data submitted in their application for support,

- have obstructed the examination aimed at verifying data submitted in a former application for support, for a period of two years following final resolution,
- have failed, although they had been obliged, to repay the state the financial aid or the fee of legal assistance granted under the provisions of the Victim Support Act.

Under the provisions of the Victim Support Act, the following are entitled to state compensation:

- Those who have been victimised by an intentional violent crime and, and as a direct consequence thereof, suffered severe physical or mental injury,
- Those who are a direct relative, adoptive or foster parent, adopted or foster child, spouse or common-law spouse of the victim injured or killed as a consequence of a crime, and were living at the time of the crime with the victim as a domestic partner, and

- Those whom the victim injured or killed as a consequence of a crime (referred to above) are or were obliged to maintain pursuant to the provisions of a legal regulation, an enforceable court order, or official decision, or a valid contract.

The Victim Support Act provides that state compensation is only available in case of violent intentional crimes. In order to be entitled to state compensation, the victim needs to be indigent, which means that her/his net monthly income, or the per capita household income, may not exceed double the so-called 'basic sum'. (The basic sum is 43 percent of the national gross monthly average wage as determined and published by the Central Statistics Office of Hungary in the second year prior to the year in question.) In some cases the victim shall be considered to be indigent irrespective of her/his earnings (e.g. the victim receives regular social aid or social welfare payments provided for the elderly, s/he is a homeless person in need of temporary accommodation in lodging facilities or overnight refuge, asylum seekers, etc.).

However, state compensation is not designed to cover all the losses/damages to the victim. It solely means an advance payment by the state, providing support to the victim until her/his loss is refunded from other sources. Consequently, the victim shall enforce her/his social security or other insurance claim arising from the crime, otherwise s/he is not entitled to state compensation. Furthermore, the victim shall refund the state compensation within three years following the decision on the merits of her/his application, if her/his loss or damage was fully or partly compensated from other sources. However, the victim's obligation shall not exceed the amount of such compensation; and the victim is not entitled to state compensation, if s/he enforced their claim for damages or insurance claim and was fully compensated by the time of submission of the application for state compensation. Similarly, the payment of allowance shall be terminated under certain circumstances, e.g. if the victim has been granted annuity payments for damages by a final court order, and disbursement of such annuity has commenced; an insurance company starts disbursing annuity benefits to the victim, or the victim's disability to work came to an end.

## ITALY

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (ITALY)

Where necessary, please quote specific statutory law and leading case law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

In Italy, civil cases are dealt with at the first instance level by 2,419 justices of the peace (whose offices are spread over 850 seats) and 165 courts of first instance (called *tribunali*). Often, the *tribunali* are located in the cities that are the capitals of the provinces representing one of the many units that comprise the Italian public administration at the local level. Each *tribunale* may have a variable number of 'detached divisions' in the major cities of its district (for a total of 220 detached divisions). There are 26 courts of appeal and a single Supreme Court (sitting in Rome), acting as the court of last resort for civil, administrative and criminal cases. The Italian judiciary consists of professional judges, that is, judges who are recruited through a competitive examination and hold salaried positions until the age of retirement; they are civil servants, even though they enjoy a special status, in order to guarantee their independence and impartiality. Only the justices of the peace (quite a recent addition to the Italian judiciary) are lay judges. The judicial geography of the country is more or less the same as Italy had a century ago when it became a unified kingdom. Several attempts at changing the landscape of the courts with the view to rationalising the judicial organisation have failed due to strong opposition from various groups of stakeholders (essentially local politicians, lawyers and judges themselves). At present, the technical government in power is working on a bill for a complete reorganisation of the courts, many of which are expected to be unified, so as to eliminate, for instance, the many courts of first instance functioning with less than 20 or even 10 judges.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

In principle, Italian courts are courts of general jurisdiction. A constitutional rule provides that 'extraordinary or special judges may not be established. Only specialised divisions for specific matters within the ordinary judicial bodies may be established, and these divisions may include the participation of qualified citizens who are not members of the Judiciary' (Article 102, sec. 2). The Constitution, though, preserved a few pre-existing special courts, namely, the administrative courts, that is, the '*Consiglio di Stato*' and the '*Corte dei Conti*'; later on, other administrative courts (called '*Tribunali amministrativi regionali*') were added as courts of first instance for cases involving the State or public entities at large. The '*Consiglio di Stato*' plays the role of appellate court: in other words, judgments issued by the '*Tribunali amministrativi regionali*' can be appealed against to the '*Consiglio di Stato*'. The '*Corte dei Conti*' mainly hears cases regarding public expenditures, as well as cases brought against civil servants in order to hold them accountable to their hierarchical superiors. Implementing the constitutional principle according to which only specialised divisions can be established within ordinary courts, a limited number of such

'specialised divisions' have been established: the divisions in charge of cases concerning agricultural property, the juvenile divisions (with both civil and criminal jurisdiction), and the divisions handling IP cases. A recently enacted statute( statute no. 27 of 24 March 2012, at Article 2) has enlarged the jurisdiction of the divisions (originally) handling IP cases: as of now, such divisions are in charge of a wide variety of commercial cases, corporate cases, and class actions for damages as well, and have adopted a new denomination reflecting their modified roles, that is, '*Tribunali delle imprese*'.

The most common way by which attention is paid to the need for specialized knowledge for better management of certain types of cases is to assign a few judges (more or less permanently) to the panels in charge of cases involving specific matters, such as labour and family disputes, or bankruptcy. Such panels do not fall within the category of the 'specialised divisions' envisaged by the Constitution: they are established only with the goal of implementing a better 'division of labour' within the courts of general jurisdiction.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

The modern Italian theories of civil procedure tend to stay away from standard definitions of what a civil claim is. Certainly, a civil claim implies the assertion of a right by its alleged bearer, who contends that his or her right has been infringed, and because of that turns to a court asking for protection, that is, for a remedy suitable for restoring the infringed right. This is a simplistic way of describing a civil claim, but its positive side is that it emphasises the fundamental elements of a claim: the right that is asserted and the remedy sought. Judicial enforcement of a right arising under substantive law can always be sought by those who claim to be the bearers of the right itself, a principle enshrined by Article 24 of the Italian Constitution: the essence of access to justice is to obtain from the court a remedy that can restore the right in its pristine wholeness.

Every kind of legal relationship (whether binding private parties or public entities) can give rise to the interplay of rights and corresponding duties that is at the root of civil disputes. One must keep in mind, though, that in Italy some 'civil' (that is, non-criminal) matters fall within the jurisdiction of administrative courts, which are in charge of the judicial protection of what Italian legal sources (the Constitution included) identify as 'legitimate interests' (*interessi legittimi*). Legitimate interests can be loosely defined as the 'little brothers' of rights, since they can be claimed only insofar as they coincide with the general interest in the proper functioning of the public administration. The distinction between 'rights' (or, more precisely, 'subjective rights' – *diritti soggettivi* – as they are called in Italy) and 'legitimate interests', even though more and more blurred, still marks the divide separating matters belonging to the jurisdiction of civil (also known as ordinary) courts, and matters falling within the jurisdiction of administrative courts.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

In Italy, standing is not only a distinct procedural requirement, but it is also one of paramount importance, since when standing is lacking, the adjudication cannot proceed so as to reach its expected outcome, that is, a decision on the merits of the case. The Italian notion of standing comprises two elements. The first element

(called *legittimazione ad agire*) concerns the relationship between the claimant and the claims he submits to the court: the claimant is the 'proper party' to a case only if the claim has to do with a right the claimant contends to be his own, since in principle nobody can petition a court for the judicial protection of somebody else's rights (Article 81 of the Code of Civil Procedure). In other words, the claimant must have a personal and direct stake in the outcome of the case: he must claim that his right was adversely affected by a legal wrong perpetrated by the defendant, and ask the court to take action so as to redress the alleged legal wrong. The second element (called *interesse ad agire* and laid down by Article 100 of the Code of Civil Procedure) entails the relationship between the claim and the kind of redress the claimant is seeking: the remedy sought must be capable of restoring the right allegedly violated by the defendant, and there must be no avenues of redress other than resorting to adjudication. Reference is often made to the 'usefulness' of the remedy sought; even a declaratory judgment can be deemed 'useful' when the claimant is able to demonstrate that such a judgment would eliminate the uncertainty surrounding the existence of a right he claims as his own.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

As far as the requirements for standing at first instance level are concerned, nothing can be added to the answer given to the previous question. On appeal, things are much simpler: only the parties to the adjudication have standing, provided that they can be identified as the losing parties, that is, the only ones who have a direct interest in the reversal of the decision that the court of first instance issued rejecting their claims or defences.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Again, the general features of the standing requirements have been described in the answers given to questions 2.1. and 2.2. The only additional point that can be made is that standing requirements do not change as regards final appeals. No leave to appeal is necessary to have the Italian Supreme Court (the Corte di cassazione) reconsider decisions issued by lower courts, taking into account that by the appeal to the Supreme Court only specific questions of law can be raised, while issues of fact are not reviewed by the Court. By virtue of a constitutional provision (Article 111, sec. 7), even the final appeal is as of right.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

From a legal point of view, the two elements comprising the Italian notion of standing do not change and stay always the same no matter what kind of claims are brought to court or remedies sought. In practice, though, the element that has been described above with reference to the 'usefulness' of the remedy (that is, its being suitable for redressing the legal wrong the claimant claims to have suffered) changes according to the type of claim at issue, to the point that each claim or

remedy legally available could be dissected so as to identify which shape is taken by this specific requirement of standing: a kind of analysis that seems to be beyond the purpose this questionnaire is intended to achieve. However, it could be worth mentioning that the requirements of standing play a complementary role as far as provisional and interim measures are concerned. For such measures other requirements are laid down by the Italian Code of Civil Procedure, and must be met in order to be granted the provisional remedy sought: they are known as '*fumus boni iuris*' and '*periculum in mora*'. '*Fumus boni iuris*' refers to the fact that the claimant must show what can be called a sort of probable cause for his claim, that is, he must demonstrate the existence of enough facts that would lead a reasonable person to believe that the claim is justified. '*Periculum in mora*' refers to the fact that the claimant must demonstrate that, absent an interim remedy, the right he claims would be irreparably compromised.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

As mentioned before, requirements for standing are indifferent to the diverse areas of substantive law falling within the jurisdiction of civil courts, nor are there any special rules as regards specific types of claims.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

The requirements of standing do not change according to the 'nature' of the claimant. As far as legal entities (both private and public) are concerned, standing – if its requirements are met – is vested in the person who can represent the legal entity according to the relevant substantive law or the organisational chart of the entity itself. The State and its bodies can sue and be sued before civil courts if the usual requirements of standing are met, keeping in mind that – as emphasised sub 1.3. – several claims involving public entities fall within the jurisdiction of administrative courts, since the subject matter gives rise to 'legitimate interests' and not to 'subjective rights'.

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Interpleader, as it is conceived in some common law jurisdictions, is not allowed in Italy, since third party C would not have any standing as regards the two parties A and B claiming the same right to a piece of property or a sum of money. In other words, third party C cannot force A and B to settle their claim through adjudication. Supposing C is the insurer mentioned in the example given by the question, C could bring an action against A and B for a declaratory judgment with a view to having the court ascertain whether A or B is entitled to receive the money or the property.



An alternative is an action brought by A against B (or vice versa), joining the insurer C in the adjudication.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

In Italy, reference to human rights law as an additional basis for standing is unheard of.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Joinder of parties, either permissible or mandatory, is allowed, and it can affect joinder of claimants, defendants and third parties. Joinder is necessary when more subjects are 'united in interest', that is, they have a joint interest in the substantive right to which the claim is related. If all these subjects have not been parties to the lawsuit from the very beginning, the court must order that they join the adjudication within a deadline. A judgment issued in a case in which joinder was mandatory, but some necessary parties did not take part in the proceeding, has no effect at all, not even as regards the parties who were present before the court. Permissive joinder is allowed when two or more claims are 'connected', that is, they arise out of the same transaction or occurrence (as the Americans say), so as to give rise to the same questions of law or fact. Third party intervention is allowed, too. The intervention can be voluntary when the third party asserts a claim against both the (original) claimant and the (original) defendant, provided that his claim is connected with the one the claimant and the defendant are trying to settle through adjudication. Another form of voluntary intervention can take place when the intervenor asserts a claim that is parallel to the claim asserted by one of the original parties. Yet another type of intervention is allowed when the third party does not assert any claims, but only supports the claim or the defence asserted by the original parties, provided that the third party is able to demonstrate his own interest in joining the lawsuit, an interest that arises when the court's decision might affect the intervenor's rights (for instance, a third party may intervene in an action brought by the creditor against his debtor if the third party is the guarantor of the debtor's obligations). Third party intervention may also be requested by a party to the case (often, by the defendant) or ordered by the judge; in the latter case, the order is directed at the original parties. If they fail to comply with the court order, the case is stricken from the docket.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Voluntary intervention of a third party can be opposed by the original parties

through the mechanics of specific defences, that is, by denying that the requirements making intervention admissible exist. Should that happen, the matter will be settled by a court judgment.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

In Italy, there are three types of multi-party litigation.

1) Collective actions for injunctive relief can be brought by consumer associations for the protection of consumer rights. These actions were originally provided for by several statutes implementing EU directives in the field of consumer protection, and as of now they are governed by the general rules of the consumer code. Other kinds of collective actions for injunctive relief are selectively present in other areas of substantive law, such as anti-discrimination law, immigration law, environment protection law and labour law.

2) Class actions for damages can be commenced by a consumer or user (in person or represented by a consumer association). The original claimant can be joined later by other members of the class who opt-in and who must do so if they want to avail themselves of the settlement or the judgment by which the proceeding comes to its end. Several kinds of claims (arising out of contracts or torts) can be asserted, according to the relevant provision of the consumer code.

3) The so-called 'public class action' is a group action consumers and users can bring against a public body whenever the inefficient performance of its duties has harmed the rights of a plurality of individuals. The remedy sought can only be a sort of cease and desist order; if the court (by the way, the administrative court) finds for the claimants, it must order the public body to redress the wrong done within a deadline. If the order is not complied with, resort will have to be made to the special procedures governing the enforcement of court judgments and orders issued against the public administration.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

As far as collective actions for injunctive relief are concerned, the law clearly identifies the claimants who are granted standing: for instance, in the field of consumer protection, only the consumer associations that have been accredited by the government can bring collective actions. Class actions for damages can be brought by an individual consumer or user: the rule governing these actions (Article 140 bis of the Consumer Code) apparently does not lay down any further specification, but its very wording makes it clear that the claimant has standing only insofar as he represents a group of individuals who can claim 'homogeneous' or 'identical' rights adversely affected by the unlawful conduct of the same defendant. The same can be said with reference to standing in the so-called 'public class actions'.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Regulation of multi-party litigation is sector specific.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

No.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

The difference between this question and question 5.1. escapes the reporter. The only 'general' interests that can be vindicated in court by way of group actions are the ones that fit the framework of collective actions or class actions mentioned above.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

See 6.1.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Standing seems to be taken quite seriously by Italian courts. It is a well-established principle that lack of standing is one of the few points of law that a court can raise ex officio at every stage of the proceeding and even on appeal, as it is repeatedly said by the Court of cassation. The reporter is not aware of any case law that is worth mentioning as an example of the approach adopted by the Court, even though it is possible that, out of the approximately 30,000 judgments issued each year by the Court on civil matters only, some decisions stand out as the 'manifesto' of the Court's attitude towards the requirements of locus standi.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

No.

- 7.2.2. the field of substantive law at hand?

No.

- 7.2.3. the nature of the claimant?

No.

- 7.2.4. the nature of the claim?

No.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

Absolutely not, since the control courts exercise over standing precedes the examination of any issues or points having to do with the merits of the case.

- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid

trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

I do not think Italian judges at large consider standing as a tool they could use to improve the administration of justice: most judges – unfortunately – have a bureaucratic approach to their tasks, and tend to overlook the 'big picture', while trying to stay afloat on the sea of their overcrowded dockets.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

The implementation of secondary EU law has forced the Italian legislators to grant new rights as rights that are not individual ones, but belong to a group of subjects; that has brought about new hypotheses of collective or group standing, but – as noticed supra, at 5.1. and 5.2. – only in well- identified areas of the law. That aside, no significant changes have taken place in the rules governing standing.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

The implementation of secondary EU law has forced the Italian legislators to grant new rights as rights that are not individual ones, but belong to a group of subjects; that has brought about new hypotheses of collective or group standing, but – as noticed supra, at 5.1. and 5.2. – only in well- identified areas of the law. That aside, no significant changes have taken place in the rules governing standing.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

It can be emphasised that the principle of effective judicial protection as well as the right to an effective remedy and the right of access to courts are all provided for by the Italian Constitution, and fall within the guarantee of 'due process of law', as enshrined in art. 111 of the Constitution.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

None of the above, to the reporter's knowledge.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

None of the above, to the reporter's knowledge.

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

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## QUESTIONNAIRE FOR REPORTERS ON ADMINISTRATIVE LAW (ITALY)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

Art. 102 of the 1948 Italian Constitution forbids the setting up of extraordinary or special courts, the administration of justice being the preserve of courts made up by 'ordinary' judges, i.e. judges enjoying the safeguards provided by the specific law on the court system and, more importantly, by the Constitution itself (Art. 104 ff; independence from any other State power; selection on the basis of merit; the right not to be removed from office; all these safeguards are buttressed by having issues affecting the career of judges decided upon by a self-government institution, the Consiglio Superiore della Magistratura - High Council of the Judiciary, most of whose members are judges elected among and by all the judges). These are the general courts normally dealing with civil and criminal matters. Administrative cases only rarely are heard by the general courts as in the main they fall under to the jurisdiction of administrative courts (below 1.4). As a rule, cases decided at first instance by a general court may be appealed, and appeal judgments may be challenged in front of the Corte di Cassazione on points of law (the Corte's jurisdiction does not extend to the facts of the case). The jurisdiction of the general courts is therefore the rule laid down in the Constitution; however, the Constitution also provides for exceptions, namely: a) the possibility to set up special divisions of the general courts (Art. 102); b) the permanence of the most important pre-Constitution special jurisdiction: besides military courts, the Consiglio di Stato and lower administrative courts and the Corte dei conti - Court of auditors (Art. 103); moreover; c) a special 'court' is established to deal with issues concerning the conformity of statutes with the Constitution and the conflicts between the State highest institutions (Corte costituzionale, Art. 134).

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

Both exception a) and b) above are relevant for Italian administrative law. Special divisions of the general courts are competent for tax disputes and for disputes concerning the exploitation of public water. Moreover, the Consiglio di Stato and lower administrative courts have a jurisdiction in most administrative law disputes (Art. 103 Const.: see below 1.4.).

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

The Court of auditors is a special administrative court. It combines auditing and jurisdictional functions. In particular, it has jurisdiction on cases against State servants - broadly understood - accused of having mismanaged public funds or having otherwise harmed the financial interest of the State.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

In principle, the jurisdiction of courts - both general and administrative - to review administrative decisions is limited to legality review, meaning that courts do not go into the merits of the decision taken. A short list of matters on which the administrative courts have jurisdiction on the merits of the administrative decision is to be found today in Art. 134 of Legislative Decree ('d.lgs.') 104/2010 (the code of administrative (judicial) procedure).

Generally speaking, according to a pattern that was first established in 1889, general courts have jurisdiction for the protection of *diritti soggettivi* ('subjective' rights) while administrative courts have jurisdiction in cases involving *interessi legittimi* (which could be roughly translated into interests to the legality of administrative decisions).

The distinction is not an easy one and not just because of the difficulties in defining *interessi legittimi*; problem is also that some of what would be normally considered as rights are treated as a legitimate interests.

Indeed the distinction still gives rise to a number of cases each year. The Grand Chamber (Sezioni Unite) of the Corte di cassazione has the last word on this kind of disputes, but as we will see it may be overruled by the Parliament giving either jurisdiction - but normally the administrative one - competence on both *diritti soggettivi* and *interessi legittimi* (giurisdizione esclusiva).

In theory, an *interesse legittimo* is an interest to the legality of administrative decision-making proceedings whose holder happens to have some specific links to same proceedings (see also below 2.2). To try to make the matter tractable if not simple, it is fair to say that individuals and undertakings are normally held not to have *diritti soggettivi* but only *interessi legittimi* when they are asking for a permission or a licence or a grant or other utility or benefit (*Leistungsverwaltung*), included employment with the State or other public law entity and the award of procurement or concession contracts. Only exceptionally in these cases a *diritto soggettivo* has been recognised to the benefit of individuals, namely in the health care sector (limited to life saving and other essential medical treatments), and, more recently, to the benefit of asylum seekers (Cass. Civ. Sez. Unite, 19577/2010).

The opposite is not true, meaning that *Eingriffverwaltung* is not necessarily faced with *diritti soggettivi*. Generally speaking, courts, and only not administrative bodies, have the power to limit personal and other core freedoms enshrined in the Constitution. In this case, no administrative decisions may be taken and a problem of judicial review cannot be posed. Of course, first instance judgments affecting personal and other core freedoms enshrined in the Constitution may be appealed and, concerning personal freedom, in any case challenged in front of the Corte di cassazione (Art. 111(7) of the Constitution).

As a natural development general courts have been expressly given jurisdiction to hear cases against fines such as parking or traffic tickets which formerly had the nature of criminal violations and were later de-criminalised (law n. 689/81).

Given the close similarity with industrial relations cases, the general courts are also competent with reference to most actions brought by public servants against the State and other public law entities.

Property and other economic rights instead are treated as *interessi legittimi* when the State or other public law entities are given the power to take lands or other

property or rights; general courts are competent only with reference to the compensation to be paid, not with the legality of the expropriation decision. The general doctrine is that no individual or undertaking can claim a right when public law entities are given discretionary powers (unless it is a fundamental right). Art. 103 of the Constitution empowers the Parliament to give administrative courts *giurisdizione esclusiva* (i.e. jurisdiction on case involving both *diritti soggettivi*, including fundamental rights, and *interessi legittimi*) in relation to specific subject matters. The Constitutional Court read this as implying that administrative courts cannot be turned into the general jurisdiction for administrative law cases (C.Cost. 204/2004).

Art. 133 d.lgs. 104/2010 provides a quite long list of matters falling under the *giurisdizione esclusiva* of administrative courts; among them cases concerning the right of access to documents, services of general economic interest, award procedures, and decisions taken by independent administrative authorities. In the end, it is fair to say that administrative courts hear most of the cases against the State and other public law entities, the general courts having some jurisdiction for the protection of fundamental rights.

Administrative courts are the *Consiglio di Stato*, being the appeal court, and the *tribunali amministrativi regionali* (TAR) established in 1971 as first instance courts. Judgments by the *Consiglio di Stato* can be reviewed by the *Corte di Cassazione* only on matters concerning the jurisdiction, including in case it overstepped its jurisdiction or reviewed the merits of the administrative decision.

The powers of administrative courts extend to both decisions and omissions, including delays in taking a decision. Under Art. 113 Const., all decisions taken by administrative authorities may be challenged in court.

Art. 7(1) of d.lgs. 104/2010 provides that administrative courts cannot review political - i.e. non-administrative - decision taken by the Government. The administrative courts are quite restrictive in acknowledging the existence of such political acts (for instance, the appointment of a deputy-president of one Region was considered to be an administrative decision: CdS V, 4502/2011; on the contrary, the refusal by the president of another Region to answer a question raised by one councillor was held to be a political decision: CdS VI, 2434/2011).

Moreover, administrative decisions taken by the top institutions of the country (such as the President of the Republic, the Houses of the Parliament, and the Constitutional Court) concerning their own organisation, and mainly including those taken as an employer and affecting those working for the institution concerned, are exempt from judicial review.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

With the exception set out above at 1.4, all administrative decisions or omissions are reviewable; political decisions are another matter; some of them could be reviewable by the Constitutional court.

Concerning administrative decisions taken by the top institutions of the country which are exempt from judicial review by any jurisdiction, some internal appeal mechanism have been set up. The arrangement was held to be in line both with the Constitution and the ECHR (Cass. Civ. Sez. Unite, 6529/2010, and therein reference to older cases; the case concerned a worker who lamented the rank he was given



when moved from the Prime minister to the Presidency of the Republic staff; the Court expressly referred to the 2009 *Savino* case, a case concerning a worker with one of Italy's houses of Parliament, where the ECHR accepted in theory the possibility to commit some cases to internal – and independent – juries; while the ECHR had held the arrangements present within the Italian Parliament in conflict with the requirements laid down in Art. 6.1. ECHR, the Corte di cassazione has held that those requirements are met in the case of the Presidency of the Republic).

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Any individual or undertaking willing to bring an administrative law claim must show standing. In theory, there is a clear distinction between the *intérêt à agir* and the substantive right (or *interesse legittimo*) (e.g. CdS VI, 3280/2011). In practice, a right or a legitimate interest are the most relevant preconditions to standing (which one depending on the considerations spelt out above under 1.4). A few additional (beyond a right or legitimate interest) preconditions make up standing, first of them that the same infringement has neither been remedied in the meantime nor been confirmed by a subsequent decision which was not challenged in due time; moreover, no standing is given in case where, even if the breach was proven, the claimant's position would not be better (on this see below 7.3).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

As was shown above at 1.4, in some circumstance the general courts have jurisdiction to hear cases against the State and other public law entities. In such cases, the claimant must show he/she is granted a right by the applicable legal provisions. These rights are the usual private law rights which are part and parcel of the western legal tradition. The same applies to taxation cases brought in front of the specialised divisions of general courts, the concerned taxpayer having standing. The situation is more complex when actions brought in front of the Consiglio di Stato and lower administrative courts are considered. The Italian system started from a position similar to the French objective approach to the *recours pour excès de pouvoir*. According to the now prevailing opinion, actions in front of administrative courts are to be characterized as *recours subjectif*, meaning that *interessi legittimi* have a substantive law dimension as it is the case with rights. However, it is fair to say that the all judicial review system is geared to serve a dual purpose, that is both safeguarding individual interests and taking out illegal decisions which are by definition detrimental to the general interest. The problem of course is to establish when any individual or undertaking can be said to have an *interesse legittimo* (above 1.4 and below 3.1).

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

In 1971 Italy abandoned the French-inspired *récurso préalable* system, which made

hierarchical appeal a condition precedent to judicial review. Later the Corte Costituzionale has held as inconsistent with the right to judicial review a number of specific provisions which foresaw a similar rule (e.g. 296/2008).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

The theory - there is no legislative definition for interessi legittimi - goes that interessi legittimi are qualificati and differenziati (CdS. VI, 7591/2010; V, 7026/2009). The latter means that holders of interessi legittimi must possess some special characteristics setting them aside from the general public. This implies the rejection of the actio popularis. This rejection is very strong in the case law. L. n. 765/67 provided that "everyone" could challenge building licences. The Consiglio di Stato read the provision holding that the words "having a legitimate interest" should be implied after "everyone". Even the owner of a parcel of land cannot challenge planning decisions, if he or she cannot show that the choices made are detrimental to his/her interests (CdS IV 133/2011). Correspondingly, the right of access to administrative documents is conditioned on the claimant being granted either a right or a legitimate interest (CdS VI, 555/2006).

In Italy actio popularis is allowed only in electoral matter, all citizens being entitled to challenge the election results.

It is to be stressed that the "differenziati" requirement is construed as a much weaker limitation than that of "individual concern" present in the TFEU. The special characteristics required must be enough to set the individual or undertaking concerned aside from the general public, but can be shared by a plurality of individuals or undertakings, including entire categories of persons. For instance, in case a given university degree is required to take part to a selection for a job in the public service, everyone holding a different degree attesting the knowledge necessary for the job has standing to challenge the selection procedure (e.g. T.A.R. Sicilia Palermo, 772/1995).

The "differenziati" requirement therefore rules out standing only with reference to members of the general public or very wide categories, such as for instance taxpayers or voters concerning decisions taken by a municipality which do not specifically affect any of them.

Not much of a constraint is the "qualificati" requirement. Interessi legittimi are not defined as such by law, nor are they bestowed in specific legal provisions.

Qualificati means that the interest must be one whose relevance may be deduced from the legislative framework for the administrative decision making procedure.

In the end, as it will be shown by some of the instances recalled later on, it is very much for the courts to decide whether or not to allow standing, the qualificati and differenziati requirements being a quite weak framework.

And administrative courts tend not to be too strict, to avoid situations where no one might challenge possibly illegal decisions (the general interest facet of the judicial review system).

Finally, standing requirements do not change from first instance to appeal, and no

leave is required to appeal.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

In principle the requirements for standing are the same independently from the remedy sought. However representative of general (diffuse) interest, such as environmental groups, may not claim damages (see below 7.2.1).

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

As pointed out above 2.2, in areas such as tax law where citizens and undertakings can avail themselves of *diritti soggettivi*, the standing is conditioned upon stricter requirements (namely, holding a right as defined by the applicable statutes). As already remarked, concerning *interessi legittimi* instead, it is very much up to the administrative courts to hold the requirements for standing to be met or not; this changes from sector to sector but also because of evolutions in the legislation and in the case law, even if the caveat is necessary that there is no *stare decisis* principle in Italian law, so that even in this matter different judgments may be conflicting.

A relevant difference may be introduced by specific legislation giving standing on special basis, as was the case with the environment (see below 6.2); this is usually based on the subject matter rather than on the type of claim.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

Of course legal persons don't enjoy very personal rights such life and health and therefore they don't have standing to vindicate them. With this caveat, in principle the requirements for standing do not change according to the nature of the claimant. In any case, the interest at the root of standing must be *differenziato* and *qualificato*.

In the case of legal persons, the analysis of the requirements for standing may extend to the articles of incorporation of the given legal person, to check whether the action is within the mandate of the legal person and whether they limit or in any way qualify the possibility to start legal proceedings (e.g. CdS VI, 8023/2010; CdS VI, 1911/2010).

What may be further specific to NGOs, including associations, is that, besides their own rights and *interessi legittimi*, they may act on behalf of the interests of their associates or even the general interest (as for the latter see below 6.1).

In some cases, associations have the status of public law entities (this is the case of some professional associations, such as those of lawyers and physicians).

Public law associations - as any other association - may act in the interest of their members. Professional associations quite frequently litigate on behalf of their members, challenging administrative decisions which are considered detrimental to their interests (e.g. CdS IV, 2434/2009; VI 5239/2006).

More generally, public authorities may challenge decisions which they think infringe their competencies or, in case of regional and local authorities, are seen as

detrimental to the interests of the people they represent (e.g. CdS VI, 1059/2009, giving a Municipality the standing to challenge the concession of the right of exploitation of a beach by a State authority; CdS IV, 1559/2004, which allowed a Municipality to challenge the decision by a Region to downsize a hospital; CdS VI, 1372/2002, deciding the same with reference with a concession to exploit a quarry), including environmental interests (CdS V, 3921/2011).

However, the Corte Costituzionale has jurisdiction to hear cases opposing the State and the Regions, while under Art. 120(2) of the Constitution the State has some power to take decisions in the place of Regions and local authorities (in case of breach of international or EU rules, or for reasons of public security, or to protect the unity of the State).

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

None.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

As remarked above at 1.4 and 3.1, only the general courts may take measures affecting personal and other core freedoms enshrined in the Constitution while generally standing is allowed on a fairly generous basis in front of administrative courts. Reference to fundamental rights is, therefore, not needed to widen standing and it is rather used to deny competence to the administrative courts and uphold the competence of the general courts.

This was the case already in the late '70, when the general courts affirmed their competence concerning the right to health care (*diritto alla salute*) at least in so far as life saving and other essential medical treatments are concerned.

It is remarkable that, after more than 30 years, the reference to fundamental rights as a tool to affirm the competence of the general courts has been seldom used, the most relevant case being with reference to asylum seekers, when both the Constitution and the ECHR were referred to (see, holding that the legislation then in force did not leave any discretion to the State services as to whether or not to accept the application, Cass. Sez. unite, 19577/2010; Cass. Sez. Unite, 19393/2009). It is to be stressed that the people concerned would have been in any case given standing also if the situation had been classed as *interesse legittimo*: again, reference to fundamental rights does not widen standing, it only affects the question of which court are competent.

Finally, the Corte di cassazione has held that the fundamental nature of a given right does not affect the jurisdiction of administrative courts when they enjoy *giurisdizione esclusiva* (extended to cover rights, fundamental rights included: e.g. Cass. Sez. unite, n. 5290/2010, concerning the review of a decision on where to build a water treatment plant which had been challenged by some members of the local population who had claimed it was potentially harmful to their health; see also Cass. Sez. unite, 11832/2009; Cass. Sez. unite, 26790/2008).

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the

parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

The starting point must be that the Italian judicial review system by administrative courts is set up to exploit the policentric nature of many administrative disputes. In line with the tradition, Art. 27 and 41 of d.lgs. 104/2010 stipulate that the application for judicial review must be served at the same time both to the public law entities having taken the decision (or having failed to act) and to any person whose interest would be detrimentally affected in case the application were successful (so called *controinteressati*). For instance, if the annulment of a building permit is sought, the application must be notified to the building permit holder; if the award of a public procurement contract is challenged, the economic operator having been awarded the contract must be served with the application.

The *controinteressati* have the right to take part into the judicial review procedure, and may also challenge the decision any breach which were in favour of the applicant (Art. 42) (e.g. in case of selection procedures for public sector jobs).

The *controinteressati*, as well as the public law entity, have the right to appeal any first instance judgment which was favourable to the applicant.

Moreover, under Art. 28 of d.lgs. 104/2010, anyone having a legitimate interest may intervene in a judicial review proceeding.

The requirements are the same as for standing; the only limit is the deadline which applies to those would-be interveners who would have had the same standing as the applicant to start the proceeding (*cointeressato*) and who decides too to challenge the measure. In this case, and only in this case, the possibility to intervene is ruled out after the deadline has expired; the rule is that a potential applicant having left the deadline pass cannot avail him/herself of an action brought on time by another party.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

In no way other than raising the argument that the deadline to intervene, if applicable, has expired, can the original parties to the action prevent the intervention of third parties having standing to do so.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Traditionally the avenue for multi-party litigation has been a single joint application for judicial review signed by all the concerned parties having the same interest. This is often the case with actions brought by public servants (in so far as they still belong to the administrative jurisdiction), for instance because they were denied some benefits.

D.lgs. 198/2009 has introduced a class action aimed at improving the efficiency of the public sector (concessionnaires as for instance defined under Directive 2004/17/EC included). If the action is successful, the administrative court may order the public authority to solve the problem with the resources available. Damages are expressly excluded as a possible remedy.

The special problems of standing in environmental matters are analysed below at 6.2.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

All those lodging a single joint application for judicial review must have standing on an individual basis. If someone does not have, he or she will be struck out of the action, but the proceeding will be decided on the merits concerning the other applicants. Moreover, the measure challenged and the grounds of challenge must be the same (e.g. CdS V, 5932/2011).

The action foreseen by d.lgs. 198/2009 may be brought by natural or legal persons, including NGOs, having the same right or legitimate interest infringed by breaches or delays in implementing citizens' or users' quality charters (i.e. those documents laying down the rights of citizens and users with reference to a given SGI: e.g. under Art. 26 of Directive 2006/123/EC). Anyone claiming to have the same legal interest may join the action.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

The above avenues are generally available. However the class action provided for by D.lgs. 198/2009 is available in relation to measures of a specific nature, liable to affect a wide number of individuals/undertakings; regulations have been expressly excluded from the coverage of the provision. The line is fine, but trespassing it has led to the failure of a number of actions (e.g. CdS 3516/2011, concerning building standards for schools).

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

None.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The special action foreseen by D.lgs. 198/2009 has already been examined above 5.1 and 5.2.

As remarked above at 3.1, the Italian judicial review system is in principle against *actio popularis*; however, both local public authorities and NGOs may litigate in the behalf of their constituency/members (above 3.4).

On top of this, a special regime applies in environmental matters (below 6.2).

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

In the late '70s, the Corte di cassazione ruled out the possibility for both individuals and environmental associations to challenge administrative measures which, while being detrimental for the environment, did not prejudice anyone's rights or legitimate interests (Italia Nostra had tried to challenge the decision by a provincial government to build a road through pristine forests owned by the same Province).

As a consequence, when l. 349/86 was passed setting up a specific department for environmental matters, it also gave the Minister the power to compile a list of environmental associations active in the entire country or in at least in 5 Regions (out of 20) (Art. 13). Under Art. 18(5), these associations have the right to intervene in those cases where the State or other public law entity is suing for environmental damage (see also Art. 2 law decree 208/2008, converted into law 13/2009) and, more interestingly here, have standing in front of the administrative courts to challenge the legality of administrative measures affecting the environment.

In the past decades, two major issues have been discussed concerning the implementation of Art. 18(5): 1) whether the provision ruled out standing for associations and other NGOs which were not listed; and 2) whether the environmental matter had to be read restrictively, excluding for instance building activities not having taken alone a significant impact on the environment.

In the past few years the case law seems to have embraced the most generous interpretation possible, holding that 1) anyone, including individuals and NGOs may challenge measures affecting the environment in which he/she lives (CdS IV, 5986/2011); concerning NGOs, the courts check that they meet minimal stability and representativity requirements (CdS 3107/2011), and 2) the environment has to be read broadly, including also cultural heritage and the landscape (CdS IV, 2329/2011).

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Italian administrative courts are quite lenient.

A recent case concerned the challenge of licences for high street general stores; there was no doubt that a competitor might have had standing to challenge the measures, the only problem being how to define what a competitor was; in the past the guiding doctrine was one of vicinitas, meaning proximity; in the actual case, the shop of the claimant and the shops for which licences were sought were more than one km apart, but the Consiglio di Stato considered that what was relevant was not so much the distance but, taking into account the nature of the commercial activity, whether they had the same catchment market and held this to be the case based on some charts which had been provided by the claimant (CdS V, 5655/2011; see also CdS IV, 1559/2010; in this latter case the owner of a high street general store challenged both the building permission and the commercial licence for a big commercial centre which was at the distance of 4 km and on a quite different area of the town; standing was allowed concerning the licence considering the strong pull on customers of commercial centres).

Another good instance is a judgment concerning the challenge to a building permission which was to allow works to be carried out on a small building on the beach to be used by a concessionaire providing services (showers, cabins ...). The Consiglio di Stato held that the owner of a flat in the municipality had sufficient standing, even if the flat was two km away from the building and the building itself in no way limited the access to the beach (CdS VI, 6554/2010).

- 7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

As a rule standing is allowed on a general basis, independently from the remedy sought. The only exception one can think of is for damages in environmental cases. Individuals and NGOs may challenge decisions, and the latter - provided they have been listed under the procedure laid down under Art. 13 l. 349/86 may also intervene in cases for environmental damages, but cannot claim the damages themselves (Cass. Pen. III, 14828/2010). The State only, and, according to some cases, Regional and local public law entities can do so (contrast, concerning local authorities Cass. pen. III, 8091/2011; Cass. Pen. III, 41015/2010).

7.2.2. the field of substantive law at hand?

As recalled above at 6.2, standing requirements have grown more and more lenient in the environmental sector. The judgment by the Consiglio di Stato referred to above at 7.1 expressly acknowledged that it is difficult to identify people who can be said to have a special relationship with the environment. However, and notwithstanding the rejection of the *actio popularis*, the court held that what had to be avoided is a situation where no one can challenge a decision affecting the environment. On the facts, the Consiglio di Stato remarked that the building rested at the centre of a large pine grove along the beach, with no immediate neighbour having standing; therefore it held that being a flat owner, even if at some distance, was enough to have standing based on the proportionality principle (CdS VI, 6554/2010).

It is true that the large organisations referred above at 6.2 have standing in such case, but they cannot be expected to go after all and any measure affecting the environment; therefore, the initiative of individuals is relevant also under the horizontal subsidiarity principle now enshrined in Art. 118 of the Constitution. According to this principle, civil society is to be involved in all administrative activities, and especially in the provision of services.

It is worth remarking that many different measures taken in different sectors may affect the environment, meaning that this widening of standing may be hardly considered to be sector specific.

7.2.3. the nature of the claimant?

The nature of the claimant affect the rights and legitimate interest it may have. Standing is a consequence.

7.2.4. the nature of the claim?

Only in the sense explained above at 7.2.1.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

Abusive claims are not allowed.

A claim is considered abusive, and standing denied, if the claimant would not be in a better position even if the claim was upheld. For instance, in selection procedures for jobs in the public sector, no claimant would have standing to challenge his/her ranking if the breaches he/she laments, even if proved true, would not be enough to affects his/her ranking (e.g. CdS V, 3084/2011).

Moreover, a claim is considered to be abusive if the claimant aims at getting benefits running against the law or the general interest. An example of such a case concerned an action brought in the context of the private provision of health



services on behalf of the National Health Service (which actually is very much regionalised ...). A number of diagnostic services are provided by private market participants which may then claim compensation against the NHS but need to be "accredited" (i.e. the NHS checks that their personnel and technical appliances meet the legal standards). One longtime accredited market operator challenged the accreditation of a new entrant but was denied standing because the Consiglio di Stato held that it was trying to limit future competition to be able to charge the NHS more (CdS V, 5244/2009). Of course one could well question what is the difference with the licence cases seen above at 7.1 or with the competition cases to be examined below at 8.1; possibly in this case the Consiglio di Stato was concerned with protecting competition benefiting the public purse.

- 7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

No. Other tools are used to this end, such as allowing short reasons to be given for judgements when they are in line with precedents and docket management measure, such as grouping cases having at their core the same legal issues as naming the same reporter and panel for all of them.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

As shown above at 3.1, standing in Italy is determined by case law rather than by legislation. Actually, with the exception of the special rules recalled above at 5.1, 5.2 and 6.2. the legislation on the topic has not really changed since 1889. Therefore, it has fallen upon the administrative courts to develop the law on standing.

Moreover, standing doctrines are generally generous.

However in a couple of relevant instances EU law (EC law before) has played a role in shifting the case law but it is difficult to precisely point out exactly which sources of EU law - the general principle of effectiveness, or some other Treaty-based principle, rather than some specific measure of secondary law - have inspired the administrative courts.

According to the database used in the research, the Aarhus Convention was never quoted in the case law. However, as it was recalled, a long standing special legislation applies in environmental matters, and the case law has developed since long.

The influence of EU law was particularly clear in two instances. The first concerned the standing of economic operators to challenge direct awards (with no prior advertisement) of procurement contracts. A long standing case law of the Corte di cassazione ruled out the standing on the basis that, since no proceeding had taken place, it was impossible to differentiate among the large and indeterminate number of potential competitor (Cass., Sez. un., 1777/78). The Consiglio di Stato departed from the precedents referring to the need to foster competition, a core principle in the (then) EEC Treaty (CdS V, 792/86; CdS V, 454/95). A different case substantiated the granting of standing referring instead to Directive 89/665/EEC, on remedies in public procurement contracts; the Directive was considered to be directly applicable as to the principles of effective judicial protection it embodies

(CdS VI, 498/95).

The second instance concerns decisions authorising mergers. The first judgment on the topic (the Italian Competition Law was passed in 1990) ruled that competitors could not challenge such authorisation, even if they had taken part to the proceeding opposing the merger (CdS VI, 1792/1996). The judgment was again based on a quite strict reading of the "differenziato" requirement and on the assumption that that of potential competitors was too an open-ended category. The judgment was sharply criticised because in the end it led to a situation where no one could challenge the authorisation (the undertakings being interested to the merger being of course happy, unless some divestment measure were imposed: see CdS VI, 5156/2002).

This led the Consiglio di Stato to overrule its precedent. It held that the approach followed had been unduly restrictive, and was inconsistent both with the principle of effective judicial protection embodied in the Italian Constitution, and with the principles ruling (then) EC competition law binding national competition authorities as well as the Commission; as for the latter, the Consiglio di Stato even referred to the case law of the Court of justice which allow competitors to challenge merger decisions (CdS 3865/2004).

In this vein, the Consiglio di Stato has even allowed consumers groups to challenge decisions by the Competition Authority finding that an advertisement is not misleading (CdS VI, 280/2005).

Summing up, Italian administrative courts seem to be led more by a general understanding of what the EU stands for rather than by specific principles or even less by specific secondary law measures.

The Aarhus convention was given effect in Italy with legge 16 marzo 2001, n. 108. As recalled above at 6.2., in environmental matters standing has become quite relaxed in the past decades. It is doubtful whether the Aarhus convention has played any role; at least the role was not explicit, the only case referring to the Aarhus convention as an argument to give standing to local branches of an environmental association is a first instance quite recent judgment (T.A.R. Sicilia Palermo Sez. I, 546/2011; the court also refers to two ECJ judgments: C-263/08, and Joined cases C-105/09 e C-110/09).

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

When it comes to standing, Italian administrative courts do not make any distinction between matters ruled or not ruled by EU law.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

As described above at 8.1, Italian administrative courts seem to be led more by a general understanding of what the EU stands for rather than by specific principles or even less by specific secondary law measures.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

As described above at 8.1, at times the principle of effective judicial protection has been referred to in order to relax the interpretation of the rules of standing (CdS VI, 498/95). The source of inspiration, however, has been the case law of the Court of Justice rather than the Charter or the Convention.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Again, Art. 6 ECHR has not played a role in relation to standing (while being very relevant with reference to other aspects, such as the reasonable duration of court procedures).

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Resting on general interpretative doctrines, all the changes recalled above at 8.1 have been general in their scope, independently from whether or not a case was covered by EU. This was particularly evident with reference to standing in direct award of public procurement cases. The more generous approach now followed applies also to contracts and other arrangements not covered by EU secondary law.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

None.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(ITALY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

Judicial authorities administering criminal justice (judges and prosecutors) are independent from both the legislative and executive power. The independence of the judiciary is guaranteed by the Constitution (Article 104 and Article 101; Arts. 107, 108, 109, in lesser clear terms, for the prosecutor). All matters concerning the judges' career, including promotions and disciplinary measures, are decided by an independent body: the High council for the Judiciary (Consiglio superiore della magistratura - CSM), composed for two thirds by members coming from the judiciary and for one third by members elected by the Parliament.

The judiciary ("Judicial Order" in the literal translation) is composed not only of judges but also of public prosecutors. Both judges and prosecutors are hence judicial authorities, they both enjoy independence from other powers and they both are selected through the same competitive exam. The only difference between the two figures is in the role they play within the administration of justice. Public prosecutors investigate and prosecute, while judges have the role of adjudicating on cases. Ordinary criminal courts adjudicate on offences - "contravvenzioni" (minor offences) and "delitti" (crimes) - listed in the Penal Code or in other laws. A separate and special jurisdiction deals with military crimes committed by the army forces.

Jurisdiction in first instance is exercised by different courts, whose competence differs ration materiae. Minor offences delimited per nomina delicti are dealt with by the Justices of the Peace (Giudice di pace), an honorary position that can be covered by attorneys or by others with some experience of the law. All the other offences punished with the imprisonment up to 24 years fall within the jurisdiction of the Tribunal of first instance (Tribunale ordinario). A Tribunal Court is usually composed of a panel of three judges (composizione collegiale). In some cases the Tribunal Court may consist of a single professional judge (composizione monocratica). Only crimes punished up to 10 years of imprisonment and other serious crimes listed by the code (Article 33) require a panel of three judges. Assize Court (Corte d'assise) is a criminal trial court with jurisdiction to hear cases involving defendants accused of the most heinous crime punished with more than 24 years or life imprisonment. The Assize Court is a hybrid panel composed of two professional judges and seven jurors (lay judges drawn by a list of eligible citizens). Professional and lay judges decide have – at least formally – an equal positions on adjudicating and sentencing.

First instance jurisdiction also includes Juvenile Court, which are specialised court for defendants below the age of 18 at the time of the crime. The panel of Juvenile Courts is composed of two professional judges and two lay judges chosen among the experts in psychology, psychiatry, anthropology or pedagogy.

An appeal is brought in front of the Criminal Division of the Court of Appeal (Corte di appello). Appeals for crimes devolved to the competence of the Assize Court of

appeal are dealt with by the Assize courts of Appeals. For minor offences adjudicated by the Justices of Peace, it is the competence of the Tribunal (in its single judge single composition) to decide appeals. The Supreme Court of Cassation (Corte di cassazione) sits in Rome. Article 111 para. 7 of the Italian Constitution explicitly provides for the right for every party of a trial to file an appeal to the Court of Cassation against any decision in criminal matters and against and decision on arrest or on pre-trial detention. The Supreme Court has jurisdiction only on points of law, concerning the correct interpretation and application of the law. The Court cannot decide on issues of facts, related to the proper reconstruction of the case.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

Before describing what type of standing the victim has before an Italian criminal court, a terminological clarification is needed. Technically speaking, the term 'victim' can refer to two different figures in the Italian system of criminal justice: first, it may refer to the "person harmed by the crime" (*persona offesa dal reato*) and secondly to the "person that suffered civil damages from the crime". The "person harmed by the crime" is the holder of the legal interest (the German *Rechtsgut*) that is protected by criminal law. Hence not every person that suffers an economic loss from the crime can be considered as a "person harmed by the crime". It may happen that the offence intends to protect a legal interest of the State and none of those who suffered the negative effects of the crime may enjoy the standing rights recognised to "person harmed by the crime" before in criminal trial (e.g. in the crime of perjury, see Cass., 5 April 2011, no. 250038).

The "person economically damaged" is instead the one who suffered an economic loss or a form of moral damage as a direct consequence of the crime (Article 185 Criminal Code, C.P.).

Types of standing differ accordingly to this distinction.

a) PERSON HARMED BY THE CRIME.

Usually the term 'victim' refers to this figure and we will use them in the following answers as synonymous. The person harmed by the crime can take part to all stages of criminal proceedings, although she enjoys the most relevant powers in the investigative stage. In general, she has the right to hire a counsel (Article 101 of the Italian code of criminal procedure, C.P.P.) and, if indigent, is allowed to apply for the State to pay for her legal aid. Instructing a lawyer plays a key role in carrying out parallel private investigation, given that the victim has no power to conduct such an investigation in person. A person who has been harmed by an offence can file a complaint to the public authorities (i.e. police, public prosecutors). Certain crimes – petty offences or serious crimes of sensitive nature affecting primarily the victim privacy – can be prosecuted only if there is a formal complaint (*querela*) coming from the person harmed by the crime. At any time of the proceedings the victim has the right to present memorial briefs and motions or to indicate evidentiary sources to the public prosecutor or to the court (Article 90 of the C.P.P.). The victim may play a proactive role in the investigations by searching privately for evidence (although with the exclusion of coercive measures) or by asking the prosecutor to collect evidence and even to do so with a special formal procedure called "incidente probatorio" (a sort of trial anticipation for collecting the evidence which is at risk to vanish, be suppressed or tampered with) when there is a risk that the evidence might get lost in view of a future trial (Article 394 C.P.P.). The victim may ask for the judicial review of the decision of the prosecutor to

dismiss the case and she can bring an appeal against the decision not to prosecute issued at the end of the preliminary hearing (see question 1.2.2).

At trial (and at the preliminary hearing) the persons harmed by the crime hold little powers. There is no full right to be heard: victims are witnesses and they may be called to testify in trial by the prosecutor, by the defendant or his defence counsel. Nonetheless, when they stand in the proceedings as civil parties, they may ask for their own testimony. According to the aforementioned general rule set out in Article 90 of the C.P.P., the victim can point out evidence to the trial judge but once again the indication is not binding upon the judge. Set aside this prerogative, victims do not hold the position of a party to the trial. They cannot examine witnesses or make a closing argument. If the persons harmed by the crime want to enjoy larger powers at trial they ought to file a civil claim in the criminal process, provided that they also suffered some form of economic loss from the crime.

**b) PERSON ECONOMICALLY DAMAGED BY THE CRIME**

In order to claim for civil damages and ask for compensation, victims must have suffered an economic damage by an offense. Only the person who suffered civil damages may intervene in the trial as a civil party (Articles 74-76 C.P.P.). Civil party proceedings may be instituted only after the stage of the investigations, when the case moves on to the preliminary hearing or to trial. For a civil action to be raised validly it needs to be attached to the indictment made by the prosecutor, hence necessarily at the end of the investigations and not before that moment. If the claim is filed at the trial hearing, the civil party should not enjoy the power to introduce testimonial evidence (witnesses or expert witnesses), because such a right requires the presentation by each party of a list of testimonies seven days before the trial hearing. Consequently, in order for the damaged persons to introduce evidence, they would need to file their action at least seven days before trial. Courts however have proved to be lenient in the interpretation of the latter requirement and they allow victims to submit their testimonial lists even before they have formally raised any claims (see question no. 4.1).

The civil claim has to be filed in writing, by stating the kind of economic loss that the victim suffered and by demanding for compensation of the damage. The civil claim gives to the person economically damaged the status of a party in the criminal proceedings just like the prosecutor and the defendant. Hence she will have the possibility to argue her case during the preliminary hearing as all other parties. During the investigations the person who suffered a pecuniary damage can take advantage of the prerogatives accorded to the person harmed by the crime, provided that she satisfies the requirements. If the person who endured a financial damage from the crime does not hold the position of the "person harmed by the crime", she can do nothing during the investigations.

At trial the persons harmed by the crime are given the possibility to call their own evidence, to cross-examine all witnesses, and they can make a closing argument. The right to appeal adverse decisions to the Court of Appeal and to the Supreme Court (Corte di cassazione) is given only to the victim who filed a civil claim. The appeal has to be limited to those parts of the judgment which concern the civil claim.

**c) VICTIMS, PERSON HARMED BY THE CRIME AND PERSON ECONOMICALLY DAMAGED BY THE CRIME**

In the majority of cases the person harmed of the crime and the person damaged by the crime are the same. A person harmed by the crime almost inevitably suffered an economic damage, especially because a moral suffering can always be considered as an economic damage (Article 185 criminal code). It can happen that a

person suffered an economic damage from the crime without being formally a person harmed by the crime. In the crime of perjury, as mentioned above, the courts consider the State as the only person harmed by the crime, while the private individuals who suffered the negative effects of the perjury are only damaged persons. However, the latter cases constitute indeed a very limited number in everyday judicial practice. Save for such cases, the practice usually sees victims acting as persons harmed by the crime during the investigations and eventually to assume the role of civil parties. Hence, in the majority of cases, the victim acts during the investigations as the person harmed by the crime. When the case moves on to preliminary hearing or to the trial (i.e. after the decision to prosecute) the victim can exercise ample powers by instituting civil party proceedings. If the victim does not institute civil party proceedings, its trial powers are very limited and essentially consists in the possibility to be heard as a witness.

1.2.1. Is there a possibility of private prosecution?

No. In the Italian system of criminal justice, according to article 112 of the Constitution, the public prosecutor has the monopoly to prosecute. Victims may act as complainants by reporting the crime to the public authorities but they have no prosecutorial powers and they can never oblige the prosecutor to start the investigations or bring the case to trial. There is only one exception to this general principle: when the crime falls within the competence of the Justice of the Peace (usually petty offences) the victim may bring a charge directly in front of the judge (*'ricorso diretto al giudice di pace'*). Recently the Supreme Court clearly stated that the renunciation of the claim directly presented in front of the Justice of the Peace bears as a consequence the formal extinction of the crime (Cass., 5 October 2011, no. 42427).

1.2.2. Can a victim request review of a decision not to prosecute?

Yes. Persons harmed by the crime have the right to challenge in front of the judge of the preliminary investigations the public prosecutor's request to dismiss the case and they may appeal the judge's decision not to prosecute in front of the Supreme court. The procedure for case dismissal in the Italian criminal justice system is rather complicated. At the end of the investigations the public prosecutor has to decide whether or not to prosecute the case. He or she may do so only by looking at the evidence collected. A decision taken on different criteria would be flagrantly unlawful in light of the principle of mandatory prosecution (Article 112 of the Italian Constitution). If the prosecutor believes that the evidence available is not sufficient to adequately argue in trial the case of guilt, he or she can ask the judge of the preliminary investigations to discontinue the proceedings. The request has to be notified to the victim, but only if the victim has previously demanded to be informed of the request. The victim may file an opposition to the Prosecutor's request for dismissal and challenge it in front of the judge of the preliminary investigations. In order to be admissible, the objection of the victim must underline the lacunas of the investigation and indicate specifically the new investigations to be carried out by the prosecutor. A valid objection implies the duty for the investigative judge to hold a hearing at the presence of the defendant, the prosecutor and the victim. Scholars have underlined how unreasonable it is to limit the victim's right to judicial review only for requesting further investigations. It may happen that the evidence collected by the prosecutor during the investigation is already sufficient to bring the case to trial. In the latter case, it would be more appropriate to give the victim the

power to challenge the decision not to prosecute without imposing her to suggest new evidence to be collected.

The victim has the right to appeal to the Supreme Court the decision not to prosecute adopted by the judge in two different cases: first, if no notification of the request to dismiss the case is received and secondly, when the judge wrongly declared the case inadmissible.

A further possibility to appeal is given to the victims at the end of the preliminary hearing. The persons harmed by the crime may appeal to the Supreme Court the decision of non lieu adopted by the judge but only if they were not notified of the time and the place of the hearing. They may appeal the merit only if they have instituted civil party proceedings.

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

**A) COMPENSATION-RELATED ISSUES WITHIN CRIMINAL PROCEEDINGS**

As explained above, the victim who suffered an economical damage from the crime may ask for the return of property or for compensation for those goods that were destroyed or lost as a consequence of the crime. In order to do so, the victim has to file a civil claim in the criminal proceedings or bring an independent action before a civil court. The compensation covers both the economic loss and the 'moral' damage (Article 185 of the criminal code).

When the victim has brought a claim for the restoration of the damages in the criminal trial, she may ask directly to the court for the seizure of the defendant's revenues or goods in order to preserve her right to compensation. In case of conviction the court may determine the amount of the compensation to be granted or, as it often happens, it may decide to grant only a provisional compensation, remitting the case to the civil courts for a precise determination of the total amount of the compensation. However, together with the conviction the criminal court orders the defendant (jointly with the persons that responsible for the crime according to the civil law) to refund the victim of the legal expenses incurred (e.g. lawyer's fees, notifications, etc.).

The law provides for an obligation for the court to return assets belonging to the victim if they were seized during the procedure.

According to Article 10 of Presidential Decree no. 448 /98, a civil action is not admissible in criminal proceedings against juvenile offenders. Until 1996, no civil action was possible in front of the military courts too. With the decision no. 60 of 1996 the Italian Constitutional Court overruled such a ban, stating that the exclusion for the victim to bring a civil claim for damages caused by a military crime was based on no reasonable grounds.

**B) PROTECTIVE MEASURES**

Measures of physical protection are available to the person harmed by the crime.

Protective measures may be adopted by the court on request of the public prosecutor. In particular, Article 282-bis and Article 282-ter of the C.P.P. provide for an order to the defendant to leave the family house or not to approach the victim, her house, her working place or other premises related to the victim or to her family and relatives. The judicial order must indicate in detail which are the places covered by the protective measure (Cass., 7 April 2011, no. 26819).

The order may in addition ban any form of communication with the victim and it may be accompanied by the duty for the defendant to pay an amount to support the cohabiting victim for the whole time the measure is in force.

It is important to stress that the victim has no right to ask directly for such a



measure to the judge: she has to address her request to the public prosecutor, who is the only one entitled to file a formal request for them.

#### C) FORMS OF COMPENSATION OUTSIDE OF TRIAL

Other forms of economic compensation are provided for victims (i.e. persons harmed by the crime) of specific crimes: terrorism, organised crime, and hit and run drivers. No other program exists for compensating victims of other violent or personal crime.

Several statutory instruments have recently been adopted. According to Article 4 paragraph 1 of the law no. 512/1999, Article 2-ter of the law no. 186/2008 and Article 2 paragraph 23- of the law no. 94/2009, victims of organised crime in Italy must have reported the crime to the local Prefect's office (Prefettura is the local unit for the Ministry of Interior) in order to apply for a compensation. The victim's report must indicate where and how the crime occurred, the date and location, and it must illustrate the injuries and losses derived to the victim from the crime. To be eligible for this program, a victim of organised crime must file the application for compensation within 3 months after the last judicial decision in the case.

Victims of terrorism or similar acts and their families are eligible for state assistance in criminal, civil, administrative and accounting procedures according to the law no. 206/2004.

Victims of hit and run drivers can apply for compensation only if the responsible driver is not covered by his or her personal car insurance. Compensation is given by a specific fund for the victims of road injuries. If the accident resulted in an injury, the application for compensation must be filed within two years of the accident's occurrence. If the accident resulted in a person's death, the application for financial compensation may be filed within ten years of the accident's occurrence.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

No court has an exclusive jurisdiction in these matters: the victims may choose to bring a civil claim before the criminal courts or they can file a separate claim in front of the civil courts, hence starting separate civil proceedings (Article 75 C.P.P.). There is however no possibility to ask for compensation both in the civil and in the criminal trial: according to the principle *electa una via non datur recursus ad alteram*, the two options cannot be cumulated. Nevertheless, if the action has been brought before the civil court and the latter has not yet provided for a judgment when the criminal trial (or the preliminary hearing) starts, the compensation claim may be transferred to the criminal proceedings. The transfer halts the civil action and it is for the criminal court to rule also on the expenses incurred by the parties in front of the civil court (Article 75 C.P.P.).

After the reform of the code of criminal procedure of 1988, the Italian system favours in principle the separation between the civil action for compensation and the criminal trial. Nevertheless, the system still provides for the possibility to attach a civil claim to the criminal trial due to the – unacceptable – extreme slowness of the Italian civil justice. For the same reason victims mostly choose to attach their civil claim to the criminal trial in order to have a quicker compensation. Filing a civil action within the criminal process is often a much faster way for receiving compensation of the tort suffered with the crime.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

Victims are not informed of their rights if they do not ask for private legal advice. As it was underlined in the report of 2004 on the implementation of the framework decision 15 March 2001 (2001/220/JHA) on the standing of victims in criminal proceedings, Italy gave insufficient guarantees on the right to receive information, in particular at the beginning of criminal proceedings, since authorities are under no obligation to provide victims with relevant information (Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 COM(2004)54 final/2, Brussels, 16.02.2004, p. 9).

There are no specialist services and victim support organisations financed by the state which provide the victims with information, guidance and support as regards their rights to participate in the criminal process.

Nevertheless, specialised agencies have been created at a local level by non-profit organisations in order to support victims of sexual or family crimes, with the aim to support and protect women or children harmed by the crime. Other organisations help victims of serious crimes such as organised crime, terrorism, corruption, blackmail, extortion or usury.

As mentioned above, the victim may instruct a lawyer and have access to the legal aid, if eligible. In that case all the relevant information is provided by the lawyer.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Yes. As mentioned above, in order to bring a civil claim before a criminal court the victim must allege to have suffered an economic or moral damage as a direct consequence of the crime. Rules on standing draw a distinction between *legitimitio ad causam* and *legitimitio ad processum*. The latter refers to the capacity of the claimant to bring a claim in front of a court and to stand in front of a court (see answer to question 3.4). The *legitimitio ad causam* is a specific requirement of every civil claim: it must be clear what is the loss suffered in consequence of the crime and the claimant must establish a direct causal link between the crime and the damage suffered.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

In line with its French-derived origin, the Italian system of criminal justice has always allowed the victim to file a civil claim before a criminal court. Traditionally the system upheld the so-called principle of the "unity of the jurisdiction", according to which the legal system could not tolerate two decisions based on a different reconstruction of the same facts. The principle implied as a corollary the supremacy of the criminal *res iudicata* on every decision related to crime compensation, even before a civil court. Until the 1988 reform, the law provided in fact for an adjournment of the civil trial in order to wait for the final decision of the criminal court on the criminal responsibility for the same facts. The decision taken by the criminal court was binding for the civil court in adjudicating on the civil claim for damages derived from the crime.

The 1988 reform intended instead to favour the separation between civil and

criminal jurisdiction. After the reform, the autonomy between civil and criminal courts is higher and victims may choose before which jurisdiction they want to file their claim. As a consequence, the conviction is not always binding on the civil courts called to decide on the civil claim for damages.

The reform had a strong impact on the position of the person harmed by the crime. Until 1988, the victim who did not file a civil claim would have merely played the role of the witness in front of the criminal court. The new code provides for new powers to the person harmed by the crime, especially during the investigation (see answer to question 1.2).

Concerning the definition of victim, as already mentioned (see answer to question 1.2) the term "victim", i.e. "vittima", comes from the field of criminology and it does not constitute a technical term in criminal justice: no reference to the victim is made by the criminal code, neither does the code of criminal procedure (one minor exception concerns the examination of witnesses in article 498). The term "vittima" only indicates in every day language those who somehow suffered from a crime. Recent legislation related to the fight against the mafia refers to 'victims' as the recipients of the proceeds of organised crime coming from the confiscation.

The aforementioned Article 74 of the Code in particular authorises the bringing of a civil action for compensation and damages for victims who have suffered harm, or their heirs and successors, in proceedings against the accused or the party civilly liable (the person who, under civil law, is responsible for the actions of the other).

Persons authorised to bring civil actions in criminal prosecutions under section 74 of the Code of Criminal Procedure are either natural or legal persons. In the Italian legal system legal entities can be victims, both in the sense of the "person harmed by the crime" and of the "person who has suffered an economic loss".

Furthermore, Italian law provides for a specific power conferred to legal entities that represent the interest harmed by the crime (for example, WWF, Legambiente, gay and lesbian organisations, etc.). According to Article 91 C.P.P., if the victim agrees, these no-profit organizations may take part to the trial enjoying all the rights conferred to the person harmed by the crime.

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

#### **A) PERSON HARMED BY THE CRIME**

The persons harmed by the crime may file a complaint in order to denounce a crime to the police or the judicial prosecutorial authorities. There are no admissibility requirements to file a complaint, as it is the power of any citizen to report crimes to the competent authorities.

In some cases, the victim's complaint plays the role of permitting the prosecution of certain crimes. In these cases, the victim's complaint is called "querela" (see above, point 1.2) and for it to be valid it is essential that it is filed by someone who alleges to be the person harmed by the crime and that it contains a clear sign of the victim's will to have the crime prosecuted.

Persons harmed by the crime have no formal power to privately prosecute the offender (with the exception of petty crimes, see above question no. 1.2.2) or to impose the prosecution of the offence but they may suggest the prosecutor to collect evidentiary elements during the investigations or they may indicate evidence to the trial court. They are always allowed to present memorial briefs at any stages of the proceedings.

**B) PERSON ECONOMICALLY DAMAGED BY THE CRIME**

In order to become a party to the criminal process, the victim who suffered an economic or moral damage has to file a civil claim in attachment to the charges brought by the public prosecutor. This claim has to be filed in writing. The content of the claim is prescribed by Article 79 C.P.P.: the claimant has to point out both the petitum ( i.e. the request itself) and the causa petendi (i.e. the reasons that justify the request). The same Article provides for specific time limits for the claim: it has to be presented after the issuing of a formal indictment (i.e. after the decision to prosecutorial decision to press charges taken at end of the investigations) and it can be filed no later than the formal declaration of commencement of the trial (Article 491 C.P.P.). Usually the claim is brought during the preliminary hearing, for the offences for which the hearing is provided. When there is no preliminary hearing, the claim may be filed before the trial via a formal notification to the defendant or at the beginning of the trial hearing before the formal declaration of commencement of the trial (the Italian legal system distinguishes between the commencement of the trial hearing, when the judge addresses the preliminary procedural issues, and the commencement of the trial, when the evidence is presented, collected and discussed).

The civil claim should be presented personally by the claimant or via an attorney explicitly and formally authorised for this (i.e. the lawyer must be granted special powers of attorney to raise the claim, procura speciale). The Court must decide on the admission of the civil claim during the preliminary hearing or at the beginning of the trial. Once the Court decides to admit it, the claimant is a party and he may stand in trial through the representation of an attorney at the same conditions of the prosecutor and of the defendant along the whole trial (principio di immanenza). In order to obtain compensation, the civil party must deposit in writing her 'conclusions' with the indication of the amount requested as a compensation. The lack of such a deposit implies the renunciation to the claim.

No civil claim before a criminal court is possible against a legal entity called in trial for its administrative responsibility due to certain crimes committed by directors, representatives or employees in the interest or to the advantage of the body in question (Legislative Decree n. 231 of 2001, see Cass. Sez. VI, 5 October 2010, no. 248791).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

Yes. As mentioned above, asking for compensation or return of property implies the filing of a civil claim in the criminal proceedings and the victim may bring such a claim only if the crime provoked an economic or moral damage. All the other standing rights (private prosecution for petty crimes before the Justice of the Peace and the review of the decision not to prosecute, personal protective measures, etc.) are conferred to every person harmed by the crime.

3.3. Are there specific standing rules applicable to certain types of claims?

No.

3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

Standing in criminal trial may only be possible for persons who enjoy the free exercise of their civic rights and have full legal capacity. In the absence of these requirements, interested parties may embark on civil claims in criminal trial via persons who are duly authorised on the basis of the Code of Civil Procedure, as is expressly required by Article 77 of the Code of Criminal Procedure (his parents, his guardian if any and, in the event of murder, the victim's close relatives). In case of necessity of urgent measures, the public prosecutor may file the civil claim in the criminal proceedings in the name of the victim. This power ceases as soon as the legal representative succeeds in the civil claim representing the victim.

The person filing the claim may be both a natural person or a legal entity, included organisations, associations or committees. If the claimant is a legal person, the law requires a specific decision of the competent board of governors or administrative body allowing the chief administrator (or a legal representative) to file the complaint or to bring the civil claim before the criminal court.

The State and other public authorities may file a claim before a criminal court asking for compensation with regard to damages related to a crime that harmed public interests (see below answers to questions 4.2.2 and 4.2.3). Even a political party has been admitted as a civil party in a trial concerning the murder of one of its most representative leaders (Cass., 28 January 1993, no. 195952).

3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No variation is bound to the economic value of the dispute in the criminal justice system.

Variations in standing may depend only on the seriousness of the crime: the aforementioned ban for private prosecution does not apply to petty offences falling within the competence of the Justices of the Peace. In the latter case the victim may formally press charges against the defendant directly before the Justice of the Peace.

3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

So far no attempt to increase victim's standing rights within criminal trial by relying on human rights law was successful.

In at least two cases the Supreme Court was confronted by applicants with attempts to strengthen victim's trial rights through the reference to the right to an effective judicial protection enshrined in Article 6 of the European Convention on Human Rights. In both cases the claimant sought to be recognised as a victim (i.e. as the person harmed by the crime) of perjury in order to ask for the judicial review of the decision not to prosecute. However, the Italian law defines perjury as a crime protecting exclusively the public interest of the correct functioning of the justice system. No role (as a person harmed by the crime) is given to the victim who suffered the negative consequences of the perjury. In its decisions, the Supreme Court excluded any lack of protection for the victim of perjury and it ruled out that there could be any contrast with the ECHR because the victim always enjoyed the right to bring a civil claim before a civil court (Cass., sez. 6, 9 November 2006, no.

235729; Cass., sez. 6, 28 September 1999, no. 215271).

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Italian courts' approach is both very rigorous and very lenient in controlling locus standi requirements.

Italian courts are rigorous in controlling formal requirements (written form, legitimatio ad causam and ad processum, special power of attorney, see Cass., 6 October 2009, no. 245265, etc.).

Italian courts are lenient in recognising some standing rights such as, for instance, the right to the reimbursement of the expenses related to civil claims when the case is closed through a settlement between the prosecution and the defence. In similar cases (which can be roughly assimilated to the anglo-american "plea bargain" procedures) there is no trial phase because the proceedings end at the pre-trial stage with an agreement on the penalty between the prosecutor and the defendant. This agreement always needs to be ratified by the judge and the latter may impose to the defendant to refund notifications fees and attorney fees to the victim. The supreme court has recently stated that the defendant may bring an appeal in order to challenge this decision (Sezioni unite, 14 July 2011 no. 40288). Furthermore, Italian courts are lenient in allowing the person harmed by the crime to ask for the admission of evidence in trial without a prior formalisation of the civil claim (Cass., 14 January 2011, no. 249751).

- 4.2. Are there significant variations in the courts' approach based on:

- 4.2.1. the type of remedy requested?

No.

- 4.2.2. the nature of the claimant?

No. Nevertheless, when prosecution concerns crimes relate to public safety (e.g. organised crime, see Cass., 8 July 1995, no. 202736) and public health (e.g. on environmental crimes see Cass., 15 Juin 1993, no. 196167; on infringements of local buildings regulations see Cass., 12 April 2005, no. 231952; on the illegal dumping of waste Cass., 22 May 2003, no. 226154) the courts, when admitting claims coming from public authorities (e.g. municipal or regional authorities), tend to be lenient in evaluating the causal link between the crime and the damage suffered by the claimant. The damage that allows the city hall or the regional council to file a claim may be simply connected to the economic development of the place or its appeal for tourists (see Cass., 8 July 1995, no. 202736).

- 4.2.3. the nature of the claim?

No. Nevertheless, as was said above (see 4.2.2) Italian criminal courts tend to be lenient in allowing claims related to environmental crimes or against public health because they intend to underline the public and social dimension of the crime (environmental crime is a breach to the human being in his individual and social dimension: that implies that a standing right has to recognised not only to public entities like the State, the Regions, the City Halls, the National parks administrations but to every single person on his own or associated with others in the name of the right to the environmental safeguard as a human fundamental

right: see Cass, 1 January 1996, no. 206473).

- 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

The main substantial requirement of *locus standi* is the identification of the claimant as the person who suffered a damage from the crime. Hence the claimant must thoroughly argue that the offence (as it is described in the indictment) brought about a direct damage to the claimant. The assessment of such a requirement mostly overlaps with the merits of the case. In principle the courts have to evaluate only whether the claimant's argument is sound, i.e. does the claimant qualify as a person who suffered a damage if the facts of the offence were to be proven true. In practice, the courts sometimes make a *prima facie* evaluation of the merits of the claim.

- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

No. One can only make the following, very general observation. Standing before a criminal court to claim for civil damages is a traditional feature of the Italian system and it may be considered as a tool in the administration of justice in the sense that it permits to manage the way in which civil claims can be brought before a court. Since the civil justice system is much more overloaded than the criminal one, standing concurs in keeping lower the amount of litigations in front of civil courts. Nevertheless, several scholars are critical towards the Italian system that chose in 1988 to turn to 'adversarial' model keeping some features (e.g. the *partie civile*) that recall the inquisitorial tradition. The core argument is that the presence of the *partie civile* alters the fairness of the criminal trial strengthening the position of the prosecutor.

## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

No national law has been adopted in order to implement secondary EU legislation, specifically the framework decision no. 220/2001/JHA on the standing of victims in criminal procedure. Italy implemented the Directive 2004/80/EC relating to the compensation to crime victims via the legislative decree no. 204 of 2007. However, this law does not increase standing rights before a criminal court. It only helps victims to ask for standing rights already existing in the EU member State where the crime occurred. It provides for specific rules governing the transnational dimension of the victims' compensation, i.e. conferring to the public prosecutor office working at the Court of appeal the duty to inform and transmit relevant documents and information to the victim living abroad or to the Italian victim who suffered a crime abroad.

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No.

5.3. Did the courts use:

5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No.

5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

No.

5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

See answer to question 3.6.

5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

See answer to question 3.6.

## 6. Other

6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

In evaluating standing rights in the Italian criminal justice one might consider that a relevant part of the cases are handled following the rules governing special proceedings. The role of the victim (both as the person harmed by the crime or as the person who suffered economic damages) is weaker in at least two of the several simplified and shorter proceedings existing in the Italian system. First, the defendant, before the beginning of the trial may ask to the judge of the preliminary hearing to use evidence collected during the investigation to assess his criminal responsibility. The defendant renounces to the guarantees connected to the trial phase and, as a consequence, in case of conviction, the penalty will be reduced of one third (giudizio abbreviato). In that case the victim may accept the choice made by the defendant. Accordingly, she will have no right to bring evidence in trial and the civil claim will be evaluated according to the evidence collected during investigation. On the contrary, the *partie civile* may refuse this choice and prefer to bring a claim before a civil court. In this last case, the final decision adopted in the *giudizio abbreviato* will have no influence on the civil claim.

Secondly, as mentioned above (see question 4.1), Italian system provides for the possibility of a settlement between the prosecution and the defence before the beginning of the trial. In similar cases (which can be roughly assimilated to the anglo-american "plea bargain" procedures) there is no trial phase because the proceedings end at the pre-trial stage with an agreement on the penalty to be ratified by the judge (*applicazione della pena su richiesta delle parti*). The penalty may be reduced of one third. No role is recognised to the victim: she cannot object to the agreement and no compensation may be stated with such a proceedings. In such a case the victim has only the right to be refunded for fees (see question 4.1);



she may bring a civil claim before a civil court and the agreement concerning penalty will have no influence on the civil trial for compensation. Finally, the victim has the special power to ban the prosecutor to apply for a penal decree of convection (*decreto penale di condanna*). That is a fast procedure which starts with the request of the prosecutor to the judge of the preliminary investigation in order to obtain a penal decree providing for a fine. This decree can be accepted or objected by the defendant. It is clear that whether the defendant accepts the decree, the proceeding ends with no participation of the victim. That is why the system confers to the victim the power to object to such a proceeding. In the complaint the victim may underline that she does not accept the prosecutor to apply for a penal decree.

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (THE NETHERLANDS)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

In the Netherlands, the courts are administered by the Council for the Judiciary (in Dutch: Raad voor de Rechtspraak), based in The Hague. This Council was established in order to create the necessary distance between the Ministry of Justice and the Judiciary.

There are 19 Courts of First Instance (in Dutch: Rechtbanken; "District Courts" hereafter) which are competent for, amongst other things, criminal, administrative matters and civil actions. Their territorial jurisdiction is based on various criteria; an important criteria in the procedure commenced by writ is the defendant's actual domicile within the area where the court is competent. An alternative competent court in tort-related cases is the court where the harmful event has occurred. In litigation about immovable property, an alternative forum is the court where the property is located (this competence is exclusive if the dispute relates to the lease of property). Each District Court has at least two divisions in civil matters. There is a subdistrict division (in Dutch: Sector Kanton) where single judges deal with claims up to 25,000 euro, consumer credit cases up to 40.000 euro, as well as with consumer sales, rent, land lease, labour and commercial agency cases irrespective of the value of the claim. All other civil claims are handled by the general civil division of the District Court, where cases are heard either by a single judge or by a panel of judges.

Within the District Court, there is a specific procedure for urgent cases (in Dutch: Kort Geding procedure). This procedure is handled by a special judge, the so-called "voorzieningenrechter". Territorial competence in these cases is not only determined by e.g. the domicile of the defendant, but also competent is the "voorzieningenrechter" where the provisional measure has to take effect.

Appeals against judgments of the District Court in civil matters can be lodged with the Court of Appeal in the area of which the District Court is located. Appeals in land-lease cases, however, must always be lodged with the Court of Appeal in Arnhem (where the case is heard by three judges and two specialists-non judges in the field). There are 5 Courts of Appeal in the Netherlands.

Final appeal on points of law only (cassation) can be lodged with the Dutch Supreme Court in The Hague.

A legislative proposal has been submitted to Parliament by the Government which aims at a reduction of the number of courts. According to this legislation, the number of District Courts will be reduced from 19 to 10, and the number of Courts of Appeal from 5 to 4. These changes may become effective in 2012 or 2013.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

The Netherlands does not have specialised courts in civil matters, although some courts have a monopoly as regards certain civil cases at first instance or on appeal.

To give a few examples: (1) In patent and EU trademarks, The Hague District Court has exclusive competence at first instance; (2) litigation concerning limited liability companies is exclusively dealt with by the Court of Appeal in Amsterdam (there is a special division for these types of cases, known in Dutch as the "Ondernemingskamer" or "Enterprise Division"); (3) appeals in land-lease cases can only be lodged with the Court of Appeal in Arnhem (see answer to question 1.1).

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

An answer to this question needs to start with a reference to Article 112(1) of the Dutch Constitution: "The judgement of disputes involving civil rights and claims shall be the responsibility of the judiciary". In this case, "the judiciary" may be read as the civil courts. In 1915, the Dutch Supreme Court decided that the civil courts should determine whether or not they are competent to hear the matter based on the grounds advanced by the claimant, and not on the defence or the actual legal relationship of the parties (HR 31.12.1915, NJ 1916, p. 407 (Gemeente Noordwijkerhout/Guldemond); see also HR 05.02.1993, NJ 1995, 716 (Gemeente Rotterdam/Staat); HR 18.02.1994, NJ 1995, 718 (Staat/Kabayel)). Accordingly, the claimant needs to base his claim on a right under civil law. However, if the civil court is of the opinion that the same matter can be brought before the administrative or criminal court, it will declare the claim inadmissible if the claimant has not attempted to initiate the action there first (see also Hugenholtz/Heemskerk, Hoofdlijnen, 2009, nr. 30).

In order to determine which specific type of civil court is competent, the starting point is that only civil claims which according to the relevant legislation fall within the subject-matter jurisdiction of that specific type of civil court can be brought before that court. According to Article 42 of the Code on Judicial Organisation, the civil divisions of the District Court are competent to hear all civil claims at first instance except for those which according to the law they may not entertain (e.g. where a Court of Appeal is competent to hear a civil action at first instance; see answer to question 1.2).

With a few exceptions, the Courts of Appeal are competent to hear all appeals from the various District Courts in their area (Article 60 Code on Judicial Organisation). In legal literature it is hard to find a definition of a civil claim according to Dutch law. In practice, the following rules are usually sufficient in order to determine the jurisdiction of the civil court: (1) the civil court has no jurisdiction in matters for which an administrative court has been declared competent by law (HR 26.06.1964, NJ 1965, 2); (2) when the matter concerns civil rights and obligations, the civil court is competent unless the civil court also would have to decide matters of administrative law for which the law has opened an administrative court procedure with the necessary safeguards (HR 12.12.1986, NJ 1987, 381). Residual jurisdiction remains with the civil court where the administrative court cannot decide specific civil law issues of the case. First, however, the administrative court procedure has to be completed.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

Standing is not a distinct procedural requirement in civil law claims in the Netherlands. In actual fact, the terminology "locus standi in judicio" is rarely if ever

used in Dutch private law. An article which comes nearest to the concept of legal standing is Article 3:303 of the Dutch Civil Code. This article lays down that "A person has no right of action where he lacks sufficient interest" ("point d' intérêt, point d'action"). In general, however, the existence of sufficient interest is presumed and there is no requirement to address questions of substance before "standing" can be granted.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

As stated above, standing is not a procedural requirement in civil law claims. As long as the claimant bases his claim on his subjective right(s) under civil law, he will be heard by the civil court (see also answer to question 1.3). Sufficient interest in the action is usually presumed (see also answer to question 2.1).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Parties in civil litigation ("legitima persona standi in iudicio") can be only natural or juridical persons (HR 25.11.1983, NJ 1984, 297). Juridical persons include public bodies such as the State (e.g. HR 14.04.1989, NJ 1990, 712, where the Dutch State in a procedure for urgent cases (Kort Geding) obtained an order directed to a German limited company to remove illegally dumped and heavily polluted waste). An exception to the requirement of being a natural or a juridical person is the works council (in Dutch: "ondernemingsraad"), which may act as a party in civil litigation even though it is not a natural or a juridical person (Articles 26 and 36 Law on Works Councils; in Dutch "Wet op de Ondernemingsraden" or WOR). The same is true for "participation councils" (in Dutch: "medezeggenschapsraden") (HR 03.12.1993, NJ 1994, 375). In these cases, not allowing these bodies to participate in civil litigation would result in an unacceptable omission in the available legal protection. The rule that entities that are not natural or juridical persons may act as a party in civil litigation also applies in cases where a separate fund (in Dutch: "afgescheiden vermogen") is involved. In such cases, the entities administering this fund may be a party in civil litigation. An important example is partnerships. A general partnership (in Dutch: vennootschap onder firma) can sue and be sued in its own name even though it is not a juridical person. With respect to private partnerships (in Dutch: maatschap), however, only the partners as such can act as parties in litigation. Nevertheless, if the private partnership functions in public under a joint name, litigation may be conducted under the name of the partnership without the need to mention the names of the individual partners. Similar rules apply to trusts created under foreign law that are recognised as such in the Netherlands.

Permission is not required to bring a first instance case, an appeal or a final appeal (cassation) in Dutch civil litigation. Apart from the rule that an ordinary appeal is not allowed in cases where the value of the claim that was submitted to the court at first instance does not exceed 1750 euro (in that case parties can only lodge a final cassation appeal), and that a final appeal is limited to grounds specific for

cassation proceedings, there are no further specific requirements to be met for bringing first instance cases, appeals and final appeal. Legislation is currently pending to reduce the workload of the cassation court by allowing this court to declare an appeal in cassation inadmissible if on the basis of the statement of case containing the complaints of the claimant, and the statement of case containing the reply of the defendant, it comes to the conclusion that the complaint does not justify proceedings in cassation, either because the claimant does not have a reasonable interest in bringing cassation proceedings or because the complaint cannot result in the decision of the lower court being quashed. Most likely this legislation will be introduced in 2012.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

The requirements mentioned in the answer to question 3.1 do not change according to the type of remedy requested. There may, however, be special rules as regards jurisdiction.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

The requirements mentioned in the answer to question 3.1 do not change according to the field of substantive law at hand. There are no specific standing rules applicable to certain types of claim. As regards jurisdiction, however, sometimes the rules are slightly different. In consumer cases, for example, the claimant-consumer may also start litigation before the court of his or her own domicile (he or she has a choice), even though the general rule is that the court of the area where the defendant is domiciled is the competent court. Specific alternative rules of jurisdiction also exist for e.g. labour contracts, tort cases, estates of deceased persons, and so on. See Articles 100-108 Dutch Code of Civil Procedure.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

In addition to the answer to question 3.1, the following point should be mentioned. In HR 18.02.1994, NJ 1995, 718, the Dutch Supreme Court ruled that not only is it allowed for private citizens to bring tort cases against the State before the civil courts when they claim that the State has committed a tort due to acts in contravention of public law, but that the State may do the same (i.e. bring such claims against private citizens before the civil courts). In these and similar cases, claims must be based on rights under private law in order to allow the civil courts to take cognizance of the matter.

In certain cases, a civil action can be initiated by the Ministère Public as a party to the lawsuit. Examples are actions for the nullity of a marriage and the dissolution of juridical persons.

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Interpleader actions do not exist in the Netherlands. In these cases, however, the interested party (claimant) may start litigation in order to obtain a declaratory judgment against the other parties. Litigation in order to obtain a purely declaratory judgment was not allowed in the 19th century, but this changed in the early twentieth century. Currently, the interested party's claim will be held admissible if this party can demonstrate sufficient interest in an immediate declaratory ruling against the opponent party (HR 15.12.1939, NJ 1940, 206 and many subsequent rulings).

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No other important variations can be mentioned.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Human rights law is not used as an additional basis for standing in the Netherlands in civil cases.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Parties who have a sufficient interest (e.g. a party who has given collateral for the defendant's obligations to the claimant) may join a civil lawsuit as a party with the aim of advancing facts and arguments that support the position of one of the litigating parties. This is known as "voeging" (joinder of parties) in Dutch. Parties who want to make a claim of their own against the claimant or defendant in a pending civil lawsuit, may intervene in the action (in Dutch: "tussenkomst"). This may, for example, occur where litigation concerns title to property and where the intervening party also claims title. In both cases, the third party acts out of his own free will: whether or not to join or to intervene is his own decision. Joinder or intervention must be effected not later than the date of submission of the last statement of case. The reasons for joinder or intervention must be stated in the relevant motion.

In practice, the lower courts often allow joinder or intervention when there are reasonable grounds for doing so, e.g. when it is efficient from a procedural perspective as an alternative to the joining or intervening party commencing separate litigation. According to the Supreme Court, a sufficient interest for joinder is that a possible unfavourable outcome of the litigation for the litigant the joining party wishes to join would possibly harm the joining party's legal position (HR 14.03.2008, NJ 2008, 168). As regards intervention, the Supreme Court has decided that not only a legal interest but also an interest in fact may constitute sufficient ground for intervention (HR 14.03.2003, NJ 2003, 313). Cf. Van

Hooijdonk & Eijvoogel, *Litigation in the Netherlands*, 2009, para 6.2.5.  
Third parties who have not been a party in first instance proceedings, or who have not joined or intervened in these proceedings, may file third party opposition against a judgment between other parties resulting from these proceedings if their rights have been infringed by this judgment. Third party opposition is filed with the judge who has entered the first instance judgment.  
Apart from joinder of parties and intervention, the Dutch Code of Civil Procedure knows the motion for indemnification proceedings (in Dutch: "vrijwaring"). In this case, the third party is forced to become involved in litigation by one of the parties in the original lawsuit (other examples of forced involvement in civil litigation may be found in the Civil Code, e.g. in relation to usufruct and pledge). Different from joinder of parties and intervention, however, the third party does not become involved in the original lawsuit, but in a separate lawsuit between himself and the party having made the indemnification motion. On the basis of his involvement in the indemnification proceedings, the third party may decide to join or intervene in the main proceedings, although he cannot be forced to do so. Only in a specific situation is the third party allowed to take over the defence of the original defendant in the main lawsuit. This is the case where the litigation concerns goods owned by the defendant which have been encumbered with rights of the claimant, according to the defendant as a result of activities of the third party. Taking over the defence does not mean that the original defendant is not bound by the judgment in the case; the opposite is true because the original defendant also remains a party to the lawsuit.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Third party intervention (joinder of parties and intervention in the strict sense) cannot be prevented by the original parties to the action, unless they can convince the judge that this should not be allowed, e.g. by arguing that the third party does not have sufficient interest in intervening. The original parties file their arguments in the statement of case they may submit in answer to the (interlocutory) statement of the third party requesting intervention.

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## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Multi-party litigation is still in its infancy in the Netherlands. There are limited possibilities to bring such litigation before Dutch courts, although these cannot be equalled to class or group actions as they are known in other jurisdictions. The Dutch Civil Code contains a set of articles on organisations litigating in the interest of their members or in the general interest. Originally, claims brought by such organisations would be declared inadmissible, since the rule is that a claim can only be brought when the claimant litigates in his own personal interest. Later, such claims were sometimes allowed by the courts. In 1994, the Civil Code was modified with the introduction of Articles 3:305a and 3:305b, and in 2001 with the addition of Article 3:305c. In these articles, the right of foundations, associations with full legal personality, and legal persons under public law to bring an action in the interest of a collectivity is, under certain conditions, recognised. Conditions are



that the interests of those for whom the action is brought must be similar in nature and that the aim of representing their interests is expressed in the documents by which the legal person was created (i.e. the articles of association; in Dutch: statuten). It is not necessary that all those interested have agreed to the action (HR 09.042010, NJ 2010, 388). In Article 3:305a (2) of the Civil Code it is stated that the claim of a foundation or association cannot be admitted if 'in the given circumstances, it has not made a sufficient attempt to achieve the objective of the action through consultations with the defendant. A two week period from receipt by the defendant of a request for consultations giving particulars of the claim shall in any event suffice for this purpose.' (translation based on M. Freudenthal, *Civil Procedure in EU Competition Cases*, Kluwer Law International, p. 192). Damages cannot be claimed in actions brought in this way. As a result, often a declaratory judgment is being asked for in an action on the basis of Articles 3:305a-c Civil Code. This declaratory judgment can then be used by individual claimants in their actions for damages.

Article 3:305c was introduced to implement Directive EC No. 98/27/EC on injunctions for the protection of consumers' interests (OJ EC No. L 166). It lays down that an organisation or public body with its registered office outside the Netherlands that is placed on the list referred to in Article 4, paragraph 3, of this Directive, 'may institute an action for the protection of similar interests of other persons with their habitual residence in a country where the organization or public body is established, where the objective of the organisation is to represent such collective interests or where the promotion of such interests has been entrusted to the public body' (translation based on M. Freudenthal, *Civil procedure in EU Competition Cases*, Kluwer Law International, p. 193). The Court of Appeal in The Hague has jurisdiction as regards this type of procedure when the action concerns intra-EU issues.

The procedure of Article 3:305a Civil Code is often combined with the assignation of claims to the foundation or association, allowing the foundation or association to claim damages too. For further particulars see S. Hoes-Weishut et al. in *Actualiteiten Mededingingsrecht* (2008), p. 139. Currently, legislation is pending which aims at preventing ad hoc foundations and associations to bring claims under Article 3:305a by adding a second sentence to the article stating that the legal person should be sufficiently representative re the interests of the representees. It is suggested that the condition of representativeness should not be imposed when efficient and effective legal protection cannot be provided against infringement of interests that affect large groups of citizens collectively and where these interests cannot be sufficiently protected by bringing individual claims before the court. See also *Stichting Via.Claim* (HR 08-07-2011, NJ 2011, 1401).<sup>15</sup>

The Dutch Civil Code also knows a specific action by organisations representing the interests of a collectivity aimed at establishing by way of a judgment that General Terms and Conditions in a Contract are unreasonably burdensome for contractual partners (see Article 6:240 CC), which may lead to the annulment of these Terms and Conditions (the Civil Code was amended in this respect as a result of Directive No. 93/13 EEC, 05.04.1993, on unfair terms in consumer contracts, and Directive No. 98/27/EC, 19.05.1998, on injunctions for the protection of consumers' interests

<sup>15</sup> The author benefitted from a presentation by Marie-José van der Heijden, Utrecht University, when writing this paragraph. It should be noted that currently a proposal for new legislation introducing improvements in the existing legal framework is under discussion.

(OJ EC No. L 166)).

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

These requirements are mentioned in the answer to question 5.1: foundations, associations with full legal personality, and legal persons under public law may bring an action in the interest of a collectivity if the interests of those for whom the action is brought are similar in nature and if the aim of representing their interests is expressed in the documents by which the legal person was created (*statuten*). It is not necessary that all those interested have agreed to the action (HR 09.04.2010, NJ 2010, 388).

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Multi-party litigation is regulated generally. For an exception, see the last paragraph of the answer to question 5.1.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

In 2005, Articles 7:907-910 were introduced in the Dutch Civil Code, and Articles 1013-1018 in the Code of Civil Procedure. These articles govern situations in which a large number of individuals suffer the same harm due to an act or related acts of one or more natural or legal persons (e.g. a tobacco company). The articles open the possibility for the natural or legal persons having caused the harm and a foundation or association representing the interests of those who have suffered harm to reach an agreement (the minimum provisions that must be included in this agreement are listed in Article 7:907(2) Civil Code) which can be submitted to the Court of Appeal in Amsterdam in order to have it sanctioned as an agreement applicable to all who have suffered harm in the context of the agreement. The decision is binding for everyone involved in the dispute, except for those who decide to opt out. Case law: DES, Amsterdam Court of Appeal, 01.06.2006, NJ 2006, 461; Dexia, Amsterdam Court of Appeal, 25.01.2007, NJ 2007, 427; Vie d'Or, Amsterdam Court of Appeal, 29.04.2009, NJ 2009, 448; Shell, Amsterdam Court of Appeal, 29.05.2009, NJ 2009, 506; Vedior, Amsterdam Court of Appeal, 15.07.2009; Converium, Amsterdam Court of Appeal, 12.11.2010, NJ 2010, 683. Currently, a proposal for new legislation introducing improvements in the existing legal framework is under discussion.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

The Articles of the Civil Code mentioned in the answer to question 5.1 may, as indicated, also be used for litigation in the general interest. The requirements that need to be met by an organisation litigating in the general interest are also mentioned there and in the answer to question 5.2.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

Litigation in the general interest is regulated generally.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

The Dutch courts are lenient in the control of locus standi requirements. As stated in the answer to question 2.1, the rule in the Netherlands is that "[a] person has no right of action where he lacks sufficient interest" ("point d' intérêt, point d'action") and that the existence of sufficient interest is presumed by the courts.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

No obvious variations.

- 7.2.2. the field of substantive law at hand?

Idem.

- 7.2.3. the nature of the claimant?

Idem.

- 7.2.4. the nature of the claim?

Idem.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

This is not the case.

- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

This is not the case, although this may change for the Dutch Supreme Court after the introduction of the legislation mentioned in the answer to question 3.1. This legislation aims to allow the court to focus on cases that are relevant from the perspective of the aims of cassation proceedings.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

As stated in the answer to question 5.1, Article 3:305c of the Dutch Civil Code was introduced to implement Directive EC No. 98/27/EC on Injunctions for the Protection of Consumers' Interests. It lays down that an organisation or public body with its registered office outside the Netherlands that is placed on the list referred to in Article 4, paragraph 3, of this Directive, "may institute an action for the protection of similar interests of other persons with their habitual residence in a country where the organization or public body is established, where the objective of the organisation is to represent such collective interests or where the promotion of such interests has been entrusted to the public body" (translation based on M. Freudenthal, *Civil procedure in EU Competition Cases*, Kluwer Law International, p. 193). The Court of Appeal in The Hague has jurisdiction as regards this type of procedure when the action concerns intra-EU issues.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

No.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

No.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

As stated in the answer to question 3.1, even though Dutch law only grants natural and juridical persons standing, the Dutch Supreme court has allowed entities that are not juridical persons standing; not allowing these bodies to participate in civil litigation would result in an unacceptable omission in the available legal protection. Standing is also allowed to such entities where a separate fund (in Dutch: "afgescheiden vermogen") is involved.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

No additional remarks.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW** **(THE NETHERLANDS)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

1) First if all: before one can bring a claim successfully to an administrative court, the general rule is that an objection must first be filed (also translated as: filing a complaint, prior-out-of-court-proceedings, preliminary proceedings) with the administrative authority that issued the decision. See art. 7:1 Algemene wet bestuursrecht (subject to certain exceptions).

2) At the first instance the administrative division of the district court (court of first instance) is competent. (Art. 8:1 Awb)

3) On appeal: either the Judicial Division of the Council of State (art. 47 Council of State Act), or the Central Appellate Adm. Court (art. 18 Appeals Act), or the Corporations (or: Trade and Industry) Court (art. 20 Judicial Review Corporations Act), or - in tax law disputes - the Court of Appeal and the Supreme Court (art. 27h en 28 General Tax Law Act).

4) There are some exceptions, especially when an Act of Parliament prescribes that a claim is to be submitted directly to the Council of State or the Corporations Tribunal (acting as courts of first and only instance).

5) As a general rule: no cassation, except in - see above, under 3) - tax law matters.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

Yes, see above (1.1): specialised courts (in particular in higher appeal) and at district court level a division of the general court.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

Yes, see above (1.1), hence esp. in highest instance.

Judicial Division of the Council of State (art. 47 Council of State Act): one could say the general higher appellate court, unless one of the other courts is competent (see below).

Central Appellate Adm. Court (art. 18 Appeals Act): social security cases and public service cases and study finance cases.

Corporations Court (art. 20 Judicial Review Corporations Act): social-economical matters

Court of Appeal and the Supreme Court (art. 27h en 28 General Tax Law Act): tax law disputes

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

Administrative courts are, in general and according to art. 8:1 Awb, competent to decide on administrative decisions ('besluiten', for a definition see art. 1:3 Awb). However, not all administrative decisions can be challenged before administrative courts. Some restrictions exist, such as generally binding rules and policy rules, both type of administrative decisions being excluded from the competence of administrative Courts (see art. 8:2 Awb). On the other hand, some actions of the administration can be challenged in administrative court proceedings although not being a decision but rather an actual action (see for instance art. 8:1, subsection 2, Awb). Another important extension of the administrative legal protection is laid down in art. 6:2 Awb. Sub (a) provides legal protection against refusals to take an administrative decision, whilst sub(b) provides administrative legal protection against the failure to take an administrative decision in due time.

The possible claim is relatively limited and mainly aimed at annulment of the administrative decision. Since the Awb came into force, it is possible to ask the administrative court for damages too (alongside annulment), under certain conditions, one of which is the annulment of the decision (art. 8:73 Awb). Currently it is even possible to ask the administrative authority for a so-called independent compensation decision which can be challenged before the administrative court. However, ordering damages is, to a large extent, not the exclusive domain of the administrative court. A citizen has, in general, a choice: to address the claim for damages to the administrative or the civil court (but once a court has decided on the grounds, the role for the other court vanishes).

As stated above, the key notion for access to administrative courts remains 'besluit' (administrative decision). Hence, in case a citizen asks the administrative court to order damages a 'besluit' is also required.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Yes. Act(ion)s other than administrative decisions (= (f)actual actions and private law actions) as well as excluded administrative decisions (see in particular art. 8:2, but also some more (8:3--8:5 Awb) cannot be brought before administrative courts and hence fall within the scope of the civil courts.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Yes, art. 8:1 Awb: a 'concerned / interested party may appeal...'. It is described in art. 1:2 Awb.

In Dutch: one must be 'belanghebbende'. In addition, it is also required to have 'procesbelang': the interested party must be able to gain, win something with the procedure.

The standing requirement of art. 1:2 in conjunction with art. 8:1 Awb contains several sub conditions, developed in case-law: the interested party must have 1) direct, 2) own, 3) personal, 4) objective and 5) an actual interest. There can be (sometimes a lot of) other interested persons besides the addressee.

Ad 1: the interest may not be too derived, nor indirect, such as where a person has

a contractual relationship with the addressee (and both the same interest). The interest of the person that wants to contest the administrative decision must be directly influenced by that decision. An important sub condition in practice!  
Ad 2: one cannot start an administrative procedure for someone else's interests (other than as a legal representative).  
Ad 3: one has to distinguish himself with his interest from other random persons.  
Ad 4: it is not permitted that the interest is strictly subjective or of a purely emotional nature (famous example: the daughter of a member of an orchestra wanted to contest an administrative decision which concerned the alteration of the building in which the orchestra of her father who passed away played its music because of the memories she had of her father in connection with the building.  
Ad 5: fear for something that, due to the issued administrative decision could occur in the future is not sufficient for granting standing.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

Interest-based.

The standing requirements fall between the *recours subjectif* and *recours objectif* but more towards a *recours objectif* (which is remarkable because according to the legislator the primary goal of the legal protection of the Awb was *recours subjectif*). Despite the conditions set out at 2.1 - which are indeed taken seriously in administrative procedural law – it is relatively easy to be granted standing and hence start proceedings to get an administrative decision quashed by an administrative court in the Dutch system.

More recently in a certain area of administrative law the legislator introduced (in the 'Crisis- en herstelwet) a so-called relativity principle (*Schutznom*) which stipulates that a decision cannot be quashed because of violation of a legal norm which does not protect the interest(s) of the person who relies on this norm as a ground for appeal (see art. 1.9 Chw). It is very likely that in the future this relativity principle will also be introduced in the Awb.

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

The standing requirement is relevant for both the objection procedure as for the administrative court proceedings. No standing means inadmissible.

If the question aims at whether objection proceedings are compulsory before one can go to administrative court, the answer is yes.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

Several requirements applicable before a case can be brought before the first instance (or appeal) court:

- article 6:5 Awb: formal requirements ((a) the name and the address of the submitter (b) the date);
- (c) a description of the order against which the objection or appeal is addressed and
- (d) grounds for appeal);
- article 6:7 Awb: time limit of 6 weeks;
- article 8:41 Awb: registry fee needs to be paid.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

No.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

No, the idea behind the rules in the Awb is that they should apply to all types of claims. It is possible however that acts of parliament (wetten in formele zin) deviate on certain points from rules in the Awb for certain decisions (see relativity principle/Schutznorm as mentioned before in Crisis- en herstelwet). In practice courts do apply the general requirements in a specific way on certain types of claims. To apply the interested person concept or art. 1:2 Awb on for instance social security cases or environmental cases the courts for instance use specific criteria/sub-conditions which are unique to these types of claims. To determine whether a person's personal interest is affected by an environmental decision the courts often use a distance and sight criterion. In certain social security cases (WAO/Disablement Insurance Act) the employer is considered to be an interested party, although the employee is the addressee of the disputed decision.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

Yes and no; no because the notion of 'belanghebbende' (interested person) stays the starting point. Some of the sub-conditions developed by the courts are applied differently or in a specific manner for NGOs/legal persons who represent a general interest or public authorities.

Art.1:2 sub section 2 Awb provides that public authorities can initiate administrative action before administrative courts. They are only considered to be an interested party when a general interest which is entrusted to them is at stake. This means the protection of this interest belongs to their public duties and for its protection competence is conferred upon them by the legislator. Furthermore, the Crisis- en herstelwet contains a provision which excludes a right to appeal for local public authorities (art. 1.4).

Art. 1:2 sub section 3 Awb stipulates that NGOs/legal persons need to prove that they represent a collective or general interest in particular according to their goals in the articles of association (bylaws/statuten)) and activities. In the past years the courts have started to interpret these sub-conditions more strictly with regard to



general interest claims and NGOs need to show that they really undertake activities to protect a specific general interest (see ABRS 1 oktober 2008, AB 2008/348; ABRS 15 oktober 2008, AB 2008/349; ABRS 28 oktober 2008, AB 2008/351). An organisation which represents a collective interest can more easily fulfil these requirements by simply showing it represents the interest (according to their goals in the articles of association) of the majority of its members (ABRS 24 juni 2009, AB 2009/336).

If public authorities or NGOs/legal persons represent their own personal interest (for instance when applying for a permit) they automatically fulfil the requirements of art. 1:2 subsection 1 and the other sub-sections are not relevant.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

In general no. However, due to case law of the ECtHR under article 6 the sub-condition of directly affected interest has sometimes been interpreted more broadly by the courts in certain cases and access is granted to persons whose civil rights are affected by a decision. The same can also apply to other human rights (in particular freedom of speech). The courts seem to be more willing to grant access and accept a directly affected interest when a human right is at stake. (see ABRS 5 september 2007, JB 2007/194; ABRS 21 november 2007, JB 2008/14)

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Yes. Every interested party in the sense of art. 1:2 Awb is allowed access. Not relevant whether it concerns a primary party. One condition: access only if they have participated in a preliminary administrative procedure (art. 6:13 Awb). This article stipulates that no appeal may be lodged against a decision by an interested party if he may reasonably be considered at fault in not having used a existing administrative preliminary procedure.

The court can furthermore allow other (than the primary parties) interested parties to join a procedure/claim according to art. 8:26 Awb. Art. 1:2 Awb and art. 6:13 Awb also apply in that case.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No.

#### 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a

large group of litigants? Please specify which types of such actions are available and provide a short definition.

Yes, see question 3.4. Organisations which represent a collective interest can file a claim to annul a decision, if they fulfil the requirements of art. 1:2 sub section 3 Awb. In practice courts grant these organisations access.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

The general requirements. See question 3.4.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

See question 3.4.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

Generally in the Awb (art. 1:2 Awb).

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Somewhere in between. See question 3.4.

(Altogether perhaps more lenient or fairly lenient (rather) than rigorous).

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

No. Only one type of remedy (annulment, with some additional sub remedies exist, such as the possibility of damages) exists.

- 7.2.2. the field of substantive law at hand?

Not really. See question 3.3.

- 7.2.3. the nature of the claimant?

1) Not really. Art. 1:2 is the central key notion to be applied in all cases (unless Act of Parliament deviates, such as - to a certain extent - the Crisis- en herstelwet). Nevertheless, art. 1:2 sub section 2 Awb (so, legislation, not created by case-law) contains a specific (extra) condition in case a public legal person / public authority wants to contest an administrative decision. But, as mentioned above, that is based

on legislation not on case-law/courts practice. And art. 1:2 sub section 3 Awb contains the two conditions of the 'statuten' en (f)actual activities. But again, on legislative grounds, not created by courts. However, in case a 'general interest legal person' starts proceedings, the restrictive case-law of the October 2008 plays a role. See above.

2) If the question also aims at the other access-related requirements (besides art. 1:2 Awb / 'belanghebbende'), court-practice is more relevant. According to the case-law the time limit of appeal (6:7 Awb) is applied pretty strict; it is however possible that exceeding the time-limit of six weeks is not fatal. See the escape clause in art. 6:11. Citizens are sometimes granted access to court although they are too late with their appeal, although this depends on case-law / court practice. It is worth mentioning that in case a citizen is represented by a professional lawyer, it is likely to be more exceptional that he is granted access (in case he is too late with the appeal) compared to the situation he is not; the same is true for someone who is not a complete layman someone who appeals decisions frequently or is a legal person involved frequently in proceedings etcetera. For them it is more / very difficult to get access to court in case they have exceeded the time-limit.

7.2.4. the nature of the claim?

No, not really. The (almost one and only) claim (and remedy) is annulment of the disputed decision.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

No.

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

To a certain extent perhaps (but not explicitly) when applying the standing requirements of art. 1:2 Awb or the requirement of procesbelang. If a person does not have a real and actual interest in the claim or something to gain he will be denied access (see 2.1).

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

No, not in the rules itself as stipulated in art. 1:2 Awb. It is generally assumed that the notion of interested party in art. 1:2 Awb suffices with regard to access to a court. However for the preliminary administrative procedures this could be different. EU law can play a role however in the way courts apply the sub conditions of art. 1:2 Awb. The courts will have to interpret these conditions in light of the Aarhus Convention and apply the sub conditions of art. 1:2 section 3 Awb with regard to environmental organisations more lenient if necessary. But in cases where no access to the administrative court is granted, there is always the possibility of access to the civil court (residual court).

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No, but see question 8.3.2.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

No. Worth mentioning is one case in which was held that art. 1.6 Crisis- en herstelwet does not violate the Convention of Aarhus nor article 6 ECHR (ABRS 17 November 2010, AB 2011/42). Art. 1.6 Chw contains the duty to state the grounds for review immediately when filing a claim/appeal; the possibility to do so later or to complement the appeal is excluded. The court did not find this duty to be in contradiction with the right to access as laid down in the European rules. The relevance of this case is underlined by the fact that there is a possibility that this provision in the Chw in the future will apply to all or other administrative law disputes.

In another case with regards to art. 1.4 Chw, ABRS 29 juli 2011, AB 2011/281(see question 3.4 concerning this article), the court held that this article, in which public authorities are excluded from access to the administrative courts, does not violate the Convention of Aarhus nor the principle of effective judicial protection nor the ECHR.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

See question 8.3.2 with regard to Chw and art. 6 ECHR.

See also question 3.6. The courts have interpreted national standing rules in a different or more lenient way in a specific case, ABRS 5 sept 2007, JB 2007/194, but the influence of art. 6 ECHR in general is not clear on the basis of just this case. It is not certain that art. 6 ECHR in general will lead to broader access.

Note that the courts do not set aside national standing rules but they interpret them in a different way.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

No.

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

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## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(THE NETHERLANDS)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

In the Netherlands, lower courts, courts of appeal and a Supreme Court exist. Every lower court and court of appeal encompasses a sector criminal law. At the lower court the Public Prosecutor's Office is represented by the officier van justitie, at the court of appeal by the advocaat-generaal. In first instance criminal cases need to be brought by the Public Prosecutor before the lower court – this is the principal rule; exceptions to this rule will not be discussed here. Within every lower court magistrate's courts and full courts exist. (Minor) offences as summed up in book III of the Dutch Penal Code (overtredingen) are brought before a magistrate's court (kantonrechter) (art. 382 of the Dutch Criminal Procedural Code). (Serious) offences as listed in book II of the Dutch Penal Code (misdrijven) are brought before a magistrate's court (politierechter) or a full court (meervoudige kamer) which exists out of three judges. Although the Dutch Criminal Procedural Code assumes that misdrijven are as a rule brought before the full court (art. 268), in practice they are usually brought before the politierechter (art. 367). The Public Prosecutor brings the case before a politierechter, when he deems that the case is simple and that the to be requested imprisonment is not more than one year (art. 368); for the politierechter is not allowed to sentence someone to prison for more than one year (art. 369). When a case is brought before the politierechter and he deems it appropriate that this case should be brought before the full court, he will refer the case. Vice versa, the full court can also decide that a case needs to be brought before the politierechter and can therefore also refer (art. 282a). Against the verdict of a lower court appeal is possible (art. 404). In appeal criminal cases are as a rule brought before the full court which exists out of three judges (art. 411). In some cases it is also possible that a magistrate's court rules, for example when the case is simple and it was brought before the kantonrechter or the politierechter in first instance. Against the judgment of the court of appeal cassation is possible at the Supreme Court (art. 427). In this procedure criminal cases are assessed by the full court, which exists out of three or five judges (art. 75 of the Wet op de Rechterlijke Organisatie). The Supreme Court does not rule over the facts of the case, instead it only determines whether the lower courts have applied the law correctly. When this is not the case, the Supreme Court will quash the verdict (art. 440). When it is not necessary to conduct a new factual investigation, the Supreme Court will rule the case by itself. When a new factual investigation is necessary, it will refer back to the court which ruled previously in the case or to another court. This court should review the case taking into account the judgment of the Supreme Court.

One needs to consider that many criminal cases in the Netherlands are not brought before a criminal court. Instead, they are handled by the Public Prosecutor, either by a (un)conditional dismissal ((on)voorwaardelijk sepot), a transaction (i.e. a

settlement between the Public Prosecutor and the suspect to prevent prosecution; art. 74 of the Dutch Penal Code), or a strafbeschikking (i.e. a punishment by the Public Prosecutor which serves as an act of prosecution; art. 257a). A transaction or strafbeschikking is possible for all offences, with the exception of those for which the possible imprisonment is more than six years. When the suspect does not agree with the strafbeschikking – which is implemented in phases since 2008 to replace the transaction – he can protest to the Public Prosecutor, so that the case will be brought before the court (cfm. art. 6 (1) ECHR). In frame of the strafbeschikking, the Public Prosecutor is not allowed to impose sanctions which involve the deprivation of liberty; those sanctions are the sole authority of the criminal court (art. 113 of the Dutch Constitution). Apart from the Public Prosecutor, the police is also competent in a limited amount of cases to offer/impose a (un)conditional dismissal, a transaction or a strafbeschikking.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

Since 1 January 2011 the Wet tot wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces (Kamerstukken 30143; Stb. 2010, 1) has been in force in the Netherlands. This act implements the EU-Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JBZ, PbEG L 82). This has led to a separate section in the Dutch Criminal Procedural Code, in which the rights of victims in criminal proceedings have been arranged. Many of these rights were already in existence, however, they are now codified and united. This act ensures that the victim of a criminal offence is explicitly recognised in the criminal procedure as an independent participant with his own interests. However, his status is not equal to that of the suspect and the Public Prosecutor in the criminal procedure.

#### The right to proper treatment and information

First of all, the victim has a right to proper treatment by the Public Prosecutor (art. 51a (2)) – this includes the police and the personnel of the Public Prosecutor's Office, who fall under the supervision of the Public Prosecutor. This right encompasses inter alia that the victim, when he requests, will be informed of: a. the start and continuation of the criminal investigation and prosecution in the case against the suspect; b. the date and time of the trial and the verdict against the suspect; c. the release of the suspect/convict in case of serious offences (art. 51a (3)). Also, the victim will be notified of the options for compensation (art. 51a (4)). Moreover, a proper treatment means that the victim of a severe crime or his surviving relatives, is/are offered the option to meet with the Public Prosecutor prior to the trial (Aanwijzing slachtofferzorg, Stcrt. 2004, 80). Complaints regarding proper treatment against the police or the personnel of the Public Prosecutor's Office can be submitted to the Public Prosecutor.

#### The right of access to and addition of files of proceeding

Furthermore, the victim has the right to access the files of proceeding and to add documents to the criminal dossier which are of importance to him (art. 51b). Requests regarding this right need to be deposited by the victim to the Public Prosecutor. This right is not absolute. When the access or addition is refused, the victim is able to raise objections within fourteen days at the court of residence of the Public Prosecutor. No appeal is possible against the judgment of the court (art. 445).

#### The right to assistance and representation

Moreover, the victim has the right to be assisted (by a person of his own choice) and to be represented at the trial (by a lawyer who is explicitly authorised for this purpose by the victim) (art. 51c (1)(2)). The victim has no right to free legal assistance – except in cases of sexual or violent offences (art. 44 (5) of the Wet op de rechtsbijstand). The victim has a right to an interpreter as well (art. 51c (3)). Parliamentary history shows that the victim is not liable for the costs of an interpreter.

#### The right to speak

On the basis of art. 51e and 302-303 the victim has the right to speak during the trial. The victim may only make a statement about the experienced personal consequences of the criminal offence (victim impact statement). A third party is not allowed to perform the right to speak for the victim. When a victim is not capable of making a statement, he may not be represented; he may only be assisted. In contradiction to the statements of the victim made as a witness, victim impact statements cannot be used as evidence. After making his statement the victim can be asked questions by the judge and – through the judge – by the Public Prosecutor and the defence. Nevertheless, it is not intended that the victim who makes use of his right to speak, is treated as a witness.

Apart from the right to speak, the victim has also the right to add a written victim impact statement to the criminal dossier through the Public Prosecutor. The judge will read this statement during the trial. The Supreme Court held that a written victim impact statement can be used as evidence (HR 11 October 2011, LJJ BR2359). A proper treatment of the victim includes that a form will be sent to him in which he is asked whether he is willing to make use of his right to speak and/or to add a written statement (Aanwijzing spreekrecht en schriftelijke slachtofferverklaring, Stcrt. 2004, 248).

#### The right to compensation

Art. 51f-51g, 332-335 and 361 embody the victim's right to compensation. When the victim is notified of the prosecution of the suspect, a joining form (voegingsformulier) is sent to him. The victim can join before the trial (by way of using the joining form) or during the trial (orally or in writing) as a claimant/injured party (benadeelde partij); during the trial joining is possible until the indictment (requisitoir) of the Public Prosecutor. Damages as a consequence of an *informatie* joined offences (i.e. offences which are not explicitly charged as such, however, which are added to the indictment and are confessed by the suspect) can also be considered for compensation. The victim can choose to join as a claimant in the criminal procedure for a portion of the damage; the remaining part of the damage he can submit to the civil court. If the assessment of the claim for compensation brings about a disproportionate load to the criminal case, the judge will declare the claim completely or partially inadmissible and will refer the claimant to the civil court (art. 361). In principle, the judge passes judgment over the claim simultaneously with his judgment in the criminal case (art. 335). On the claim of the claimant for compensation substantive civil law is applicable (particularly art. 6:162 of the Dutch Civil Code). Moreover, a claim can only be assigned when the suspect is sanctioned or when he is found guilty without the imposition of a sanction (art. 9a of the Dutch Penal Code). When the claim is rejected and the Public Prosecutor and/or the suspect appeals, the claimant can join once more (art. 421). When the



claim is rejected and the Public Prosecutor and the suspect do not appeal, the criminal case ends and the claimant cannot independently appeal against the verdict. However, it is possible that the claimant appeals independently solely for his civil claim; the appeal will be brought before the civil court of appeal then, which means that civil procedural law is applicable (art. 421). When the case is brought before the Supreme Court by the Public Prosecutor and/or the suspect, the claimant can hold a cassation argument regarding the previous judgment on his claim for compensation (art. 437). When the case is not brought before the Supreme Court by the Public Prosecutor or the suspect, the criminal case ends and the claimant cannot independently bring his claim before the Supreme Court. Dutch law does not provide the opportunity for the claimant to independently bring his claim before the Supreme Court (HR 26 February 2002, NJ 2003, 557; HR 25 March 2003, NJ 2003, 329).

One needs to consider that the victim can also receive compensation in the criminal procedure when the judge imposes a compensation measure (schadevergoedingsmaatregel) (art. 36f of the Dutch Penal Code) or when he imposes a (partly) conditional punishment, in which he includes the extraordinary condition of compensation to the victim by the perpetrator (art. 14c (2) of the Dutch Penal Code). For both measures it is not obliged that the victim joins as a claimant in the criminal procedure – in practice, however, this plays an important role. It is sufficient that the perpetrator meets one of the imposed modes of compensation. The advantage of the two abovementioned modes of compensation, is that it includes means of pressure to fulfil the payment obligation. For when the schadevergoedingsmaatregel is not lived up to, detention can be applied and when the extraordinary condition of a conditional punishment is not fulfilled, the punishment can be executed. An extra advantage of the schadevergoedingsmaatregel is that the Public Prosecutor is responsible for the execution of this measure. N.B.: in the frame of a strafbeschikking, it is the Public Prosecutor who can impose a schadevergoedingsmaatregel (art. 257a).

#### The right to mediation

The Dutch legislator has made the choice not to elaborate upon mediation in criminal cases in the Dutch Criminal Procedural Code. Art 51h only states that rules can be drafted considering mediation between victim and perpetrator. Since 1 January 2007 a victim-perpetrator-conversation can be held under the supervision of the Public Prosecutor. However, the Public Prosecutor and the judge do not have to take into account the outcome of this conversation. Mediation which is aimed at the formation of an agreement between perpetrator and victim which settles the case does not currently exist in the Netherlands. The limited Dutch interpretation of art. 10 of the aforementioned EU-Council Framework Decision has been criticised by several Dutch scholars. Nevertheless, in 2010-2011 a pilot has taken place at the lower court of Amsterdam in which mediation in approximately 25 criminal cases has been performed aside from the criminal procedure. Next to this pilot, in 1999-2011 mediation has been taken place in the lower court of Maastricht instead of the criminal procedure. It can be said that the victim formally has no right to mediation instead of a criminal settlement. However, it occurs that in very simple cases the police or the Public Prosecutor mediate between victim and perpetrator in order to establish a compensation agreement; the Public Prosecutor can take this agreement into account with his decision to prosecute (Aanwijzing slachtofferzorg, Stcrt. 2004, 80).

#### The victim as a witness

The victim can be a witness in the criminal procedure. The hearing of a witness can take place: a. during the investigation by the police (no legal rules exist for a hearing during this stage, so the victim cannot be forced to testify); b. during the preliminary examination (gerechtelijk vooronderzoek) by the examining magistrate (rechter-commissaris) (art. 210); c. during the trial by the judge (art. 287). When the victim has been summoned to testify by the examining magistrate or by the judge at the trial, he is obliged to appear and to testify (the truth); when he refuses to do so, he can be punished (art. 192, 207 and 444 of the Dutch Penal Code) and certain measures can be used against him in order to make sure he appears and testifies. During the trial it is the duty of the judge to take into account the interests of the (victim-)witness. The law states explicitly that the judge takes care of the proper treatment of the victim or his surviving relatives (art. 282a (2)). In this frame the judge can order that the trial takes place behind closed doors; this command can also be given on request by other participants than the Public Prosecutor and the defence, such as the victim (art. 269 (2)). If the judge thinks it is necessary, he will send the different participants in the criminal procedure into separate rooms before they are examined (art. 288a (1)). Moreover, he can omit a question about certain personal information of the witness and he can take measures to prevent disclosure of this information (art. 290 (3)). Furthermore, he can determine that the suspect leaves the courtroom with the aim of hearing the witness without the suspect's presence (art. 297 (3)). It is also possible that the judge prevents the witness from answering improper or redundant questions (art. 293 (1)). Lastly, the judge has the authority to hold the trial and to order further investigation by the examining magistrate; in this manner, the witness can be heard outside the public trial (art. 316). N.B.: the Netherlands knows a special procedure for threatened witnesses; those witnesses are heard exclusively by the examining magistrate (art. 226a).

#### 1.2.1. Is there a possibility of private prosecution?

No. The Public Prosecutor is exclusively responsible for the prosecution of criminal offences (art. 9), either by summoning the suspect before the court or by imposing a strafbeschikking. The Public Prosecutor does not have the obligation to (further) charge every known criminal offence. On the basis of the so called principle of opportunity (opportuiniteitsbeginsel), the Public Prosecutor is authorised to waive (further) prosecution on grounds of the public interest (art. 167 and 242); apart from the waive on technical grounds (technisch sepot), a waive on grounds of policy (beleidssepot) exists in the Netherlands. It is expected from the Public Prosecutor that he takes into account the interests of the victim in the frame of his decision (not) to prosecute; those interests can defer from the public interest. The law does not prescribe that the Public Prosecutor hears the victim before taking a decision (not) to prosecute. However, any party with interest in the decision (not) to prosecute can turn to the Public Prosecutor.

Furthermore, certain criminal offences (in the private sphere) can only be prosecuted after a complaint is filed (art. 64 of the Dutch Penal Code and art. 164). A complaint (klacht) is the report (aangifte) of a crime with the request to prosecute. The complaint can be filed until three months after the complainant has got knowledge of the committed criminal offence. In contradiction to the report, which cannot be withdrawn, the complaint can be withdrawn within eight days after filing it. When this happens, the right to prosecute ceases to exist. Authorised to file

a complaint is in the first place the victim against whom the criminal offence is committed. Examples of offences for which a complaint is necessary, are: defamation (art. 269 of the Dutch Penal Code), stalking (art. 285b of the Dutch Penal Code) and theft between spouses and next of kin (art. 316 of the Dutch Penal Code).

Finally, one needs to consider art. 167a, in which it is determined that, when it concerns a sexual offence against a minor who is twelve years of age or older (art. 245, 247, 248a, 248d or 248e of the Dutch Penal Code), the Public Prosecutor gives this minor the opportunity as much as possible to elaborate upon his opinion on the committed offence. However, the Public Prosecutor is not bound by the victim's view.

### 1.2.2. Can a victim request review of a decision not to prosecute?

Yes. On grounds of the complaints procedure ex art. 12 at the court of appeal within the residence in which the decision not to prosecute has been taken, the victim can complain about: a. the decision of the Public Prosecutor not to charge; b. the decision of the Public Prosecutor to withdraw the charge; c. the decision of the Public Prosecutor to impose a strafbeschikking. Also, the Public Prosecutor's choice concerning the qualification of the indicted offence can be submitted to the court of appeal on basis of aforementioned complaints procedure (HR 25 June 1996, NJ 1996, 714).

When the case is dealt with by a transaction, the victim can complain within three months after receiving knowledge of that transaction (art. 12k (old) and art. 74b of the Dutch Penal Code); the same time-frame is applicable when it concerns a strafbeschikking (art. 12k (new)). When the Public Prosecutor decides to offer a transaction or to impose a strafbeschikking, possible reasons for the victim to complain can be: a. to have a public trial; b. to impose a (more severe) punishment; c. to make use of his right to speak.

The assessment of the complaint takes place in the council chamber (raadkamer). The complainant as well as the person whose prosecution is requested, are heard or at least summoned to be heard. Both parties can be assisted and represented by a lawyer. After the oral hearing, the court of appeal makes a decision on the complaint. In the case that the court of appeal rules that (further) prosecution has to take place, it commands the Public Prosecutor to (further) charge. The court of appeal can refuse to give this command on grounds of the public interest. The assessment by the court is not marginal but full (HR 25 June 1996, NJ 1996, 714). Against the decision of the court no opportunity to appeal exists (HR 18 October 1994, NJ 1995, 118). The complaints procedure ex art. 12 can only be used in first instance; when the Public Prosecutor does not appeal, this procedure cannot be utilised (again) to force (further) prosecution.

N.B.: when there is/was an opportunity to complain ex art. 12, a civil claim cannot be made concerning the prosecution.

### 1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

Yes. Compensation: see 1.2. Other measures:

- return of property: as soon as the interest of criminal proceedings no longer objects to the return of property, the (Assistant) Public Prosecutor commands the return of it to the person under which the property was seized (art. 116). When an order to return the property fails to appear, the party of interest can complain at the

court where the case is/was prosecuted (art. 552a). Moreover, the judge can order in a special requirement of an (partly) conditional punishment that the perpetrator returns stolen property to the victim (HR 30 June 2009, NJ 2009, 368).

- contact or area prohibition: the judge can attach the special requirement to a (partly) conditional punishment that the perpetrator does not contact the victim and/or enters a certain area in which the victim takes residence. Since recent, the judge is also able to impose a freedom limiting measure (vrijheidsbeperkende maatregel) (i.e. contact or area prohibition) (art. 38u of the Dutch Penal Code). This measure is of importance when the fear exists that the suspect will bother the victim again after conviction. In his verdict the judge attaches at least three days of detention to every violation of the measure. He has the opportunity to declare the measure of immediate execution, so that going in appeal will have no stay of execution.

- temporary house prohibition: the mayor can impose a temporary house prohibition (tijdelijk huisverbod) to the person who is suspected of domestic violence. He can impose this prohibition for ten days by means of a 'cooling-off period'. He can mandate this power to the Assistant Public Prosecutor.

- blood test: in case of a crime where there are indications that a contagion of the victim with a serious disease (i.e. HIV or Hepatitis B/C) could have taken place, the Public Prosecutor can request and – with authorisation of the examining magistrate – force the suspect (or a third party) to undergo a blood test (151e). The victim can also independently request the Public Prosecutor to do the same; if the Public Prosecutor refuses, the victim can complain before the examining magistrate (151g). In case of a negative result, the tests can be repeated after a period of three to six months; for this test the same rules apply as for the first test (art. 151h).

- legal advice and assistance: art. 51c determines that the victim can be legally advised. The victim can obtain free legal advice at the Juridisch Loket ([www.juridischloket.nl](http://www.juridischloket.nl)) and at Slachtofferhulp Nederland ([www.slachtofferhulp.nl](http://www.slachtofferhulp.nl)). Free legal assistance by a lawyer is only granted to victims of sexual- and violent offences (art. 44 (5) of the Wet op de Rechtsbijstand).

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

In case of obtaining compensation as a result of a criminal offence (that also includes a tort), no division of jurisdiction exists between the criminal court and the civil court. The victim has the choice to bring his claim to compensation before either the criminal court or the civil court or to both. When the victim brings the claim before both courts and the criminal court or the civil court grants the claim, the victim can withdraw his claim at the civil court respectively at the criminal court. If he fails to withdraw, the judge will declare him non-admissible. The victim can also separate his claim for compensation: the part that can be easily proven, will be brought before the criminal court, the other part before the civil court. When the criminal court dismisses the claim, the victim is not able to bring the same claim before the civil court; non-admissibility does not obstruct this, since the criminal court has not substantially assessed the claim then. The civil court in criminal cases will often decide upon the remainder of the cases (restrechter). This means that when joining as a claimant is impossible or leads to non-admissibility at the criminal court, the victim needs to turn to the civil court for his compensation. Different from criminal law, in civil law the victim can claim a temporary provision as long as the

proceedings continue, when this provision is on concordat with the main claim; in urgent cases a immediate provision can be claimed by summary proceedings (kort geding) (art. 254 of the Civil Procedural Code), inter alia a contact or area prohibition or a blood test.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

Yes. After the offence is reported by the victim, the police provides a general explanation on the usual procedure and an information brochure. For practical information the victim is usually directed to Slachtofferhulp Nederland. Moreover, the police will ask the victim who reports the crime, whether he has suffered damages as a result of the offence and whether he wants to file for compensation. If this is the case, this will be mentioned in the record (proces-verbaal) and the victim will be informed about the possibilities for compensation. Furthermore, art. 51a (3) determines that the Public Prosecutor provides information to the victim about the criminal case against the suspect, if the victim requests so. Finally, the victim can apply for free legal advice at the Juridisch Loket and at Slachtofferhulp Nederland.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Yes.  
Complaints procedure: art. 12c (non-admissibility declaration without further investigation) and art. 12i (non-admissibility declaration after investigation).  
Criterion: the direct party of interest (rechtstreeks belanghebbende) ex art. 12 (1).  
Compensation: art. 333 (non-admissibility declaration without further investigation) and art. 335 (non-admissibility declaration after investigation). Criterion: the claimant/injured party (benadeelde partij) ex art. 51f (1).  
Right to speak: the judge investigates whether someone can be qualified as a victim ex art. 51a (1) (see 2.2). Criterion: the victim (slachtoffer) ex art 51a (1). N.B: many of the rights mentioned sub 1.2 are linked with the victim criterion (i.e. the right to proper treatment and information, the right of access to and addition of files of proceeding, the right to assistance and representation and the right to mediation).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

Since the beginning of the 80s of the last century a process has started, in which the interests of the victim have become more important in the criminal procedure. International developments and the national project Strafvordering 2001 have played an important role in this process. In the Netherlands the status of the victim is not equal to that of the suspect and the Public Prosecutor, however, the victim is explicitly recognized as an independent participant with his own interests in criminal proceedings. The victim criterion can be found in art. 51a (1). In this provision the victim is described as 'the person who has suffered material damage or other harm as a direct cause of a criminal offence' ('degene die als rechtstreeks gevolg van een

strafbaar feit vermogensschade of ander nadeel heeft ondervonden'); this definition adheres to art. 1 of the aforementioned EU-Council Framework Decision. The victim can be a natural person as well as a legal person. In the Dutch Criminal Procedural Code a separate reference to legal persons is made, since the legislator did not want to alter the existing practice that legal persons too can claim their damage as a result of an offence in the criminal procedure; this counts for both private as well as public legal persons. Also, in frame of the complaints procedure ex art. 12 (in which the criterion of the direct person of interest is used) private and public legal persons are authorised to file a complaint.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

#### Complaints procedure

The right to complain ex art. 12 belongs to the direct person of interest (art. 12 (1)), i.e. 'the person who is affected by the omission of a prosecution in an interest that concerns him specifically' ('degene die door het achterwege blijven van een strafvervolgung is getroffen in een belang dat hem bepaaldelijk aangaat') (HR 7 March 1972, NJ 1973, 35; HR 18 March 197, NJ 1975, 247); this does not need to be a financial interest. The concept direct person of interest encompasses more persons than the victim ex art. 51a (1) alone. The concept is something between the victim and everyone. As a direct person of interest at least the surviving relatives can be indicated. In exceptional cases also the suspect can be indicated as such. A direct person of interest can also be a private or public legal person, which – according to its goal and its factual practice – promotes an interest that is directly affected by the decision not to prosecute (art. 12 (2)). The complainant can be assisted by a person of his own choice and be represented by a lawyer who is explicitly authorised for this purpose (art. 12f).

#### Compensation

The right to compensation belongs to the claimant/injured party, i.e. 'the person who has suffered direct damage by a criminal offence' ('degene die rechtstreeks schade heeft geleden door een strafbaar feit') (art. 51f (1)). Since the definition of the victim ex art. 51a (1) seamlessly fits with the definition of the claimant, it can be said that the right to compensation in fact belongs to the victim. According to the legislator, directly suffered damage exists when someone is affected by an offence in an interest that is protected by the violated penal provision. In general, penal provisions do not protect the interests of third parties (inter alia insurance companies), which means that in principle only the victim of a criminal offence can participate as a claimant. When the claimant is deceased, the right to compensation belongs to his successors and to the persons meant in art. 6:108 (1)(2) of the Dutch Civil Code, i.e. the surviving relatives as far as the deprivation of living costs and costs of disposal of the dead are at stake (art. 51f (2)). The claimant can be assisted by a person of his own choice and be represented by a lawyer who is explicitly authorised for this purpose (art. 51f (4)).

#### The right to speak

The right to speak ex art. 51e belongs to the victim ex art 51a (1), i.e. 'the person who has suffered material damage or other harm as a direct cause of a criminal offence'. When the victim is deceased, the right belongs to one of his surviving relatives (in obligatory ranking: 1. partner; 2. child; 3. brother/sister). Minors who have not yet reached the age of twelve years old, can make use of the right to

speak, when they are thought to be capable to reasonably appreciate their interests (art. 51e (3)).

At the moment, the question has arisen, whether parents of minors who have not yet reached the age of twelve years old and who are not thought to be capable to reasonably appreciate their interests, should be allowed to make use of the right to speak. This is set against the criminal case in which a suspect, Robert M., is charged with the sexual abuse of more than eighty very young children. Multiple parents of these children have requested through their lawyer that they want to make use of the right to speak. Recently, the lower court in Amsterdam has ruled that the parents in this criminal case have the right to speak (Rb Amsterdam 15 December 2011, LJN BU 8322/8313). The victims in this case are too young to speak themselves and therefore they can only be represented by one of their parents. The parents are not only permitted to speak about the physical and mental consequences of the abuse for their child, but also about the impact on the direct environment, such as the family. Parents who do not want to speak, are allowed to submit a written victim impact statement. The verdict by the lower court in this case has established a precedent and can have consequences for other criminal cases. According to the lawyers of the suspect, the lower court is running ahead of possible future law concerning the right to speak by the parents of young victims (Kamerstukken X); after all, the possibility of allowing a third party to speak for the victim, is explicitly rejected during parliamentary deliberation. Officially, it (still) prevails that the person who has the right to speak, can be assisted, but not represented.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

Complaints procedure: the criterion is 'the direct party of interest' ex art. 12 (1).  
Compensation: the criterion is 'the claimant/injured party' ex art. 51f (1).  
The right to speak: the criterion is 'the victim' ex art 51a (1).  
The circle of authorised persons seems to be the biggest when it concerns the complaints procedure ex art. 12 and the smallest when it concerns the right to speak ex art. 51e (see 3.1).

- 3.3. Are there specific standing rules applicable to certain types of claims?

No difference is made between types of claims. For every claim the same standing rules are applicable.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

Complaints procedure  
No requirements exist regarding the age or the mental status of the complainant. Nevertheless, art. 12 implicitly empowers legal representatives in civil matters to represent their clients as well in the complaints procedure (Hof Den Bosch 14 July 1994, NJ 1994, 631). When the minor is younger than twelve years old, the legal representative has to complain on behalf of the minor. When the minor is twelve years or older, he can be assisted or represented.  
Compensation  
Persons who need assistance or representation in civil matters, such as minors and mentally disabled persons, need assistance or representation in criminal matters as well when they join as a claimant.

The right to speak

Minors who have not yet reached the age of twelve years old, can make use of the right to speak, when they are thought to be capable of reasonably appreciating their interests (art. 51e (3)). Minors who have not yet reached the age of twelve years old and who are not thought to be capable of reasonably appreciating their interests, may not be represented. The same applies to mentally disabled persons. Officially, it (still) prevails that the person who has the right to speak, can be assisted, but not represented.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

Complaints procedure

The complaints procedure ex art. 12 can be used in case of every criminal offence; each time the same standing rules are applicable.

Compensation

It is possible to join as a claimant in case of every criminal offence, unless the assessment of the claim for compensation brings about a disproportionate load to the criminal case. If this is the case, the judge will declare the claim (completely or partially) inadmissible and will refer the claimant to the civil court (art. 361). Whether the claim brings about a disproportionate load, is dependent on the complexity of the claim – not solely on the amount or type of damage.

The right to speak

The right to speak can only be used in case of criminal offences for which possible imprisonment involves more than eight years or which are explicitly mentioned in art. 51e (4); this concerns in particular sexual and violent offences.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

Certain articles from the ECHR bring about a positive obligation for the government to undertake action in favour of the victim. Art. 2, 3, 8 and 13 of the ECHR are of particular importance for the victim (e.g. ECHR 26 March 1985 – X and Y vs. the Netherlands). Moreover, art. 6 is applicable to the claim of the claimant. In the criminal case against suspect Robert M., the lawyer of the parents of the victims has invoked art. 6 and 13 of the ECHR regarding the right to speak, since, according to him, this right – as well as the claim of the claimant – forms a civil part within the criminal procedure; furthermore, he has invoked the International Treaty for the Rights of the Child and the EU-Council Framework Decision of 15 March 2011. Concerning the assessment of the criminal case behind closed doors, he has founded his request with an invocation of art. 8 and 13 of the ECHR, the Lanzarote Treaty of the European Council and the Charter of fundamental rights of the European Union. In its verdict of 15 December 2011 (LJN BU8322/8313) the court only directs to national legislation regarding the victim.

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

From the fact that little jurisprudence can be found on the requirements for locus standi of victims of criminal offences, it follows that the legal provisions concerning these requirements are not very problematic and that the courts are not often



confronted with difficulties on this subject.

4.2. Are there significant variations in the courts' approach based on:

4.2.1. the type of remedy requested?

Concerning the right to speak, the courts seem – for the time being – to uphold the rule that only the victim has the right to speak. In the criminal case against suspect Robert M. this has been overruled for the first time; it is clear that a precedent has been formed. Also, it needs to be mentioned that the right to speak is being appointed on ground of the indictment. This means that when the Public Prosecutor indicts an offence as laid down in art. 51e, the victim is allowed to make a statement – even though the court finally can acquit or convict the suspect in its final decision for an offence for which the right to speak is not allowed. In practice, the courts are very strict regarding the demand that the victim can only express himself about the consequences of the indicted offence for him; he cannot give his opinion about the evidence or the punishment.

4.2.2. the nature of the claimant?

In practice, mainly natural persons can be found as victims in the criminal procedure. The courts seem to take into consideration whether or not the victim is assisted by Slachtofferhulp Nederland.

4.2.3. the nature of the claim?

When it concerns immaterial damage, the courts have to determine the compensation in fairness. This criterion makes it possible that decisions of the courts concerning immaterial damage vary.

4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

In the criminal case against suspect Robert M., the very young age of the victims, the quantity of the sexual abuse and the attention of the media, all seem to have played a part in the decision of the judge to agree with the request of the lawyer of the parents to attribute the right to speak to the parents.

4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

No information is available to answer this question. Several of the asked questions can be answered in the near future (see: <http://wodc.nl/onderzoeksdatabase/civiel-schadeverhaal.aspx>).

## 5. Influence of EU law

5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

The EU-Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JBZ, PbEG L 82) is of particular importance for the Netherlands. Since 1 January 2011 the Wet tot wijziging van het Wetboek van Strafvordering ter versterking van de positie van het slachtoffer in het strafproces (Kamerstukken 30143; Stb. 2010, 1) has been in force in the Netherlands. This act implements the aforementioned EU-Council Framework Decision. This has led to a

separate section in the Dutch Criminal Procedural Code, in which the rights of victims in criminal proceedings have been arranged. Many of these rights were already in existence, however, they are now codified and united. This act ensures that the victim of a criminal offence is explicitly recognised in the criminal procedure as an independent participant with his own interests. However, his status is not equal to that of the suspect and the Public Prosecutor in the criminal procedure. Also, of importance for the Netherlands is the Council Directive of 29 April 2004 relating to compensation to crime victims (2004/80/EC, PbEG L 261).

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

Yes. Those rules are also applicable in cases in which no EU-law is invoked.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

5.3 t/m 5.4

In the criminal case against suspect Robert M., the lawyer of the parents has invoked art. 6 and 13 of the ECHR regarding the right to speak, since, according to him, this right – as well as the claim of the claimant – forms a civil part within the criminal procedure; furthermore, he has invoked the International Treaty for the Rights of the Child and the EU-Council Framework Decision of 15 March 2011. Concerning the assessment of the criminal case behind closed doors, he has founded his request with an invocation of art. 8 and 13 of the ECHR, the Lanzarote Treaty of the European Council and the Charter of fundamental rights of the European Union. In its verdict of 15 December 2011 (LJN BU8322/8313) the court only directs to national legislation regarding the victim. In general, it can be concluded that the courts almost exclusively refer to national legislation in case of (the requirements of) locus standi of victims; they often also refer to the parliamentary deliberation, in which frequently international legislation is mentioned.

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

**6. Other**

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

In the Netherlands, different views exist regarding the strengthening of the position of the victim in criminal law. Next to the advocates of this strengthening, there are sceptics who argue that victims are being 'abused' to develop criminal law into a repressive direction at the expense of the suspect/convict.

## POLAND

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (POLAND)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

Common courts adjudicate on cases in all matters which are not statutorily reserved to other courts, esp. administrative courts. The Polish Constitution generally guarantees the right to the two-instance court proceedings (Article 178 (1) of the Constitution). In most cases, the courts of the first instance shall be **District Courts** (*sądy rejonowe*), hearing cases in pecuniary claims the value of which does not exceed PLN 75,000 (ca. EUR 17,000). In commercial cases this threshold rises to PLN 100,000 (ca. EUR 23,000). **Regional Courts** (*sądy okręgowe*) are courts of the first instance in cases concerning pecuniary claims equal to, or exceeding, the value thresholds just mentioned; they adjudicate also on certain non-pecuniary claims (i.e. claims arising of the violation of the rights of personality) and some specific issues enumerated in Article 17 of the Civil Procedure Code, as for instance the intellectual property rights. The latter courts hear also the appeals lodged against the judgments and decisions of District Courts. **Courts of Appeal** (*sądy apelacyjne*) operate almost exclusively as the higher courts (i.e. the courts of the second instance) in relation to Regional Courts. Within the framework of the judicial supervision over common and military courts (Article 183 (2) of the Constitution), **the Supreme Court** (*Sąd Najwyższy*) shall hear the extraordinary appeals against the final and binding judgments of the higher courts (i.e. the Courts of Appeal and – in certain cases – also the Regional Courts) and it votes on the resolutions on the preliminary questions as well – in the way approaching to a certain extent the procedure applied before the ECJ according to Article 267 TFEU (of course, only issues within its sphere of jurisdiction may be the subject matter of the resolution).

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

Yes, it does. According to Polish law, common courts are divided into separate units called "divisions" (*wydziały*), some of them actually adjudicating as the 'specialized' courts. For instance, there are divisions for the family (*wydziały rodzinne*) and labour law matters (*wydziały pracy*) in the District and Regional Courts. Moreover, courts in Poland carry certain registers, too; it is for instance the land register and the register for the moral persons and commercial entities (officially called: 'National Court Register' = *Krajowy Rejestr Sądowy*). In spite of their administrative nature, the registration cases obviously involve the applying of the civil law rules. Within the organisational structure of the Regional Court in Warsaw, there are also two special divisions called: the "Court for the Protection of Competition and Consumers" (*Sąd Ochrony Konkurencji i Konsumentów*) and the 22<sup>nd</sup> Division called the "Court of the Community Trademarks and Designs" (*Sąd Wspólnotowych Znaków Towarowych i Wzorów Przemysłowych*).

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

Article 1 of the Code of Civil Procedure divides the 'civil cases' in two categories: **civil cases in a substantive sense**, i.e. based on the rules of civil, family or labour law, and **civil cases in the formal terms**, submitted to the common courts' jurisdiction by the way of exception (as their public-law nature seems quite evident). Matters included in the latter category are for instance: social security and the regulation of markets.

In spite of a quite strict wording of the provision of Article 1 of the Code, the notion of the 'civil case' (and consequently, of the 'civil claim') should be detached from the specific characterization in the light of the material law. The subject matter of the case brought before the court is only the claimant's request based on his or her assumptions that the other party has a duty with regard to him or her. Everyone – irrespective of his or her nationality and other features of the personal status – has a right to have his or her case heard by the competent, impartial and independent court (Article 45(1) of the Constitution), which shall seek the appropriate legal characterization *ex officio*. It is to say that the correspondence between the substantive and procedural law aspects becomes essential practically only at the final stage of proceedings, i.e. just when the court adjudicates upon the case. It is worth mentioning that the current Polish Constitution of 1997 supported by the jurisprudence of the Constitutional Court has led to the extension of the jurisdiction of the common courts also to some 'residual' cases which do not fall within the sphere of jurisdiction of any particular court or organ. From a purely doctrinal point of view, however, such a category does not come under the notion of 'civil cases' because the jurisdiction of the (civil) common courts results here from the individual's right to have his case heard before the court.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

Polish Code of Civil Procedure does not define legal standing (*legitymacja*) as a necessary prerequisite to institute civil proceedings. Yet this factor is one of the conditions for granting the legal protection to the claimant. The source of legal standing may be the fact that he or she has a right or has no duty under the applicable substantive law. Lack of legal standing leads to the dismissal of an action, which is perceived as the decision as to the merits of the dispute. The factor of the infringement of one's right of duty by the judgment of the court of the first instance plays also a certain role in the appeal procedure (see the next point).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

The general idea underlying the *locus standi* in Polish law of Civil Procedure is that for the lawsuit to be effective, the party has to be engaged in a relationship out of which the lawsuit as such has resulted. The court may grant the legal protection solely to a person who has a right or an obligation against the other party. In spite of the above-mentioned detachment of the case from its substantive law qualification, there must be obviously the correspondence between the standing in the process and the party's position within the framework of the legal relationship. The court of the first instance takes the latter factor into consideration in two ways.

Firstly, while adjudicating upon the case, it has to assess whether or not the claim brought before it corresponds with a right and an obligation resulting from any particular rule of substantive law; if the effect of this inquiry is in the negative, the court shall dismiss the claim (see *supra*); such a decision is subject to appeal. Secondly, if there are several persons entitled or obliged together with one another (as for instance in the case of the joint ownership), such individuals shall appear on the same side of the proceedings, i.e. either as co-applicants or as co-defendants. The issue of standing in the proceedings before the higher court reflects generally the above-mentioned assumptions. From the purely procedural point of view, the appeal may be lodged only by, and only against, the party who took part in the procedure. Within the limits of the appeal, however, the higher court may adjudicate also on the case in favour of the co-participants to the proceedings who have not challenged the attacked judgment, where the subject matter of the appeal is a right or an obligation which is common to them (Article 378(2) CCP).

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

The question who has *locus standi* varies indeed with the type of a civil claim brought before the court. If the action has only a **declaratory** character, so if it aims at the establishing of the existence (or non-existence) of a right or a legal relationship, everyone whose legal interest is touched (e.g. a person who derives his or her right therefrom) has the standing. As regards the action for **performance** (*dare, facere, non facere, pati*), the legal standing is attributed only to those who participate in a relationship concerned. The legal standing in proceedings which aim at the **modifying of a legal relationship or a right**, only the persons stipulated by the provision of law governing the particular remedy may lodge an action (e.g. these are only the spouses who may sue or be sued in the case upon the annulment of marriage; it is only the shareholder of the corporation who may sue the company for the annulment of the General Meeting's resolution, etc.). The judgments and decisions issued at the first instance may be challenged by the parties, without any additional qualification. Generally speaking, no permission for lodging the appeal is required; however, the extraordinary appeal (*skarga kasacyjna*) to the Supreme Court – irrespective of limitations *ratione materiae* or *ratione valoris* in certain types of cases – shall be held admissible only if the Supreme Court itself so decides, taking into consideration the grounds enumerated in Article 398-9(1) CCP (e.g. whether there is a preliminary issue or there are points of law deserving the general interpretation, the appeal is manifestly justified, etc.).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

The provisions of substantive law may occasionally break the above-mentioned scheme and impose some limitations as to whom to sue or who shall be sued. Such a situation rather occurs in cases other than that aiming at the performance of one's obligation. For instance, the action for the negation of paternity shall be brought against both the child and its mother, and where the latter is dead –

against the child (Article 66 of the Family and Guardianship Code); the child may bring an action for negation of paternity of his or her mother's husband against both the mother and her husband, and if the mother is dead – against her husband only; but should the latter be dead, then the action shall be brought against the *curator ad litem* appointed by the family court (Article 70(2) Fam.&Guard.C.).

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

Yes, such requirements may occasionally change with depending on the field of substantive law. For instance, as the labour law is concerned, the employer may be any organisational entity, even if it has no moral personality (Article 3 *in principio* of the Labour Code) and this rule of law implies of course the legal standing of such an entity by way of an exception, where it could not sue or be sued in a common civil-law case. The same remark is to be made e.g. as to the consumer-law or market-regulatory cases, where some special organs or bodies (the District Ombudsman of Consumers and, respectively, the President of the Office for the Protection of the Competition and Consumers) have the standing. Generally speaking, such cases are rather rare and may occur only in particular branches of law.

It is also worth noting that any civil proceedings may be instituted by the public prosecutor (*prokurator*), if he finds it necessary for the protection of the legal order, citizens' rights or public interest.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

Generally speaking, the way in which the civil proceedings may be instituted does not depend on the legal status of the party. The only thing that is required from the majority of moral persons is producing of the evidence of their existence, i.e. of the transcript of records from the National Court Register. Such an obligation does not apply to the State, which has an attribute of the moral personality *ex lege* (Article 33 of the Civil Code) and then it may sue or be sued like any other legal entity. To be sure, the State has no single organ which could represent it; due to this fact, it is the organisational unit (*statio fisci*) with whose activity a given case is connected which shall act on the State's behalf (Article 67(2) CCP). Yet in some more serious cases the State has to be represented by the special body called in Polish: "*Prokuratoria Generalna Skarbu Państwa*" (a free translation: "State Treasury Solicitors' Office").

An important – and quite exceptional – precondition for the instituting of the civil case against the State has been foreseen as to the case concerning damages for acts or omissions in the course of the exercise of the official authority (*acta iure imperii*). Article 417-1 of the Civil Code requires the applicant to obtain first the final and binding judgment or decision establishing the violation of law by the State organ concerned. Without such a declaratory act, the applicant shall be deprived of standing and then the action for damages shall be dismissed.



- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Polish law does not foresee such actions and then it is not possible for a third party to force two persons or other legal entities to settle a dispute between them. The third party who owes the performance of an obligation to an undetermined person may eventually apply to the District Court of the place where the obligation was to be performed for establishing an escrow deposit (Article 692 of the Code of Civil Procedure); such a step shall absolve the applicant from his obligation (Article 470 in conjunction with Article 467 of the Civil Code).

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

This author believes that the above-mentioned limitations have been listed in an exhaustive manner. Generally speaking, standing of a party is not determined by the criterion of the value of the subject matter of the dispute.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Admittedly, cases where the standing would be a consequence of the law concerning human rights are very rare in Poland. However, it may happen occasionally. One good example thereof could be the judgment of the Supreme Court of 28.11.2008, Docket No. V CSK 271/08 (OSN-ZD = [*Supr. Court Rep. – Civil Chamber/Additional Series*] 2009 issue C, pos. 78): Polish limited liability company Teltronic-CATV sued the President of the Court of Appeal for damages as the consequence of the unjustified dismissing of the applicant's claim against the third party on the ground that the applicant's petition against this party had not been paid and the motion for the exemption from court costs had been dismissed practically without any scrutiny. With the judgment of 10.01.2006 (application No. 48140/99) rendered in the case *Teltronic v. Poland*, the European Court of Human Rights held that there had been violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the respondent State was to pay the applicant certain amounts of money as the reimbursement of costs and expenses and the non-pecuniary damage. Under such circumstances, the Supreme Court found that the applicant company may invoke the judgment of the ECtHR as the binding declaration of illegality of the act of the State organ within the framework of the exercise of the official authority, which consequently gave the standing to the applicant company.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

To be sure, Polish law knows the so-called *interwencja gówna* ('general intervention'), which is a kind of an action of the third party against both parties in

the pending lawsuit if the former claims that the dispute concerns a thing or a right belonging to him. The general intervention, which has a purely preventive character, is brought before the court seized with the primary action (Article 75 CCP), which has to stay the proceedings. That means that the third party does not become the party to the same lawsuit as pending between the other parties. The third party may take part in the lawsuit as the so-called 'side intervener' (*interwenient uboczny*), provided that she so applies and the court gives its permission (Article 76 ff CCP). The intervener may join one of the parties until the closing of the hearing before the higher court. Such an institution does not give an absolutely independent legal position to the intervener, who has to prove his interest in the case being ruled in favour of one of the parties to the dispute. It might be the case where e.g. the guarantor intervenes on the side of the defendant in the case upon the debt secured with the guarantee. In spite of this, the side intervener exercises a wide margin of discretion in the proceedings, as he or she may perform on its own any acts at the respective stage of the civil proceedings; the only limitation of his competence is that these acts must not contradict the acts and statements of the party whom the side intervener has joined (Article 79 CCP). Joining of the side intervener shall be filed in writing. Obviously the two institutions, i.e. the general and the side intervention, are separated from each other and should not be confused.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Every party may lodge an opposition against the side intervention but not later than at the beginning of the next court hearing. The court shall dismiss the opposition if the side intervener makes it plausible that he or she has the interest in joining the proceedings (Article 78(2) CCP). The opposition is a kind of a non-formalised legal remedy; one assumes that it may be brought even orally in the presence of the court. Should the court's decision as to the party's opposition be positive, the side intervening party may lodge his or her appeal to the higher court.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Polish law recognises group actions in civil law cases. *Group actions* (*roszczenia w postępowaniu grupowym*) are defined in Article 1(1) of the Act of 17 Dec. 2009 on Claims in the Group Action Proceedings (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*; Dz. U. = OJ 2010 No. 7, pos. 44) as the actions in cases upon the claims of the same kind brought by at least 10 persons based on the same facts or on the facts of the same kind. A person intending to join the group has to opt in; her positive decision in this respect cannot be presumed. From a procedural point of view, the whole group is treated as if it were be a single applicant; it shall have one joint representative who is one of its members or the District Ombudsman of the Consumers (Article 4 of the Law). The legal representation by the advocate shall be obligatory, unless the group representative himself fulfils such professional qualifications (Article 4(4) of the Law). As the consequence, it is only the representative who has the standing. Group actions belong to the jurisdiction of the Regional Courts (see *supra*, the 1<sup>st</sup>

answer) as the courts of the first instance.

The claims for the protection of the rights of personality – incl. the damages for the immaterial loss incurred by their violation – shall be expressly excluded from the scope of regulation of the Law on Group Actions.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

As it was said above, it is either the member of the group or the District Ombudsman of Consumers who can act as the representatives of the group in the group action. The representative of the group conducts the proceedings in his or her own name and on behalf of all members of the group. It should be noted that according to the recent resolution of the Supr. Court of 13 July 2011, Docket No. III CZP 28/11, the mandatory representation of the group by the advocate (*adwokat*) or the legal counsel (*radca prawny*) applies also to the case in which the Consumers' Ombudsman represents the group.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Group actions are regulated in a general way. This instrument may be applied notwithstanding the type of the claim brought before the court – however, with some (rather essential) exceptions (see *supra*).

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

More than one person can act in proceedings as claimants or defendants, if the subject of the case is rights or obligations common for them or based on the same legal and factual basis (substantive complicity); and also if the claims or obligations are of the same type and based on identical factual and legal basis (formal complicity).

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

As to the general interest defence, the answer should be rather in the negative. Polish law does not recognise an overarching institution of the 'action brought in the common interest' (*actio popularis*). Obviously, there are exceptions to the rule (but still not numerous). One of them is undoubtedly the action for the declaration of the contract form to be prohibited (Article 479-36 ff CCP), which is rooted in the provisions on the abusive clauses in consumer contracts (Article 385-1 ff CC), implementing the EU Directive No. 93/13/EEC. The action for the declaration of the contract form being prohibited may be brought by anyone who according to the offer of the defendant could enter with him into a contract, the part of which is the contested clause. Such an action may also be brought by the NGO whose statutory exercise is the consumers' protection, the District Ombudsman of Consumers and the President of the Office for the Protection of Competition and Consumers (Article 479-38 (1) CCP); the same concerns the foreign organisation registered in the list of the organisations entitled in the EU to the instituting of the proceedings for the declaration of inadmissibility of the contract form published in the Official Journal of the European Union, if the purpose of the functioning of the organisation justifies bringing such a claim as to the contract forms applied in Poland due to the possible

infringement of the consumers' rights in the country where the organisation has its seat (Article 479-38 (2) CCP).

The general (abstract) judicial control of the contract forms lies within the sphere of jurisdiction of the Court of Competition and Consumers' Protection in Warsaw (see *supra*). The final and binding court injunction, issued as the result of such an application, has *erga omnes* legal effects from the very moment of registering of an inadmissible contract clause in the register kept by the President of the Office for the Protection of Competition and Consumers (Article 479-43 in conjunction with Article 479-45 (2) CCP).

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

As the consequence of what has been noted above, there is no general regulation of the court litigation concerning the issues of the general interest protection. Such issues are regulated together with particular institutions designed for these aims.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In this author's opinion Polish courts treat the question of the *locus standi* in quite a strict manner. Lack of formal legal standing (active or passive) results in the dismissal of an action. As it has been remarked in the judgment of the Supreme Court of 28 Apr. 2004, Docket No. V CK 472/03: "... *determination of the personal substrate of the proceedings is an act of the will of the person who instituted the case. Should the action then be brought against an inappropriate party, such a situation has to be characterized as a procedural fault which is due to the act of will of the claimant. Such a defect – as it concerns the procedural legal act – may be cured only in a manner provided for by the provisions of the procedural law. From this point of view, one should distinguish the incorrect designation of the party from the improper selection of the parties to the proceedings. In the first situation, the defect may be cured through the rectifying of the designation of the party... If, however, the claimant designated the party who, according to his intent, was to be his opponent but – in terms of the substantive law – this selection was made improperly, the elimination of this defect of the manifestation of his will is only available either through the revocation of the defective procedural act in the civil proceedings (Article 203 CCP) or by the way of the personal transformation of the civil action (Article 194 CCP).*" In the latter case, in the absence of any appropriate act of the claimant, the claim shall be dismissed due to the lack of the defendant's *locus standi*.

On the other hand, the Supreme Court occasionally admits a less rigorous interpretation of the procedural law provisions, so as to cure the deficiency of precision of the rules of substantive law governing the claim submitted to the court's adjudication. As an example thereof, one can consider the judgment of 4 Aug. 2006, Docket No. III CSK 138/05 (OSNC = Supr.C.Rep. – Civil Chamber 2007 issue 4, pos. 63), the subject matter of which was the claim of the hospital against two State agencies: the National Health Fund (the body holding the system of the mandatory health insurance and paying for the medical service) and the lower chamber of the Parliament called '*Sejm*' (which was due to the alleged defective legislation unexpectedly imposing the financial burdens on the hospitals in the field

of their employees' remuneration scheme). The appeal from the judgment of the Court of Appeal had been lodged by the Chancellery of the *Sejm*, which employs its auxiliary staff. The latter court heard the appeal and adjudicated as to the merits, dismissing the claim. In his extraordinary appeal to the Supreme Court, the claimant raised the objection of the violation of the procedural law because of the lack of the Chancellery's standing in the proceedings. The Supreme Court affirmed the following: *"The State's Treasury is a particular moral person; as it possesses no 'organs' within the meaning of the civil law, as provided in Article 38 of the Civil Code, it has to act through its organizational units. The latter are deprived of the legal personality, whereas their competence and the scope of functioning seem to be often difficult to be defined. In fact, the assessment of the standing of the statio fisci in order to satisfy the needs of the civil-law commerce must not disregard its overall legal nature, mostly designated by the rules of public law... Polish Sejm is one of the official authorities exercising the legislative power (Articles 10 (2) and 95 (1) of the Constitution). It is difficult to say, however, that it is an 'State organizational unit' within the meaning of Article 67 (2) CCP, which would have required it to be equipped with some part of the State property (Article 44-1 (1) of the Civil Code), together with the granting of certain ownership rights... The Basic Law sets specific political functions of the Parliament and it allows this institution neither to manage nor to perform juridical acts concerning the State property... [T]he Court of Appeal rightly heard the appeal filed by the Chancellery of the Sejm, which manages the State property, dedicated and granted to the needs of the legislative power... [S]hould the civil liability of the defendant been settled in the final and binding way, this would be the only entity able to perform the damages awarded."*

7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

There are no significant differences in the approach of the courts based on the type of demand claim because procedural legal standing is the consequence of the legal status set by the rules of the substantive law.

7.2.2. the field of substantive law at hand?

There are no significant differences in the courts approach to the issue of legal standing depending on the branch (area) of substantive law.

7.2.3. the nature of the claimant?

With certain exceptions (see above), there are no significant differences in the courts' approach based on the nature of the claimant.

7.2.4. the nature of the claim?

Due to the specific nature of the claim, courts apply a wider interpretation of law, which sometimes leads to the attribution of the standing to the undetermined group of the addressees. For example, in its judgment of 4 Oct. 1968, Docket No. I CR 325/68, the Supreme Court stated that pursuant to the article 13 (2) of the Family and Guardianship Code, any person having a legal interest can demand the annulment of the marriage due to the bigamy. The legal interest should be interpreted not only as the right in the tangible objects, but above all as a personal interest, particularly in the matters of family law, which have profound social and moral implications. Thus the nature of the claim may play some role in the way of understanding of the applicant's interest and consequently in his or her standing in

the civil proceedings.

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

Generally speaking, it is not the case. The condition *sine qua non* for a court is the parties' capacity to sue and to be sued and their status within the framework of the underlying relationship. If this test is in positive, the court is not entitled to state that there is no standing due to other considerations.

- 7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Due to the constitutional implications (see above), such an attitude would have been found inadmissible. To the best knowledge of the author, there is no such practice.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

There are some changes within the sphere of the standing provoked by the implementation of the EU law into the national legal system in Poland. A good example is the law of consumer contracts where various institutions have been created under the influence of the secondary EU law. Nevertheless, such changes take place only in particular fields of the legislation, whereas the core of Polish legal rules concerning the standing in civil proceedings remain unaffected.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No, they did not.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

Yes, they have on the several occasions. It is, however, treated rather in terms of the reinforcing of the argumentation used in reasoning of the judgment because, as it has been already mentioned, both Polish law of civil procedure and the Constitution ensure the full effect of EU law and guarantee the opportunity to have one's case heard before the competent, impartial and independent court (Article 45 (1) of the Constitution).

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

The doctrine of the 'effective remedy' has appeared several times in the judgments of the Supreme Court in the context of Article 13 of the ECHR, all the more that it is also enshrined in Polish domestic law, namely in Articles 45, 77 (2) and 78 of the Constitution. An example thereof is the decision of the Supreme Court of 27 June 2008, Docket No. III CZP 25/08 (OSNC = Supr.C.Rep.Civ.Ch. 2009 issue 9, pos. 127) concerning the action against the State for damages for the non-pecuniary

detriment. The claimant was a person kept in detention which lasted for an excessively long time during the criminal proceedings against him. The lower courts questioned the right of the claimant to demand such damages, pointing at the fact that Poland had created a special remedy: the application for the declaration of the unjustified delay of the court proceedings (*skarga na przewleklosc postepowania*) and the claimant did not file such an application, which deprived him of the right to sue the State. Admittedly the Supreme Court did not mention the right to the effective remedy but it found the jurisprudence of the ECtHR under Articles 6, 13 and 41 of the Convention useful to the needs of the interpretation of the domestic law. Thus the Court suggested that the right to lay claim to damages from the State, understood in the way compatible with the Convention not to be limited by the arguments based on the literal interpretation of the domestic civil law.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

As to the scope of application of the EU law, to date there have been no reported judgments of the Supreme Court expressly modifying or interpreting the right of access to the court. However, the courts have occasionally stated that the right guaranteed by Article 6 of the ECHR opens the applicants the way to justice by way of exception. It has been found e.g. in some cases concerning the right to have the proceedings re-opened after having obtained the declaration by the ECtHR judgment of the violation of one's right enshrined in the Convention (see e.g. the decision of the Supreme Court of 17 Apr., 2007, Docket No. I PZ 5/07, OSNP=Supr.C.Rep.-Labour & Social Security Chamber 2008 issue 13-14, pos. 196, partly overruled by the Supr.C. resolution of 30 Nov., 2010, III CZP 16/10, OSNC 2011 issue 4, pos. 38).

As the Constitutional Tribunal has stated (judgment of 16 Nov., 2011, Docket No. SK 45/09): "the individuals (natural persons and legal persons) may invoke the provisions of EU Regulations and derive their rights therefrom in any proceedings before national courts," unless it contradicts the Constitution of the Republic of Poland. It implies that (at least potentially) the principle of supremacy of EU law may be invoked in order to be granted the standing in the proceedings, all the more that, according to the Constitutional Tribunal, "any contradictions between national and EU law shall be eliminated in the way of the interpretation respecting the respective autonomy of the EU law and the national law".

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

See the answer to the previous question.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

There are no other relevant observations.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW (POLAND)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

In Poland the court system in administrative law consists of special courts competent in administrative law disputes.

There are 16 voievodship (regional) administrative courts (wojewódzki sąd administracyjny, WSA) as first instance courts and the Main Administrative Court (Naczelny Sąd Administracyjny, NSA) in Warsaw as a second instance. The latter hears appeals from voievodship administrative courts (serves as a cassation court). Moreover it can adopt resolutions to resolve legal doubts arising from a given case or to clarify provisions whose application by voievodship administrative courts throughout Poland is inconsistent.

The proceedings before the administrative courts are regulated by the Proceedings before Administrative Courts Law Act of 30 August 2002 (Dz. U. No 153, item 1270).

Administrative courts are competent to hear cases in public law domain. According to Article 184 of the Constitution, their role is to provide judicial review over activities of public administration.

As a rule, proceedings before an administrative court (filing a complaint to an administrative court) must be preceded by administrative proceedings. This means that any act or omission of public authority must be challenged within administrative proceeding first (most frequently - before an authority of second instance), and only after these proceeding are finished, the case can be brought before an administrative court.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

As mentioned above under the question 1.1 - yes, Poland has special administrative courts, competent in administrative law disputes.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

No. Polish administrative courts are competent in all areas of administrative law.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

According to the Proceedings before Administrative Courts Law Act, one may bring before the administrative court a claim for:

- administrative decisions (they are issued in individual administrative cases),
- other acts or measures in public administration concerning the rights or obligations foreseen by law,
- written interpretations of tax law issued in individual administrative cases,



- acts of local law issued by self-governmental and governmental local, district or regional authorities,
- acts other than local law acts in public administration issued by self-governmental authorities,
- supervisory measures concerning activities of self-governmental authorities,
- inactivity of administrative authorities or lengthiness of proceedings in individual administrative cases.

Civil courts are competent in administrative cases only when specific regulations so provide. There are few cases when Polish law foresees that administrative decisions (or other measures taken by public administration) are to be challenged before administrative courts. Those cases concern mainly the situations where administrative authority grants compensation e.g. for land taking (in case of roads or other investments serving public interest construction) and decides on the amount of that compensation. In such cases the person granted with the compensation, when contesting its amount, may challenge it before the civil court.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Yes, as mentioned above, in certain cases the specific regulations foresee that - instead of using the regular administrative court path - some administrative decisions are to be challenged before civil courts.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Yes, standing is a distinct procedural requirement in administrative law claims. According to Article 50 in conjunction with Art. 25 § 4 of the Proceedings before Administrative Courts Law Act, the claim to the administrative court may be filed by:

- any person who has a legal interest in the case,
- public prosecutor,
- ombudsman,
- social organisation in cases concerning legal interest of other persons, provided that that organisation has taken part in the administrative proceedings (and provided that the case concerns the statutory objective of that organisation).

The social organisation (NGO) may act 'in cases concerning legal interest of other persons', but not necessarily in order to protect these interest. For example in environmental cases, an NGO acts to protect the environment not the legal interest of person who affects the environment (e.g. an industrial operator) - nevertheless the case concerns the interest of that operator.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

In Poland the general idea of the requirements for standing in administrative actions (i.e. in administrative procedure and then in the procedure at the administrative court) is based on the concept of "interests". Standing is granted to persons (whether natural or legal persons) having "legal interest" (which includes also administrative duties) and to some representatives of "public interest".

A person has legal interest in the case when that interest is protected by any provision of (administrative, civil or other) law. For example, when an administrative decision may affect one's ownership (e.g. in case of construction of a new object the ownership of its neighbours may be affected). A person who filed an application for an administrative decision challenged then before the administrative court or a person to whom a decision was addressed has always 'legal interest' in the case and thus has standing. Such persons are considered to be "parties" to the administrative procedure.

The legal interest has to be proved also in case when the claim concerns not an individual administrative decision but a general act of administration such as a land use plan (see answer to question 1.4).

The Administrative Procedure Code recognises as representatives of "public interest" having standing in administrative actions: public prosecutors, ombudsman and social organisations (see answer to question 3.3). Besides, some substantive laws provide some administrative agencies (for example environmental inspectors or regional water authorities) with standing in respective administrative actions. They are considered as participants "with the rights of a party".

Finally, administrative authority whose action was challenged (Art. 33 of the Proceedings before Administrative Courts Law Act) also has standing.

The administrative justice system in Poland has its distinctive features, which can be traced back to its roots in 1980 in the so called "socialist" country. Judicial review of administrative action was based on idea of "objective legality". This idea was also at the roots of granting standing to representatives of public interest. Furthermore, the review of administrative courts is basically limited only to legal issues.

However, the way the system now operates does not seem to allow to qualify it as purely *recours objectif* system, since increasingly in practice it is focused on protection of subjective rights.

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

Persons who participated in the administrative proceedings (which consists of two instances), i.e. were parties to that proceedings are considered as having legal interest in the administrative court proceedings and therefore have a right to challenge the decision to the court.

However, a person who has not participated in the administrative proceedings but whose legal interest is affected by the proceedings may also file a complaint (Art. 50.1 of the Proceedings before Administrative Courts Law Act).

The precondition of filing a complaint to the administrative court is previous lodging an appeal against the challenged administrative act in the administrative authority of the second instance.

The above requirement does not concern the environmental NGOs acting in the proceedings protecting the public interest of environmental protection - those NGOs are entitled to file a court complaint in environmental case even if did not take part in the administrative proceeding.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

There are two instances of administrative courts in Poland.  
The requirements for standing before the court of first instance have been described above in the answers to questions 2.2 and 2.3.  
According to Art. 173(2) of the Proceedings before Administrative Courts Law Act, the appeal to the second instance administrative court (Main Administrative Court) may be filed by:

- parties to the proceedings before the first instance court,
- public prosecutor,
- ombudsman.

Parties to the proceedings before the first instance court are: person who filed the claim (see answer to question 2.1 for description who is entitled to file such a claim) and the administrative authority whose action was challenged (Art. 33 of the Proceedings before Administrative Courts Law Act).  
The appeal has to be prepared by a qualified lawyer.

The permission of the court is not required in order to bring an appeal.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

No.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

The requirements for standing before administrative courts as such do not differ for different fields of law.  
However, in administrative proceedings (i.e. at the stage before administrative authorities) in certain environmental cases the environmental non-governmental organisations are granted wider rights to participate than other non-governmental organisations in other types of cases.  
The wider rights in administrative proceedings result automatically in wider standing in proceedings before the administrative court (as the social organisations which have taken part in the administrative proceedings are entitled to file a claim to the administrative court - see the answer to question 2.1).  
The difference between the organisation's rights in administrative proceedings is explained below:

- The general rule for participation of NGOs in administrative proceedings is provided by Article 31 of the Administrative Procedure Code. It grants standing to social organisations in cases where these organisations represent a common interest. The organisation may participate in the proceedings with the rights of a party which means that it enjoys the same rights as a party to the proceedings, including a right to appeal. In order to be admitted to participate, an organisation must file a relevant motion. The public authority then assesses the motion and

decides whether it considers it justified. The assessment is not limited to verification of formal requirements, but concerns also merit justification (need) of participation of the organisation in a given case (in other words: the authority decides whether it considers it useful to allow the organisation to participate).

- However, in the environmental cases in which public participation is required (EIA decisions, IPPC permits, decisions regarding control of GMO), the environmental organisations are granted special rights. According to Article 44 of the Act of 3 October 2008 on access to environmental information, public participation in environmental protection and on environmental impact assessments, environmental organisations may take part in the proceedings with a right of a party, but - contrary to other social organisations - they do not need to prove that "public interest requires their participation" (as required by Article 31 of Administrative Procedure Code in case of other social organisations). In other words: in this case the authority only examines whether an environmental organisation fulfils formal requirements (see below) but is not entitled to decide whether the participation of such organisation is "needed" and "justified" from the point of view of public interest.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

As mentioned above, there are two types of claimants:

- those who act to protect their own legal interest (and here there are no differences between natural and legal persons),
- those who act in public interest, i.e. NGOs, public prosecutor, ombudsman. Those entities do not have their own legal interest. The NGOs have to prove that they had participated in the administrative proceedings in the case (the sole exception in this regard are environmental NGOs - see answer to the question 2.3). As far as NGOs are concerned, they may act "in cases concerning legal interest of other persons, provided that that organisation has taken part in the administrative proceedings" (see below part 4 "third party intervention").

Certain provisions of law provide for a possibility for public authorities to initiate administrative action against another public authority. For example the voivode (head of governmental administration on the region), supervises - to a certain extent - the activity of self-governmental authorities and in certain cases has a right to annul acts of those authorities or to file a complaint against such acts to the administrative court.

In addition, as mentioned above, the public prosecutor and the Ombudsman also has right to initiate administrative proceedings or proceedings before administrative court.

Apart from the instances clearly indicated by law, public authorities are not entitled to initiate administrative action against another public authority claiming acts or omissions of that authority.

In addition, the administrative courts are also competent to resolve the disputes between the authorities as to their competence (i.e. when there are two or more authorities which claim being competent or there are two or more authorities

potentially competent but neither from them recognizes its competence in the case). In such a case each of the authorities being in the dispute may present the dispute before the court. The authority has to prove then that it is involved in the dispute.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

There is a difference in the NGOs rights depending on whether the case concerns individual administrative decisions or general measures (acts), such as e.g. plans adopted by the administration. In the latter case the NGOs cannot participate in or initiate the proceedings before administrative court. As mentioned above, the NGOs can participate in cases provided that earlier it had participated in the administrative proceedings in that case. And there is no 'administrative proceeding' as regulated by the Administrative Procedure Code for adopting general acts.

There are no other variations in the standing rules.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

No

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Originally at the administrative procedure the primary party is usually the project proponent (developer or person applying for a permit) and as "third parties" may be considered for example neighbours whose legal interest is affected (thus they have also status of parties) as well as participants with the right of a party (like NGOs). Anyone of those third parties may appeal the decision of first instance and consequently challenge the final decision at administrative court and by virtue of this will become a primary party to the court proceedings.

According to Article 33 of the Proceedings before Administrative Courts Law Act:

a) a person who took part in the administrative proceedings (in both instances) in a given case but did not file then the claim to the administrative court, participates in the court proceedings with the rights of a party,

b) a person who did not take part in the administrative proceedings but the outcome of the court proceedings affects his/her legal interest also may participate in the court proceedings (for example a spouse of a person who challenged the tax decision before the administrative authority of the second instance when that decision was originally addressed to both spouses),

c) an NGO in cases concerning legal interest of other persons, provided that the case concerns the statutory objective of the NGO (in this case there is no requirement that the NGO had earlier participated in the administrative proceedings); according to case law, the court has also to verify whether the 'public interest' speaks for the participation of the NGO (see resolution of the extended composition (7 judges) of the Main Administrative Court of 28 September 2009; II GZ 55/09).

As mentioned above (answer to question 2.1), NGOs may also file a claim (initiate court proceedings) 'in cases concerning legal interest of other persons' (provided that the organization had taken part in administrative proceedings and provided that the case concerns the statutory objective of the organisation) - but in such a case the NGO becomes the 'primary' party.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No, the "original" (primary) parties cannot prevent the participation of 'third parties'. The court verifies whether or not the conditions (as described in the answer for the previous question) are met. The primary parties may of course argue (filing relevant motions) that the conditions are not fulfilled, but eventually it is up to the court to decide.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Not in administrative law (but multi-party litigation was recently introduced into Polish civil law).

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

N/A

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

N/A

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

No

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

No

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

N/A

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

The courts follow the principle of 'legal interest' and require that proving of the existence of this type of interest is necessary in order to have standing in the

administrative court proceedings.  
 However, the courts seem to be rather generous in interpreting what constitutes the legal interest.  
 In the verdict of 12 July 2011 the Main Administrative Court stated that the legal norm constituting the legal interest may belong to each field of law (II OSK 1227/11).  
 In the verdict of 17 July 2009 the Voivodship Administrative Court in Warsaw stated that the legal norm constituting the legal interest may belong not only to the substantive law but also to procedural law (IV SA/Wa 718/09).  
 In cases concerning construction of new objects which may affect the neighbours rights the courts stated that not only the owners of adjoining properties have legal interest in the case, but also their agents, as well as owners of particular flats in a building belonging to a housing cooperative (verdict of the administrative court in Gdansk of 1 July 1993; SA/Gd 262/93).  
 In such cases the courts also acknowledged that not only the immediate neighbours have a legal interest in the case, but also the owners (agents etc.) of the further properties in case when the planned investment may affect them (see verdicts of the: Voivodship Administrative Court in Opole of 25 February 2008, II SA/Op 578/07; Voivodship Administrative Court in Warsaw of 11 December 2007, IV SA/Wa 890/07; Main Administrative Court of 8 September 1989, II SA 437/89).

7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

Not manifestly (no court verdicts showing such an approach were identified while carrying out this study).

7.2.2. the field of substantive law at hand?

No

7.2.3. the nature of the claimant?

No

7.2.4. the nature of the claim?

No

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

Not manifestly (no court verdicts showing such an approach were identified while carrying out this study).

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Not manifestly (no court verdicts showing such an approach were identified while carrying out this study).

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

Yes, the Aarhus Convention and Directives transposing the Aarhus Convention

required changes in standing in certain environmental cases. The changes concerned mainly the rights of environmental NGOs - there was necessary to grant them with more far-reaching rights than those which other social organisations did enjoy (see answer to question 3.3). Also, it was necessary to ensure that the circle of 'parties to the proceedings' (i.e. persons enjoying standing in administrative proceedings and consequently entitled to go to the court) is not restricted to e.g. the proponent only (as it was initially proposed e.g. in the draft EIA Act) and encompasses all the persons affected by the activity authorised by an administrative decision. Currently the Directives transposing the Aarhus Convention are already transposed into Polish law. However, it seems that regarding access to justice, Polish law is still not fully compliant with the EIA Directive (as interpreted by the European Commission). The Commission states that access to justice shall be ensured with regard to all administrative decisions authorising the project subject to EIA (i.e. all decisions making up the "development consent" as referred to Art. 1.2 of the EIA Directive). Under Polish law there is a separate EIA decision and then a separate construction permit (issued under the Building Law Act). The problem is that while access to justice is ensured in compliance with the Directive in case of the EIA decision, it is very limited at the construction permit stage.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No - no court verdicts referring to this rule with regard to standing were found while carrying out this study.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

The European Convention of Human Rights is sometimes mentioned in the administrative courts verdicts, including its Art. 6 and 13 (mainly when the Convention was invoked by the parties), but no verdicts were identified in which the Convention's provisions would affect the issue of standing (art. 6 of the Convention was referred to in order to grant free legal aid to the claimant who could not bear the costs ; in one case it was also referred to when the court restored the deadline for fulfilling certain formalities by the claimant, acknowledging that to strict interpretation of the formal requirements regarding deadlines would deprive the claimant the access to court - in both cases however the claimants were already granted standing).

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?



See above

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

No

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(POLAND)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

Pursuant to Article 175 of the Polish Constitution the Supreme Court, the common courts, administrative courts and military courts shall implement the administration of justice in the Republic of Poland.

Criminal cases are examined mainly by general courts. Military courts have jurisdiction limited to a short list of offences committed by: 1) soldiers in active service; 2) civilian employees of the armed forces and 3) soldiers of the armed forces of foreign states present in the territory of the Republic of Poland and civilian members of their personnel.

There are three levels of general courts: the District Court (Sąd Rejonowy), the Regional Court (Sąd Okręgowy) and the Court of Appeal (Sąd Apelacyjny). Criminal cases are heard in the first instance by a district court or by a regional court.

Regional courts examine more serious offences (i.e. felonies (zbrodnie) and misdemeanours (występki) listed in the Code of Criminal Procedure). Regional courts have also jurisdiction to hear appeals against decisions and judgments delivered in the first instance by district courts as well as other matters referred to them by law. Courts of Appeal are competent to hear appeals from decisions and judgments issued in the first instance by regional courts. The Supreme Court shall hear cassation appeals on points of law. The parties to the proceedings may lodge cassation appeals only against final judgments. The criminal court shall, at its own discretion, determine the factual and legal circumstances of the case and shall not be bound by decisions of other courts except final and constitutive judgments. All common courts and the Supreme Court have a right to ask the Constitutional Court for assessment of the conformity of a legal act with the Polish Constitution.

The basic act regulating criminal proceedings is the Code of Criminal Procedure of 1997 (Official Journal of 1997, No. 89, item 555 with amendments, thereafter referred to as "the CCP"). Petty offences and administrative offences (wykroczenia) are examined in accordance with the provisions of the Code of Procedure on Petty and Administrative Offences of 2001 (amended text published in Official Journal of 2008, No. 43, item 848). Offences committed by minors (between 13 and 17 years of age) are examined on the basis of the Law on Procedure against Minors of 1982 (amended text published in Official Journal of 2010, No. 33, item 178).

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

There are two main phases of criminal proceedings: preparatory (pre-trial) stage conducted in the form of inquiry (dochodzenie – in minor cases) or investigation (śledztwo – in more serious cases) and judicial proceedings instituted by bringing a bill of indictment (or another form of accusation bill) to the competent court. With reference to victims' standing one shall distinguish two stages of first instance judicial proceedings:

1) the preparatory stage before the trial (at this stage certain group of criminal cases may be adjudicated without the public hearing, at the court session, mainly as a result of consensual proceedings) and  
2) the trial.

Pursuant to Article 299 § 1 of the CCP a victim has a status of a party to the preparatory proceedings (inquiry or investigation).

In the course of judicial proceedings a victim may become a party thereto, but is not granted such a status *ex lege*. In order to obtain a status of a party a victim may:

1) file a complaint against the accused in order to litigate his civil claims resulting directly from an offence – in such a case a victim obtains a status of a civil party (*powód cywilny*);

2) bring a declaration that he would like to support accusation of a public prosecutor - in such a case a victim obtains a status of auxiliary prosecutor acting alongside with a public prosecutor (*oskarżyciel posiłkowy uboczny*).

3) bring his own bill of indictment to the court instead of a public prosecutor if the latter refused to prosecute the case – such victim obtains a status of subsidiary prosecutor (*oskarżyciel subsydiarny*).

As a party to judicial proceedings a victim has the following procedural rights (the list is not exhaustive):

- the right to participate in sessions of the court and in the public hearing;
- the right to be notified about the time and place of a session of the court and of the public hearing;
- to file motions and other statements in writing or submit them orally for the record of the hearing;
- the right to be heard as a witness;
- the right to consult the case-file and, what is more, to copy them (Article 156 § 1 of the CCP);
- the right to file evidentiary motions (Article 167 of the CCP);
- the right to ask questions to persons examined at the trial (Article 370 § 1 of the CCP).
- the right to appoint a barrister or a legal counsel as an attorney (Article 87 § 1 of the CCP);
- the right to have an attorney appointed to him *ex officio*, if he can duly prove that he is unable to pay the costs of legal assistance without prejudice to his and his family's necessary support and maintenance (Article 88 § 1 of the CCP in conjunction with Article 78 § 1 of the CCP).
- the right to demand an interpreter, if he does not speak Polish. An interpreter shall be summoned whenever it is necessary to examine a person without a command of Polish (Article 5 § 1 of the Law of 27 July 2001 on general courts).
- the right to bring appeal against the first instance judgment as well as a cassation appeal against the final judgment of the appellate court.

If a victim does not acquire the status of a party, he may take part in the judicial proceedings as a witness but still exercises privileged position in relation to other witnesses.

Every disclosed victim may participate in the hearing. Due to unclear wording of Article 384 § 2 of the CCP, doubts occurred as to whether a victim who has not acquired a status of a party to the judicial proceedings, should be notified of the date of the hearing. The Supreme Court clarified this issue in 2007 stating that even a victim not having a status of a party to the court's proceedings shall be notified of the date and the place of the public hearing (see, decision of 26 January

2007, I KZP 33/06). Pursuant to Article 384 § 2 of the CCP, a victim may remain in the courtroom, even if he is to be examined in the capacity of a witness. In such a case the court shall examine him first. If the court finds it purposeful, it may obligate a victim to be present throughout the hearing or parts thereof.

At the hearing a victim may oppose to the initiative of the accused to issue conviction and sentence proposed by him without conducting evidentiary proceedings (Article 387 of the CCP).

A victim not being a party to the judicial proceedings may ask the court for imposing on the accused a penal measure of compensatory character. Pursuant to Article 46 of the Criminal Code ("the CC"), in the case of conviction, the court, upon a motion from the injured person or from another person so entitled, shall impose the obligation to redress the damage caused, in whole or in part. Instead of the obligation referred to above, the court may adjudicate supplementary payment (nawiazka) to the injured party.

In the preparatory stage of judicial proceedings (i.e. after bringing indictment to the court but before the trial) a victim has a status of quasi-party, i.e. he may exercise certain but not all rights of an ordinary party to the judicial proceedings. In particular, the victim may take part in a session of the court and may oppose to conditional discontinuance of the proceedings.

The above description of victims' status applies only to proceedings concerning offences prosecuted ex officio.

Other rules apply to offences prosecuted by private accusation (see 1.2.1. below)

As transpires from Article 2 of the CCP, the criminal proceedings aim, inter alia, at securing legally protected interests of a victim.

1.2.1. Is there a possibility of private prosecution?

Most of offences listed in the CC and in other laws are prosecuted ex officio by a public prosecutor. Only a few minor offences (like insult, defamation, causing bodily harm for a period not exceeding 7 days, violation of physical integrity of a person) may be prosecuted by private accusation.

With reference to the above-mentioned offences, a victim shall bring an indictment as a private prosecutor. As a rule the public prosecutor is not involved in such cases. Thus, an injured party acting as a private prosecutor must support the indictment before the court. There is however one general exception. Pursuant to Article 60 of the CCP, in case of offences prosecuted by private accusation, the state prosecutor shall institute proceedings, or intervene in proceedings previously instituted, if the public interest so requires. The notion of "public interest" is not defined in the CCP. However, it is generally accepted in the case-law, that a public prosecutor shall intervene when an offence violates not only personal interests of a victim but also public order. In the event of intervention of a public prosecutor, the proceedings shall be conducted ex officio and the injured person who has brought a private accusation shall be granted the rights of an auxiliary prosecutor. Thus, he has a status of a party to the proceedings.

Cases prosecuted by private accusation are dealt with through simplified court proceeding, regulated in Chapter 52 of the CCP (Arts. 485-499).

1.2.2. Can a victim request review of a decision not to prosecute?

Yes, in all cases prosecuted ex officio by a public prosecutor.

Pursuant to Article 10 § 1 of the CCP the organ responsible for prosecuting offences shall have the duty to institute and conduct the preparatory proceedings, and the public prosecutor shall have also the obligation to bring and support charges, with

respect to an offence prosecuted *ex officio*. Thus, except in a few cases precisely defined by law, there is no discretion but an obligation to prosecute offences described by law as prosecuted *ex officio*.

With reference to certain group of offences prosecuted *ex officio* a motion of a victim for prosecution is required. A consent of a victim given in written form is a necessary prerequisite for conducting criminal proceedings in such cases like, for instance: rape, sexual abuse, offences against property committed to the detriment of close relatives, causing bodily harm unintentionally to the detriment of close relatives. Once a victim files the motion for prosecution of an offence, the preparatory proceedings are conducted *ex officio*. However, a victim has a right to withdraw his motion. In the preparatory proceedings such withdrawal may take place only upon the consent of the public prosecutor, and in the court proceedings - with the consent of the court, before the commencement of the first-instance hearing. Withdrawal is not allowed by law with reference to a motion to prosecute a rape. The filing of the motion for the second time shall not be admitted.

If there is good reason to suspect that an offence has been committed, an order on instituting an investigation or inquiry shall be issued, either *ex officio* or upon receiving a notice of an offence, describing the act in question and setting forth its legal classification. Having received notice of an offence, the investigating organ shall be obligated to issue immediately an order on instituting or the refusal to institute an investigation or inquiry. Pursuant to Article 306 § 3 of the CCP, a person which submitted a notice of an offence (including a victim) and who has not been notified within 6 weeks about the institution or refusal to institute the investigation or inquiry shall have a right to bring an interlocutory appeal to the superior public prosecutor or one authorised to supervise the investigating organ to which the notice has been submitted. Thus, using this legal remedy a victim who reported an offence has a right to appeal against inactivity of an investigating organ.

Moreover, the disclosed victim shall be notified of the institution, refusal to institute or on discontinuance of investigation or inquiry (Art. 305 § 4 of the CCP). The victim (injured person) shall have a right to bring an interlocutory appeal to the court against a decision refusing to institute an investigation or inquiry and against a decision to discontinue investigation or inquiry (Article 306 § 1 of the CCP). A victim who wishes to appeal against the above mentioned decisions should have the right to inspect the case-file of the preparatory proceedings. Upon examination of a victim's appeal, the court may uphold a decision refusing to institute investigation or inquiry or a decision to discontinue the preparatory proceedings. The court's decision is final. It is not subject to ordinary cassation appeal. It may be appealed against only by way of extraordinary cassation appeal lodged with the Supreme Court by the General Public Prosecutor or the Ombudsman. The court may also quash a decision to discontinue the preparatory proceedings or a decision refusing to institute the investigation or inquiry. Then the court shall indicate the reasons thereof, and, when necessary, also the circumstances which should be clarified or actions which should be conducted. These instructions shall be binding on the public prosecutor (Art. 330 § 1 of the CCP). If the public prosecutor still does not find grounds to conduct investigation or inquiry, he again refuses to institute the preparatory proceedings or - with reference to lasting preparatory proceedings - issues a decision to discontinue them. In such a case, a victim - injured party may - within one month from the date of the service of notification about this decision - bring his own bill of indictment directly to the competent court acting as a subsidiary prosecutor. A bill of indictment of a subsidiary prosecutor

shall be prepared and signed by a lawyer (barrister or legal counsel).  
The above-presented rules on subsidiary prosecution were examined by the Constitutional Court and found compatible with the right of a victim to the court as guaranteed in Article 45 of the Polish Constitution (judgment of the Constitutional Tribunal of 2 April 2001, SK 10/00, OTK 2001, no. 3, item 52).

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

Yes, the victim has a right to ask for compensation (for details – see point 1.2.4.).

With reference to reimbursement of expenses of a victim acting as an auxiliary prosecutor or as a subsidiary prosecutor the general rule applies that a convicted person bears the costs of the proceedings. Pursuant to Article 627 of the CCP costs of the proceedings (in particular costs of legal counsel) prepaid by a victim shall be paid by a convicted person for the benefit of an auxiliary or subsidiary prosecutor.

At present there is no general remedy aimed at physical protection of victims. In particular, in most cases victims cannot be granted a status of “anonymous witnesses” under Article 184 of the CCP, since usually their identity is known to the accused from the outset of the preparatory proceedings. However, threatened victims may ask for physical protection by the police. It is granted and executed in accordance with the internal rules governing actions of the police.

Certain measures protecting disclosure of victims’ personal data to the accused are provided in the CCP for victims testifying as witnesses in the proceedings. If there is a justified concern for the possible use of violence or unlawful threat against a witness or his close relatives, in connection with his actions, he may restrict details regarding his place of residence to the exclusive knowledge of the public prosecutor or the court. The summons and other documents shall be then served at the institution where the witness is employed or at another address indicated by the witness (Article 191 § 3 of the CCP).

Pursuant to Article 333 § 3 of the CCP a list of victims disclosed in the course of preparatory proceedings, with their addresses, shall be attached to the indictment only for the court's information. Thus, this list is not included into the bill of indictment sent to the accused.

During the trial victims heard as witnesses may be granted protection stemming from Article 390 § 1 of the CCP. Although, as a rule, the accused has the right to be present at every action of the evidentiary proceedings, in exceptional circumstances, if there are reasons to fear that the presence of the accused may have an inhibiting effect on the testimony given by a witness or expert witness, the presiding judge may rule that the accused should leave the courtroom during examination of a witness. After permitting the accused to return, the presiding judge shall promptly inform him of the progress of the hearing during his absence, and allow him to give explanations concerning evidence taken during that time.

Special measures of protection are granted to minor victims of sexual offences and offences committed to the detriment of a family or custody. In cases concerning these offences a victim who at the time of the hearing is less than 15 years old, should be questioned only once, unless there are new circumstances which need to be clarified in a separate interview or the accused was not represented by a lawyer

during the first interview and so requests. The interview shall be conducted at a court hearing with the participation of an expert psychologist. The public prosecutor, defence lawyer and the victim's representative shall have the right to attend the hearing. The record of the interview shall be read out at the trial; if a video or audio recording was made, it shall be played back at the trial as well (Article 185a of the CCP).

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

Pursuant to Article 69a of the CCP the criminal court is also competent to examine material claims for damages caused by an offence.

A victim may institute a civil action for material and non-material damages resulting directly and indirectly from an offence before a civil court. In such a case a civil court usually suspends the examination of the victim's action for damages awaiting final judgment of the criminal court.

However, a victim may request compensation for damages within the framework of criminal proceedings. As mentioned above (see para. 1.2.), he has an opportunity to ask for compensation in the following two ways: 1) bringing civil action to the criminal court or 2) requesting that the penal measure of compensatory character be imposed by the criminal court.

#### 1) Civil action

The injured may, until the commencement of the judicial examination at the main trial, file a civil action against the accused in order to litigate, within the framework of the criminal proceedings, his material claims (*roszczenia majątkowe*) directly resulting from the offence (Article 62 of the CCP). It may cover both *damnum emergens* and *lucrum cessans* resulting directly from an offence.

The court may reject a civil complaint in case when:

- it is excluded by law;
- the claim has no direct connection with the charges included in the indictment;
- the civil complaint has been filed by an unauthorized person;
- the same claim is the object of another proceedings or a valid and final decision has been issued with respect thereto;
- there is an obligatory joint participation, on the part of defendants, of a public, local government or social institution, or of a person who is not participating in the case as the accused;
- injured person has already submitted to the court a motion included in Article 46 of the CC (Article 65 of the CCP).

If the civil complaint has a proper form the court shall issue a decision on the admission of the civil complaint for examination. The civil plaintiff may submit evidence in support of only those circumstances upon which his claim is founded. If the court has refused to admit a civil complaint or has left it unheard, the civil plaintiff may litigate his claim in civil proceedings. The refusal of the court to admit a civil complaint shall not be subject to interlocutory appeal. It does not prevent the victim from bringing his civil complaint to the civil court, i.e. it does not create *res iudicata*.

The civil complaint shall be granted or dismissed in whole or in part only in case of

conviction. Otherwise (in case of acquittal, conditional or unconditional discontinuance of the criminal proceedings) the court shall leave the civil complaint unheard. The court shall also decide to leave a civil complaint unheard by rendering a judgement, if the material evidence taken during the trial is insufficient to resolve the civil complaint and taking of further evidence would substantially delay the proceedings (Article 415 of the CCP).

A decision to leave a civil complaint unheard does not create *res iudicata*. Thus, a victim has a right to bring his civil complaint to the civil court (Article 67 § 1 of the CCP). Moreover, a victim may ask that his civil complaint left unheard by the criminal court be transmitted to the appropriate court having jurisdiction over civil cases. If such a request is submitted to the criminal court within the time-limit of thirty days from the day of the refusal by the criminal court to admit a civil complaint or to hear it, the day on which the claim has been filed in criminal proceedings shall be deemed as the day of the filing of the civil complaint in civil proceedings (Article 67 § 2 of the CCP).

The similar rules apply to cases in which the preparatory proceedings were discontinued. Pursuant to Article 69 § 4 of the CCP, in the event that the preparatory proceedings are discontinued or suspended, a victim may, within a time-limit of 30 days from the date on which the order is delivered, demand that the case be referred to the appropriate court having jurisdiction over civil cases. If, within the prescribed time limit, the victim fails to do so, the civil complaint previously filed shall be without legal effect.

If the criminal court awards damages the injured person may litigate in civil procedure only for the rest of his claim, which was not dismissed by criminal court (when the adjudicated damages do not cover the entire loss or do not compensate for the whole wrongdoing, the injured person may sue for additional damages in civil proceedings).

The decision granting a civil complaint in whole or in part creates *res iudicata*. In accordance with the Supreme Court jurisprudence, in case of granting civil complaint only in part, the criminal court shall dismiss the rest of the complaint or left it unheard. If the part of the complaint is left unheard, it may be litigated before the civil court (judgment of the Supreme Court of 11 September 1974, I KR 66/74, published in OSNKW 1975, no. 1, item, 11).

Pursuant to Article 11 of the Code of Civil Procedure, the fact that an offence was committed, as established in the final judgment of the criminal court, shall be binding on the civil court. The civil proceedings concerning damages arising out of an offence may be suspended if criminal proceedings concerning the offence are pending (Article 177 § 1 (4) of the Code of Civil Procedure). The civil court while adjudicating claims arising from an offence shall gather information whether the case has been examined by the criminal court.

In the event of the death of the injured person, a civil complaint with material claims directly resulting from the offence may be filed against the accused by the closest relatives of a victim. Relatives may ask for compensation only with reference to damages caused in their property (like for instance costs of medical treatment of a victim before his death, costs of a funeral). Closest relatives may also replace the victim acting already as a civil party in case of his death. Then, the closest relatives may assume the procedural rights of the deceased and ask for compensation of damages caused in their property. If they fail to do so, the court shall leave the civil complaint unheard (Article 63 of the CCP).



Finally, under Article 64 of the CCP, the public prosecutor is entitled to file a civil complaint on behalf of the injured or support the complaint filed by the injured person or his relatives, if the public interest so requires.

It should be noted that a civil plaintiff in criminal proceedings is temporarily exempted from a court fee due in civil cases litigated before civil courts.

#### 2) Penal measure of compensatory character

If the civil complaint has not been brought in the criminal proceedings, the victim and public prosecutor have the right to submit a motion indicated in the Article 46 § 1 of the Criminal Code. Pursuant to Article 46 of the CC, in case of conviction, the court, upon a motion from the injured person or from another person so entitled, shall impose the obligation to redress the damage caused, in whole or in part.

Instead of the obligation referred to above, the court may adjudicate supplementary payment (*nawiązka*) to the injured party (Article 46 § 2 of the CC).

The injured person may file this motion until the end of his first examination at the hearing (Article 49a of the CCP).

The motion is binding upon the court. It means that the court may impose this penal measure acting *ex officio* but must impose it upon the motion of the entitled person. However, the court is free to impose a supplementary payment instead of obligation to redress the damage (see, W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 465).

An obligation to redress the damages covers payment of pecuniary and non-pecuniary damages but also *restitutio in integrum*, if possible. While adjudicating this penal measure the criminal court shall apply all provisions of civil law except those regulating statutes of limitation regarding civil claims and the possibility to judge an annuity (*renta*).

The criminal court is also entitled to adjudicate compensation *ex officio* without victim's motion, but this applies only to pecuniary damages. Awarding pecuniary damages *ex officio* is not possible in case when the damage has no direct connection with the charges included in the indictment. Furthermore, *ex officio* compensation is excluded if the same claim is the object of another proceedings or a valid and final decision has been issued with respect thereto. The criminal court acting *ex officio* cannot adjudicate compensation also in these cases when order to pay damages would have to be directed against the accused and other persons not having a status of defendants (i.e. in case of the so called obligatory joint participation). What is more, *ex officio* compensation may be granted only in case of conviction of the accused (Article 415 § 4 of the CCP).

### 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

Yes, victims are informed of their rights at the very beginning of the preparatory proceedings and afterwards at the end of preparatory proceedings.

Pursuant to § 167 of the Regulation of the Ministry of Justice of 24 March 2010 – Rules on functioning of public prosecution organs (Official Journal of 2010, No. 49, item 296), before first examination, the public prosecutor shall inform a victim of his rights and duties provided for by law. A victim shall obtain a document

containing list of rights and duties and shall confirm its receipt with a signature.

Furthermore, according to Article 334 § 2 of the CCP, the public prosecutor shall notify the victim (injured person), if disclosed, that the indictment has been transmitted to the court. When informing the injured person of this fact, the public prosecutor shall notify him of the following:

- 1) the right to demand compensation for damages;
- 2) the wording of Article 49a of the CCP (pursuant to this provision, a victim is entitled to file to the court a motion requesting that an accused (if sentenced) be obliged to redress a damage, as provided in Article 46 of the CC).
- 3) the right to file a declaration that a victim wishes to act as an auxiliary prosecutor.

The victim shall also be informed about the opportunity to terminate the proceedings in a consensual manner, with consent or upon a motion of an accused (as provided in Article 335 and Article 387 of the CCP).

As mentioned above (see, para 1.2.3.), the victim acting as a party in judicial proceedings has a right to access the case-file.

In the course of investigation or inquiry the victim may consult the case-file only with the permission of an organ conducting the pre-trial proceedings. The refusal to provide access to files in the pre-trial proceedings shall be subject to interlocutory appeal. Access to the case-file cannot be refused if the victim would like to consult it for the purpose of preparing an appeal against the decision on discontinuation of the proceedings (Article 306 § 1 of the CCP).

Unlike the accused, at the end of the pre-trial proceedings the victim is not acquainted with the evidence gathered in the course of the investigation or inquiry. This is criticized in the literature.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

No special procedure to acquire the status of a victim is provided in the Polish law. Pursuant to Article 49 § 1 of the CCP a status of injured person shall be acquired by natural or legal persons (as well as other institutions) whose legal goods have been directly violated or threatened by an offence. As mentioned above, in every case a list of disclosed victims is brought by the public prosecutor to the court together with a bill of indictment. However, before granting to a victim the status of a party to the judicial proceedings the court is competent to verify whether a given person is authorised to apply for such a status (i.e. whether he may be considered a victim under the legal definition provided for in Article 49 of the CCP).

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

As transpires from the case-law of the Polish Supreme Court, a legal definition of an injured party is based on formal and substantive requirements. Formal prerequisites are defined in Article 49 of the CCP, while substantive are determined

by the characteristics of an offence.

Pursuant to Article 49 §§ 1-3 of the CCP:

“§ 1. The injured is a natural or legal person whose legal interests (legal goods) have been directly violated or threatened by an offence.

§ 2. A state institution, a local authority or self –governing entity, a social institution may also be treated as the injured person even though it has no status of legal person.

§ 3. An insurance agency shall also be regarded as an injured person to the extent of the indemnity paid by it to the injured person as a result of the injury caused by the offence, or that which it is obligated to cover.”

As transpires from this provision, a victim may be:

1) a natural person, legal person or another entity, whose legal interests (i.e. property or rights) have been directly violated or threatened by an offence;  
2) someone, whose legally protected interests have been violated or threatened by an offence, shall be considered as victim only when it is allowed under characteristics of an offence (see, resolution of the Supreme Court of 15 September 1999, I KZP 26/09; resolution of the Supreme Court of 21 October 2003, I KZP 29/03).

It is essential in assessing in concreto if a person is a victim to determine the scope of protection stemming from the provision of substantive criminal law (see, decision of the Supreme Court of 23 September 2008 r., I KZP 16/08).

Thus, in fact the attributes (znamiona) of an offence determine who may claim the status of a victim. It does not matter if the offence violated or threatened the main right protected by the law or this additional, arising from the wording of the legal norm (resolution of the Supreme Court of 21 October 2003, I KZP 29/03; decision of the Supreme Court of 26 January 2007, I KZP 33/06).

As a consequence, not all offences produce victims, because it depends on attributes of an offence created by the legislator. Victimless crimes are, for example, production and using narcotic drugs and psychotropic, incest, insult of state symbols.

The legal definition of the victim refers also to civil law since it contains notions defined in this branch of law, like 1) “natural person”, 2) “legal person”, and 3) “entities not having legal personality”.

1) The notion of “natural person”

By virtue of civil law, the natural person is someone, who has a legal capacity from birth until death (Article 8 of the Civil Code). A precondition for granting the status of the victim for a natural person is his live birth.

If the victim is a minor (under the age of 18) or is incapacitated either totally or partially, his rights shall be executed by his legal representative or by one who is exercising the permanent custody of the injured person (Article 51 § 2 of the CCP). In practice their parents most frequently exercise the rights of minor victims. However, a parent cannot exercise the rights of a minor victim in the criminal proceedings conducted against another parent, i.e. his/her spouse. In such cases the rights of a minor victim shall be exercised by legal guardian appointed by a competent guardianship court (see, resolution of the Supreme Court of 30 September 2010, I KZP 10/10). The same applies if parents of a minor victim fail to

submit a motion for prosecution with reference to an offence prosecuted ex officio but upon a motion of a victim (judgment of the Katowice Court of Appeal of 6 May 2009, II Aka 396/08, Krakowskie Zeszyty Sądowe 2011, no. 10, item 48).

The rights of a victim vulnerable due to his age or state of health may be exercised by a person who takes care of the victim (Article 51 § 3 of the CCP). A natural person cannot acquire the victim's status if he is accused in the same case (Article 50 of the CCP).

The legal definition of a victim does not include the victim's family. However, pursuant to Article 52 of the CCP, if the injured person dies, his closest relatives or, when they are either absent or not discovered, the public prosecutor may exercise his rights. The term "closest relatives" is defined as including: a spouse, an ascendant, a descendant, brother or sister, relative by marriage in the same line or degree, a person being adopted as well as his/her spouse and also a person living in co-habitation (Article 115 § 11 of the CC). It is important to remember that according to the rule *nemo plus iuris in alium transfere potest quam ipse habet*, closest relatives may exercise only those victims' rights, which he was entitled to have in case of being born alive.

#### 2) The notion of "legal person"

The legal person is someone, who has the legal personality (Article 33 of the Civil Code). It acquires the legal personality upon entry into relevant register (Article 37 of the Civil Code). Legal persons exercise their rights and obligations through their organs (Article 38 of the Civil Code). An organ authorised to act on behalf of the legal person shall conduct all actions pertaining to the proceedings on behalf of an injured person, who is not a natural person.

#### 3) Other entities

Under Article 49 § 2 of the CCP other entities such as a state institution, local authority or self-governing entity, social institutions (including non-governmental organisations) may also be treated as the injured person even though they have no status of legal persons.

Furthermore, the insurance agency shall also be regarded as the victim to the extent of the indemnity paid by it to the injured person as a result of the injury caused by the offence, or that which it is obligated to cover (Article 49 § 3 of the CCP). As transpires from this provision, the insurance agency may exercise the rights of a victim although its rights are not violated directly by the offence.

Article 49 §§ 3a and 4 of the CCP provides that the rights of the injured persons may be exercised by state control authorities which, within the scope of their activities, have disclosed the offence or have applied for the institution of preparatory proceedings to the competent investigating organ. In particular, the organs of the State Labour Office may exercise the rights of victims with reference to offences committed against employees. This solution has been designed to strengthen the protection of workers against offences committed by employers. Exercise of the rights of the injured person by the State Labour Office does not deprive an employee the right to participate in the criminal proceedings as a victim. Thus, it is accepted in legal doctrine that both the victim and the organ of the State Labour Office have the right to appeal against a decision to discontinue the investigation or inquiry.

Other state control authorities (for example the Supreme Audit Office) may

exercise the rights of a victim in cases arising out of offences which have inflicted damage upon the property of a state institution, a local authority or self-governing entity or a social institution and in which the injured institution is not acting. In such cases exclusively the state control authority exercises the victim's rights.

Non-governmental organisations (associations or foundations) have the status of legal persons under Polish law. Thus they can be considered as victims in criminal proceedings if they fulfil conditions provided for in Article 49 of the CCP.

Although non-governmental organisations cannot act as representatives of victims in the proceedings (i.e. as an organ taking procedural actions on the victim's behalf), they can participate in a trial and provide the court with statements supporting the victim.

As transpires from Article 90 of the CCP, before to the commencement of the trial, a representative of a non-governmental organisation may apply for a right to participate in the proceedings if there is a need to defend a community's interests or interests of an individual person, especially in matters concerning the protection of human rights and freedoms. A non-governmental organisation may intervene in the proceedings only with reference to matters coming into the scope of its statutory activities.

The court shall admit a representative of a non-governmental organization, if it finds that its participation in the proceedings will be in the interests of justice. The representative of a NGO may participate in the trial, make statements and submit motions in writing. It may be permitted to examine the case-file upon the consent of the president of the court.

Further readings on the definition of a victim:

S. Waltoś, *Proces karny. Zarys systemu*, Warszawa 2009, p. 189-190; W. Daszkiewicz, *Prawo karne procesowe. Zagadnienia ogólne*, Poznań 2000, p. 215; W. Posnow, *Sytuacja pokrzywdzonego w postępowaniu przygotowawczym w polskim procesie karnym*, Wrocław 1991, p. 18; K. Dudka, *Wpływ prawa karnego materialnego na ustawową definicję pokrzywdzonego (in) Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, ed. Z. Cwiakalski, G. Artymiak, Warszawa 2009, p. 138 – 146; K. Dudka, *Skuteczność instrumentów ochrony praw pokrzywdzonego w postępowaniu przygotowawczym w świetle badań empirycznych*, Lublin 2006, p. 24 and the following; W. Sych, *Wpływ pokrzywdzonego na tok postępowania przygotowawczego w polskim procesie karnym*, Kraków 2006, p. 36 and the following; J. Misztal-Konecka, *Roszczenia majątkowe osób najbliższych dla pokrzywdzonych*, Warszawa 2008, p. 164 and the following.

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

As mentioned above (see 1.2.), victims can acquire a status of a party to the judicial proceedings. With reference to a few offences prosecuted by private accusation a victim may act as a private prosecutor. In cases concerning offences prosecuted ex officio, a victim may apply for:

- the status of an auxiliary prosecutor;

- the status of a subsidiary prosecutor;
- the status of a civil party.

Victims who do not apply for a status of a party may participate in the proceedings as witnesses. Instead of lodging civil complaint to the court victims may request that penal measure of compensatory character be imposed on the accused in case of conviction.

Victims, regardless of whether they are parties to the judicial proceedings, have a right to complain on the excessive length of criminal proceedings to the higher court and obtain pecuniary redress for unjustified delay (see, Article 3 of the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time (Official Journal of 2004, No. 179, item 1843). This Law was enacted in order to execute the judgment of the European Court of Human Rights in *Kudła v. Poland* case (judgment of 26 October 2000)). Since 1 May 2009 the scope of the Law was extended to cover also unjustified delays in pre-trial proceedings. Thus, currently victims may complain also on the excessive length of investigation or inquiry (Official Journal of 2009, No. 69, item 498).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

As was explained above, in order to be a victim, a person should fulfil the conditions indicated in Article 49 of the CCP. Thus, before granting the status of a party to the judicial proceedings to a given person, the court shall verify whether its interests (legal goods) were directly violated or threatened by an offence and whether the legal goods concerned were protected by a legal provision regulating attributes of the offence. In general no other considerations are taken into account. Of course, in case of minor, incapacitated or vulnerable victims, the rules of their representation apply. In case of legal persons and other entities the court is obliged to verify, whether a competent organ exercises their rights.

Certain variations of standing apply to victims who wish to obtain a status of an auxiliary prosecutor. Every victim may apply for this status until the opening of judicial examination of the case at the trial by submitting to the court written or oral statement (even without reasoning) that he wishes to support the accusation brought by the public prosecutor or by a subsidiary prosecutor. According to the law, the court does not give a positive decision concerning victim's statement. The court is competent to verify only its formal requirements, i.e. whether the statement was submitted on time (before the opening of judicial examination of the case) and whether it was submitted by an authorised person (i.e. a person having a status of a victim). Thus, if both conditions are fulfilled, the statement of a victim itself, without the court's positive decision, creates legal status of a party to the proceedings for a victim.

However, the court shall decide that a person may not participate in the proceedings as an auxiliary prosecutor if it finds that unauthorized person submitted the statement or if a victim submitted it after the prescribed time-limit. Moreover, the court may limit the number of victims allowed to act as auxiliary prosecutors if this is necessary in order to safeguard the proper course of the proceedings. The court shall decide that a victim may not participate in the proceedings as an auxiliary prosecutor when the agreed number of auxiliary

prosecutors specified by the court is already participating in the proceedings (Article 56 of the CCP). This decision cannot be challenged by way of appeal. Victims not allowed to act as auxiliary prosecutors may submit to the court written statements concerning the case within the time-limit of 7 days from the notification of the court's decision. The above-presented procedure limiting the number of auxiliary prosecutors shall be applied only in cases with considerable number of victims. It is stressed in the literature that it may be contested from the point of view of the constitutional right of a victim to the court (see, P. Hofmański, E. Sadzik, K. Zgryzek, Code of Criminal Procedure. Commentary, Legalis 2011, on-line access, comments to Article 56 of the CCP, para. 4).

The CCP limits only the number of auxiliary prosecutors. This limitation does not apply to victims who bring civil complaint for damages or to subsidiary prosecutors. However, the court may dismiss a civil complaint as well as an indictment of the subsidiary prosecutor, which has been brought by unauthorised person or after expiry of the time limit prescribed by law.

It should be emphasised that in the course of the preparatory proceedings (inquiry or investigations) the status of a victim is assumed by investigating organs. At this stage of the proceedings it is difficult to verify whether a person claiming the status of a victim has indeed been directly victimised by an offence. For this reason usually the court competent to examine an appeal against the decision refusing prosecution does not verify whether an appeal was brought by a person authorised by law to claim a status of a victim. The situation is quite different at the judicial stage of the proceedings and then the court may verify whether a person authorised by law to act as a victim instituted a given remedy.

3.3. Are there specific standing rules applicable to certain types of claims?

Yes, with reference to claims for compensation.

A victim acting as a civil party may litigate only material claims resulting directly from an offence. The claims may cover both material damages and non-material damages but with reference to the latter the victim may request only pecuniary just satisfaction but not other, non-pecuniary forms of just satisfaction. Being a party to the judicial proceedings, a civil party may appeal against the first instance judgment but only with reference to the adjudication of his civil complaint.

If a victim chooses another legal remedy to ask for compensation (i.e. a request that penal measures of compensatory character be imposed on the accused as provided in Article 46 of the CC), the court may order the obligation to redress the damage in whole or in part and in every form provided in the Civil Code. Only rules providing for payment of annuity and limitation periods for claims do not apply. A victim requesting this remedy is not a party to the judicial proceedings. Thus, if such a victim does not act at the same time as the auxiliary of subsidiary prosecutor, he does not have a right to appeal against the first instance judgment.

As mentioned above, only the insurance agency, which shall be considered as a victim under Article 49 § 3 of the CCP, may litigate claims not resulting directly from an offence. Other victims may claim redress only for damages resulting directly from an offence.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

The answer to this question has been given in point 2.2.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

As mentioned, the criminal court, which adjudicates about the criminal liability issue, also has a jurisdiction to resolve civil claims. There are no variations in the standing rules according to the value of the dispute. This court, which is competent to examine criminal case, is also competent to examine civil claim brought by a victim.

However, victims have different standing in the proceedings conducted against a perpetrator who committed a crime in the state of insanity. Pursuant to Article 31 § 1 of the Criminal Code, insanity excludes culpability and criminal responsibility. Thus, if it is found that the suspect committed an act in the state of insanity and there are grounds to apply the preventive measures, the public prosecutor submits to the court a motion for discontinuance of proceedings and application of preventive measures. In the judicial proceedings instituted by this motion a victim is not allowed to exercise the rights of a party. It means that rules on auxiliary or subsidiary prosecutor as well as on civil party do not apply (Article 354 (1) of the CCP).

Victims have also different standing in consensual proceedings.

The Polish Code of Criminal Procedure provides for three consensual proceedings:

1) issuing a judgment without trial at the court's session.

Pursuant to Article 335 of the CCP, upon the consent of the accused, the public prosecutor may bring to the court an indictment together with the motion to convict the accused for an offence without conducting a trial. This procedure may be followed only in case of offences subject to a penalty not exceeding 10 years of imprisonment. Furthermore, the public prosecutor shall be convinced that the circumstances surrounding the commission of an offence do not raise doubts and the attitude of the accused indicates that the objectives of the proceedings will be achieved despite of lack of a trial.

The public prosecutor shall notify a victim, if disclosed, as well as the person or institution that submitted the notice of an offence, that the indictment has been transmitted to the court. A victim is also informed about the possibility to convict the accused without a trial (Article 334 § 2 of the CCP).

The court examines the motion for conviction at the session. A victim may participate in the session, so he is informed in advance about the date and the place of the session of the court. The participation in the session shall be mandatory if the president of the court or the court so decides (Article 343 § 5 of the CCP). At this session a victim may: 1) bring a declaration that he would like to support accusation of a public prosecutor - in such a case a victim obtains a status of auxiliary prosecutor acting alongside with a public prosecutor (*oskarżyciel posiłkowy uboczny*); 2) ask the court for imposing on the accused a penal measure of compensatory character under Article 46 of the Criminal Code. Moreover, if Article 46 of the Criminal Code does not apply in the case, the court may make the acceptance of the motion for a conviction conditional on the reparation of damage



caused by an offence (Article 343 § 3 of the CCP). If the court finds it purposeful because of the possibility of reaching an agreement between the accused and a victim on the matter of redressing damage or compensation, the court may adjourn the session and designate a suitable time limit for the parties. The session may be adjourned also upon a motion of the accused or a victim (Article 343 § 3 in conjunction with Article 341 § 3 of the CCP).

Upon granting the motion for conviction, the court shall convict the accused by a sentence. If the court finds no grounds for granting the motion, it shall direct the case to be heard at a trial according to general rules.

### 2) conditional discontinuance of the criminal proceedings

As a rule this probation measure may apply only in cases concerning offences subject to a penalty not exceeding 3 years of imprisonment. However, if the accused has reached an agreement with a victim, compensated a victim or promised to compensate a victim, the conditional discontinuance of the proceedings may occur also in cases concerning offences subject to a penalty not exceeding 5 years of imprisonment.

In the above-mentioned cases the public prosecutor may bring to the court a motion for discontinuance of the proceedings instead of an indictment (Article 336 § 1 of the CCP). The public prosecutor may indicate suggested probation period, obligations to be imposed on the accused and motion regarding supervision. The court examines such a motion at the session. A victim has a right to participate in this session. The participation in the session shall be mandatory if the president of the court or the court so decides (Article 341 § 1 of the CCP). If the court finds it purposeful because of the possibility of reaching an agreement between the accused and a victim on the matter of redressing damage or compensation, the court may adjourn the session and designate a suitable time limit for the parties. The session may be adjourned also upon the motion of the accused or a victim (Article 341 § 3 of the CCP). Upon deciding on a conditional discontinuance, the court shall take into account the results of the agreement between the accused and the injured on the matters of redressing damage or compensation (Article 341 § 4 of the CCP).

The victim which is not a party to judicial proceedings may appeal against the judgment on conditional discontinuance of the proceedings delivered at the court's session (Article 444 of the CCP).

### 3) the so-called abbreviated trial (i.e. issuing a conviction without evidentiary proceedings)

Pursuant to Article 387 of the CCP, the accused who is charged with a misdemeanour may submit a motion for a judgment convicting him and sentencing him to a specified penalty or penal measure without evidentiary proceedings; if the accused has no defence counsel of his choice, the court may, on his motion, appoint a counsel *ex officio*. The above-mentioned motion for conviction may be submitted not later than until the conclusion of the first examination of all suspects at the trial.

The court may grant the motion only if a public prosecutor or a victim does not object to applying this special procedure. A victim shall be properly summoned to the trial and informed about the possibility to issue a judgment without evidentiary proceedings. Article 341 § 3 of the CCP applies in this procedure. Thus, if the court finds it purposeful because of the possibility of reaching an agreement between the accused and a victim on the matter of redressing damage or compensation, the

court may adjourn the trial and designate a suitable time limit for the parties. The trial may be adjourned also upon the motion of the accused or a victim.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

The Code of Criminal Procedure regulates the status of victims and their rights in comprehensive manner. Therefore victims rarely rely on general provisions of the human rights law. To date a few constitutional complaints have been brought before the Constitutional Court contesting the law on victim's standing in criminal procedure. The first complaint concerned access to the court of victims applying for a status of subsidiary prosecutor. As mentioned above, the Constitutional Court found the provisions of the CCP regulating this remedy to be consistent with the Polish Constitution (see point 1.2.2.). Recently the Constitutional Court found it contrary to the Constitution that costs of a legal representation are not reimbursed to the victim acting as an auxiliary prosecutor if the criminal proceedings is discontinued due to the death of the accused (judgment of 18 October 2011, SK 39/09).

The Constitutional Court approach to the victim's right to the court is not clear. In certain cases (SK 10/00, SK 38/02) the Constitutional Court pointed serious limitations on victim's right to the court. In other (SK 14/03, SK 43/03 and SK 44/04) it found subsidiary prosecutor as an instrument of strengthening victim's right to access to the court. In general the Constitutional Court expresses the opinion that Constitution does not give the victim the right to initiate criminal proceedings against another person (see: P. Wiliński, *Proces karny w świetle Konstytucji*, Warszawa 2011, p. 226-232)

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In my opinion courts are rather rigorous in the control of the *locus standi*. Starting from the resolution of 1999, the Supreme Court applies rather narrow interpretation of the definition of a victim. In particular, the notion of "legal goods" (legal interests) of a victim violated by an offence is interpreted as meaning only these goods which are protected by a provision of substantive criminal law, defining the offence which is judged in the case (resolution of the Supreme Court of 15 September 1999, I KZP 26/99; resolution of the Supreme Court of 21 December 1999, I KZP 43/99; resolution of the Supreme Court of 21 October 2003, I KZP 29/03). Consequently, for example, if the case concerns a car accident (defined in the Criminal Code as violation of traffic rules causing bodily injury or an impairment to health lasting longer than 7 days), a person suffering impairment to health lasting less than 7 days cannot be considered as a victim (see the resolution in the case I KZP 26/99).

Furthermore, the notion of "directness" of a violation is given a rather narrow interpretation. This is understood as lack of intermediate links between an offence and a violation caused by this offence (see resolution of the Supreme Court of 21 October 2003, I KZP 29/03). For example, there is a divergence of views as to whether an owner of a stolen car may acquire a status of a victim in the criminal proceedings conducted not against a thief but against a person storing and selling stolen cars. The Supreme Court expressed the opinion that an owner of a car may

acquire the victim's status (judgment of 1 February 2011, III KK 243/10). Some appellate courts adopt different approach (see, judgment of the Katowice Court of Appeal of 28 April 2011, II Aka 87/11, *Krakowskie Zeszyty Sądowe* 2011, no. 9, item 68).

- 4.2. Are there significant variations in the courts' approach based on:  
4.2.1. the type of remedy requested?

No.

- 4.2.2. the nature of the claimant?

In my opinion courts are rather reluctant to use the remedy provided for in Article 46 of the Criminal Code in order to compensate for damages claimed by closest relatives of a victim.

Many doubts have arisen as to the interpretation of Article 46 of the Criminal Code. In particular, a different approach was applied by courts with reference to the right of closest relatives of a victim to claim obligation to redress moral damages in case of death of a victim. That closest relatives are entitled to claim moral damages arising from the death of a victim caused by an offence committed intentionally (see, decision of the Supreme Court of 6 March 2008, III KK 345/07; decision of the supreme Court of 28 April 2008, I KZP 6/08). However, according to the prevailing opinion expressed in the jurisprudence, courts cannot adjudicate supplementary payment (*nawiązka*) to the closest relatives since Article 46 § 2 of the CCP (contrary to Article 46 § 1 of the CCP) indicates only victims as beneficiaries of this penal measure (see judgment of the Supreme Court of 1 October 2010, IV KK 46/10).

Doubts also were raised in the jurisprudence as to whether an unborn child may acquire the victim's status.

In the opinion of the Supreme Court *nasciturus* cannot acquire a legal capacity and, consequently, he/she cannot have the status of a victim if is not born alive.

Consequently, his closest relatives may not exercise the procedural rights of an unborn child in case of his death because the condition *sine qua non* for obtaining the status of a victim (which is live birth), was not fulfilled (decision of the Supreme Court of 26 March 2009, I KZP 2/09; this ruling concerns the question whether in case of abortion a mother (who did not oppose to abortion) as closest relative on an unborn child, may exercise the rights of a victim in criminal proceedings). However, this opinion of the Supreme Court was criticized in the literature (see,

J. Potulski, *Dziecko poczęte jako pokrzywdzony w przestępstwie aborcyjnym*. Glosa do postanowienia SN z dnia 26 marca 2009 r., I KZP 2/09, *Gdańskie Studia Prawnicze – Orzecznictwo*, 2009, no. 4, p. 131 and the following).

- 4.2.3. the nature of the claim?

See, point 4.2.2.

- 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

As mentioned above (point 3.2.), in complex cases with many victims courts are entitled to limit the number of auxiliary prosecutors in order to secure the proper course of the proceedings. In general, other considerations are not taken into

account.

- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Currently the measure provided in Article 46 of the Criminal Code seems to be the most convenient tool for victims who would like to get compensation in the course of criminal proceedings. This measure is easily accessible to victims. A victim testifying as a witness at the hearing may simply express his will to obtain redress for damages. No special form is required for this statement; the victim does not have to bear any costs stemming from the proceedings. Due to amendments introduced into the Criminal Code in 2009, the motion of a victim to order redress is binding upon the court, which may redress the damage in whole or in part. The aim of the changes was to provide victims with the opportunity to request compensation in the course of the criminal proceedings and to avoid institution of a separate civil proceedings in order to litigate civil claims stemming from an offence. Thus, as was underlined in the written reasons to the draft law amending Article 46 of the Criminal Code, the primary purpose of this law was to increase the level of protection of victims' rights in the criminal proceedings.

## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

1) The transposition of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings did not require a change in the standing rules. The definition of a victim in the Polish Code of Criminal Procedure was much wider than in the framework decision.

2) The transposition of the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims did not introduce any changes in the standing of victims in criminal proceedings. This directive was transposed into the Polish legal system by the Law of 7 July 2005 on state compensation for victims of certain offences. The Law contains the autonomous definition of a victim, different than in the Code of Criminal Procedure but satisfying the requirements of the directive.

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

No.

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

No, there is not case-law referring to the above-mentioned legal instruments.

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

No.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

Yes, as mentioned above a few times the standing rules were assessed by the Polish Constitutional Court from the point of view of the right to the court as expressed in Article 45 of the Polish Constitution.

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

It ought to be noted that all considerations made in the questionnaire concern only criminal proceedings conducted on the basis of the Code of Criminal Procedure. Other rules apply to victims' standing in the following domestic proceedings:

- 1) proceedings conducted against minors who committed an offence;
- 2) proceedings concerning petty or administrative offences (*wykroczenia*), regulated in a separate Code of Procedure concerning Petty Offences.
- 3) proceedings concerning fiscal offences.

In the proceedings against minors (who are between 13 and 17 years of age) a victim cannot acquire the status of a party. It follows that he may not exercise his rights as an auxiliary prosecutor, a subsidiary prosecutor or a civil party. In the course of proceedings conducted against a minor a victim is not entitled to bring civil claims for damages arising out of an offence. However, a victim may appeal against a decision refusing institution of the proceedings against a minor or a decision to discontinue the proceedings (Article 21 § 3 of the Act on proceedings conducted against minors).

Pursuant to Article 6 of the Act on proceedings conducted against minors, the court may impose an obligation to repair the damage caused by the act committed by a minor.

In the proceedings concerning petty or administrative offences a victim may get the status of a party by bringing a declaration that he wishes to act alongside with the public prosecutor or instead of him (Article 25 § 4 of the Code of Procedure concerning Petty Offences). However, a victim cannot exercise the status of a civil party.

Pursuant to the Fiscal Penal Code, in the proceedings concerning fiscal offences general rules concerning victims do not apply.

Selected bibliography in English

1. P. Wiliński, *Criminal Procedure* (in) *Handbook of Polish law*, ed. W. Dajczak, A. J. Szwarc, P. Wiliński, Warszawa-Bielsko-Biała 2011.

2. D. de Vocht, Report on Poland (in) *Effective Criminal Defence in Europe*, ed. E. Cape, Z. Namoradze, R. Smith, T. Spronken, Antwerp –Oxford – Portland 2010.
3. P. Kruszyński, The Investigative Stage of the Criminal Process in Poland (in) *Suspects in Europe – Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, ed. E. Cape, J. Hodgson, T. Prakken, T. Spronken, Antwerp 2007.
4. A. Murzynowski, Criminal Procedure (in) *Introduction to Polish Law*, ed. S. Frankowski, Warszawa 2005.
5. P. Hofmański, Criminal Procedure System of the Republic of Poland (in) *Transition of Criminal Procedure systems*, ed. B. Pavišić, Rijeka 2004.
6. K. Krajewski, Crime and Criminal Justice in Poland, *European Journal of Criminology*, 2004, no. 1, p. 377-407.

## SWEDEN

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## QUESTIONNAIRE FOR REPORTERS ON **CIVIL LAW** **(SWEDEN)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

In Sweden civil law cases are dealt with by ordinary courts; those courts also deal with criminal law cases and other civil law matters (*ärenden*) such as adoption, division of marital property, administrators and special representatives. The court system contains three levels of instances: district courts (*tingsrätter*), appellate courts (*hovrätter*) and the Supreme Court (*Högsta domstolen*). There are 48 district courts and 6 courts of appeal.

It might be worth mentioning that the ordinary courts are supplemented by a parallel system of administrative courts. These courts do not deal with civil law disputes and will not be discussed further.

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

Land and Environmental Courts are special courts which hear cases that, for example, concern environmental and water issues, property registration and planning and building matters. The five Land and Environment Courts are part of the District Courts in Nacka, Vänersborg, Växjö, Umeå and Östersund. The Land and Environmental Courts of Appeal are part of Svea Court of Appeal. The courts were established on 2 May 2011 and replaced, among other things, earlier property courts and environment courts.

The Labour Court is a special court with the function of considering labour law disputes. Every dispute, which relates to the relationship between an employer and an employee, is a labour dispute.

The Market Court (Marknadsdomstolen) handles cases related to the Competition Act as well as cases involving the Marketing Act and other consumer and marketing legislation. In cases related to these laws, the Market Court is the highest court of appeal.

Court of Patent Appeals (PBR) is an independent special court that, upon appeal, reviews decisions by the Patent and Registration Office in matters concerning patents, trademarks and designs, names and publication authorisations. The court also reviews the decisions of the Swedish Board of Agriculture in matters concerning flora species protection.

Regional rent and tenancies tribunals mediate disputes relating to domestic premises and business premises. The regional rent tribunal also makes decisions on certain issues, for example, the right to sublet an apartment.



Svea Court of Appeal, besides its ordinary functions as a court of appeal for its district, is also responsible for appeals regarding certain special kinds of cases, among other things, those from the regional rent tribunals. The Environmental Court of Appeal is also part of the Svea Court of Appeal, and determines appeals from all the environmental courts.

- 1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

There are basically two types of claims which are recognised in the code of civil and criminal procedure: claims for judgments on specific performance or claims for declaratory judgments. Historically, a third category was seen as something separate and that was claims for constitutive judgments, e.g. claims for divorce. The claims which used to fit into the category of claims for constitutive judgments tend to be specially regulated outside of the code of civil and criminal procedure; today, it is generally considered that where such special regulations do not address the relevant questions regarding admissibility etcetera, the general requirements on claims for declaratory judgments should be applied.

A claim for a judgment on specific performance could be positive (a claim for money or physical things) or negative (a claim that the defendant must refrain from some specific performance, e.g. to ride a car on some piece of land or polluting some neighbour's property).

Literally, a claim for declaratory judgment should be seen as a request for the determination of the existence or non-existence of a legal relation and could be positive or negative.

After the expiry of time for appeal a judgment on specific performance is directly enforceable, while a declaratory judgment is not.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt*, *pas d'action*)? If so, how is standing defined in your jurisdiction?

Standing (*talerätt*) is certainly not a distinct procedural requirement in the sense that it has a distinct meaning in all civil law cases. Although the Code of Civil and Criminal Procedure does not contain a written section on standing, standing is considered to be a procedural requirement and is applied by the courts. It is disputed whether standing should be considered a general requirement which has to be fulfilled in every case before the court makes an assessment of the substantive issues, or if it is merely applicable in connection to some specific kinds of claims. If you take the view that standing is a general requirement, then according to what is called the doctrine of proposition (*påståendedoktrinen*) the requirement is automatically fulfilled when the claimant makes the claim and thereby proposes that, as against the defendant, he or she is entitled to the legal consequence which he or she claims. But the general principle is that – whether or not standing is considered a general or a special requirement – when a claimant brings an obviously substantively erroneous claim (e.g. against wrong party or requesting something clearly impossible under private law) the deficiencies of the claim are to be handled as substantive questions.

The principle of *pas d'intérêt, pas d'action* is not considered to generally applicable and nowadays it is thought to be separated from the principle of standing. In principle under Swedish law, your claim will be admitted for substantive assessment even if your claim concerns a matter which does not concern you in a legally relevant way. As said, the deficiencies of the claim will be treated as substantive deficiencies.

However, in respect of claims for declaratory judgments there is a requirement corresponding to legal interest. In Ch 13 section 2 it is submitted that claims for judgments determining the existence of a legal relation should be allowed if its existence is uncertain and if the uncertainty is detrimental to the claimant. This means that you cannot bring a claim for the determination of solely factual questions or questions of law (the claim must concern both kinds of questions, although possibly the dispute might concern just one of the two). Furthermore, you cannot bring a claim for declaratory judgment if the legal relation you want to have determined is undisputed. In such a case, it is considered that the claimant lacks "declaratory interest". The requirement of declaratory interest is a general procedural requirement in the sense that it has to be fulfilled whenever a claimant makes a claim for a declaratory judgment, but of course not when the claim is for specific performance. Even if the requirement of declaratory interest is not identical to the continental concept of legal interest or legally protected interest, it is closely related, just as it is closely related to the requirement on standing under Swedish law.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

In practice the requirement(s) of standing is not homogeneously applied; apart from situations where specific provisions reserves standing for a certain group of persons, the requirement has been applied in cases where more than two parties are involved in the matter at issue, without necessarily being involved in the proceedings.

The general rationale behind the requirements on standing and declaratory interest is commonly considered to be the same, that is, the creation of obstacles for claimants to bother defendants and courts with trying and assessing the substances of cases which are basically unnecessary to bring before a court. Another, supplementary, rationale for standing which is submitted is the protection of the interests of third persons. However, strong arguments have been, and are, submitted against the rationales behind the requirement(s) on standing and thereby against the application of the requirement itself. First, since the introduction of the possibility in uncomplicated cases to make a judgment without issuing a writ, it is in fact less troublesome for the defendant and the court to deal with a "hopeless" claim in substance in comparison to having to solve it as a preliminary question of formal procedural requirements. Second, since normally the *res judicata* of a judgment only covers the parties of the proceedings, it would be unnecessary protection for a third party to create obstacles for claimants to make claims interfering with the third party's rights. Consequently, there are good reasons for skipping the requirement on standing and deal with standing-related questions in the order provided to deal with the substantive issues of civil law cases. Still, as said above, in practice requirements on standing are applied, particularly where under

written provisions private law rights are exclusive for a certain group of persons or in matters involving more than two persons.

Thus, the requirement of standing is considered to be a necessary requirement for the court to hear the substance of a case. As a procedural requirement standing should be dealt with *ex officio* by a court, that is without a plea from the defendant. This goes for courts of all instances. Should a case be decided although the requirement of standing is not met, it constitutes a grave procedural error. Should the mistake be observed while a case is not conclusively decided but tried on appeal, the lower instance's judgment should be quashed and the case returned to the first instance. Should the case be concluded and the judgment subject to *res judicata*, the case shall be reopened and tried again.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court *a quo* or the appellate court required in order to bring an appeal?

As said above, the same requirements of standing apply in all instances and whether or not the requirements are met should be observed *ex officio* by courts in all instances. The same goes for the requirement of declaratory interest in cases concerning claims for declaratory judgment.

In Swedish civil law cases permission of the appellate court is required in order to bring an appeal (Ch 49 section 12), that is, if there are no special provisions containing different regulations. The appellate court may grant permission if one or more of the following grounds are met: 1) there is reason to doubt the judgment which the district court has reached, 2) the correctness of the district court judgement cannot be assessed without granting permission, 3) it is important for the development of law to grant the appeal, 4) there are other reasons of particular weight to grant permission.

In order to appeal against a judgment given by an appellate court to the supreme court, only the last two of the abovementioned grounds have to be fulfilled.

A decision granting permission to appeal to an appellate court cannot be appealed to the Supreme Court, whilst a decision not to grant permission can. Decisions on permission to appeal taken by the Supreme Court cannot be appealed.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

In theory the requirement of standing is general and should not differ depending on the kind of remedy sought. However, the stricter requirement of declaratory interest in respect of claims for declaratory judgment of course implies that the more open the claim, the greater the need to tighten the requirements for substantive assessment. As to injunctive relief as the main claim of a case (*ultra petitum* and not interlocutory or preliminary relief) it is generally considered that the requirement of declaratory interest should apply by analogy in order to refrain persons with little or no legal concern in the subject matter to bother the would-be

defendant. Furthermore, the requirement is considered to prevent individuals with no legally relevant concern to establish outcomes of procedure by poor litigation, which may be detrimental to other persons more concerned with an injunction and better equipped to litigate. Thus, even if injunctive relief is considered to be a claim for (negative) specific performance and not a declaratory judgment, the stricter requirement on interest should apply.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

In Sweden there are numerous provisions in various fields of civil law which can be understood as rules on standing. And generally it is difficult to know whether or not specific rules are to be applied as rules on standing. Often you have to dig deep down in substantive law in order to analyse if a specific provision should be understood as narrowing the opportunities to have a claim assessed in its substance. Therefore, it is more sufficient to make some distinctions and give a short overview of how different categories typically have been treated by Swedish courts.

It is appropriate to make a distinction between cases concerning matters over which the parties may dispose (by e.g. agreements, settlements or acknowledgements) and those over which the parties may not. Examples of the former are commercial disputes and the latter may be family law disputes or disputes over patents or some environmental cases

The general rule in cases on matters which the parties may dispose over is that when the claimant makes a claim for his or her own account, there should be no assessment of questions of standing. Theoretically you may say either that there is no requirement on standing in such cases or that the requirement is automatically fulfilled due to the claimant making a proposition that he or she is entitled to make a claim for the remedy sought. Questions on whether the claimant and defendant are the right parties in the disputed legal relation, or whether the remedy sought is correct, are dealt with as questions of substance. Where, however, the claimant explicitly makes the claim on account of a third person, the claim should be dismissed due to lack of standing. Unless, of course, there are explicit provisions allowing for claims on account of third persons.

There are some exemptions to the general rule. At least there are cases like the one where the Supreme Court has held that there is no standing where one of two physical persons joined in a legal person (company), makes a claim against the other person that the court should oblige him to honour a company debt towards a third person (creditor). The requirement of standing has been applied – against the general rule – in insolvency proceedings. Claims from individual creditors against an insolvent debtor formally bankrupt should be dismissed on grounds of no standing, even if they could be rejected after an assessment of the substance. Sometimes the requirement of standing is considered to cover situations where several persons collectively are entitled to something. A claim brought only by one of them will be dismissed without assessment of the substance, which can be understood as a requirement for standing.

It is explicitly provided that in matters concerning determination of paternity to

specific children, only the child concerned may make the claim. A claim for determination that a specific man is not the father of a specific child, may only be invoked by that man. A claim for divorce may only be invoked by one or two of the parties in a specific marriage. But it seems like the courts are inclined to make a standing test in almost all cases in which the parties may not dispose of the subject-matter, even where there are no explicit provisions on standing (Nordh, Talerätt i miljömål p 331). In cases involving environmental law and real estate, there is generally a requirement that the claimant (and defendant) shall be individually concerned by the matter, meaning that he or she should have some sort of legal connection to the issue, e.g. the property involved.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

In principle, the requirements of standing do not vary dependant on the claimant's nature. Still, public authorities' activities are more strictly governed by legislation and other public governance in comparison to private citizens. And this goes for the activities undertaken by public bodies in the field of private law as well, which means that there is a bigger possibility for a public body to have its possibilities to take legal actions limited in comparison to private (physical and legal) individuals. But that does not mean that from the point of view of the institute of standing, there is a difference between various kinds of subjects in the field of private law.

As to public bodies, it is sometimes difficult to know whether a claim is private or public, e.g. in the field of public procurement. If an individual undertaking makes a claim for having a public contract invalidated before an ordinary court instead of an administrative court, that claim should be dismissed due to lack of jurisdiction, not due to lack of standing. And where an individual undertaking makes a claim for damages before an administrative court, the claim will be dismissed due to lack of jurisdiction, not due to no standing. So, the question of the courts' material jurisdiction is distinguished from requirements of standing, even if the same kind of reasoning has been elaborated on how to handle objections against courts' jurisdiction as has been used in cases of standing. For instance, the Supreme Court in 1973 held that where a court's jurisdictional were limited to some environmental aspects, an objection that those aspects had not occurred in the case at hand and hence that the court lacked jurisdiction, should be dealt with as substantive issues determining whether the claim be affirmed or not by the court.

Some public authorities may initiate civil actions before ordinary courts, but generally they may not. It depends on what is said in the public instruction setting the authority up. Generally public authorities must be represented by the Justitiekanslern (the Chancellor of Justice), a public body under the state, but independent from the government. Accordingly, the instruction of the authority determines whether the authority in a civil action should defend itself independently or represented by the Chancellor. As implied above, no special standing requirements must be met for a private actor to make a claim against a public body,

except that the claim must qualify as a private law claim. An individual making a public law claim against another individual will have his or her claim turned down in substance, while a similar claim against a public body will be dismissed due to lack of jurisdiction.

However, as to claims for damages against the parliament, the government and the supreme courts there is a special provision on standing in the Act of Tort Liability. Under Ch 3 section 7 such claims may be brought only where the decision allegedly inflicting damage is out of force or has been altered. Under Chapter 3 section 10 only the Supreme court has jurisdiction to hear such claims. Obviously, this kind of standing requirement is in conflict with EU principles of direct effect and member state liability. Even if the rules in practice are set aside when dealing with claims for damages under the *Francovich* doctrine, that is not a relevant excuse in the eyes of the European Court of Justice (see cases against Italy, France and Belgium).

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Sweden does not allow for interpleader actions. Third parties with interest in a legal relation between two other parties may have their interest judicially protected in two ways. First, if there are proceedings between the two parties, the third party may protect his or her interests via intervention.

Second, where there is no action between the two parties and the third party has a genuine interest in determining his or her position in respect to them, nothing stops the third party from making a claim for declaratory judgment against one or two of them. For instance, an insurance company may sue one or more potential receivers of insurance money and claim, as against each and one of them, declarations its obligation to pay.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

There are no variations in the standing rules according to the value of the dispute. But the value of the dispute may matter when it comes to jurisdictional questions.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Human rights law have not been allowed as an independent basis for standing in civil law cases. (The situation is quite different before administrative courts). Still, it has been pointed out by the Supreme Court that immediate judgment without issuing a writ in clear cases (see 2.2 above) must be applied carefully, in order to avoid infringement the claimant's rights to a fair hearing under article 6. This is more elaborated under 8.3.3 below.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions

(e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

In Ch 9 section 9 it is submitted that if someone who is not party in the case alleges that the subject-matter concerns his right, and if he makes probable that this is the case, he is entitled to intervene in the proceedings. An intervention does not alter the subject-matter of proceedings and does not create an additional case. The intervenient must take sides with one of the primary parties, but may change sides if he or she finds that his or her interests are in conflict with the interests of the original intervenor. The intervenient is not bound by the judgment due to the intervention, but where the intervenient's legal position is affected by the judgment that would have happened also without an intervention. Swedish law makes a distinction between ordinary intervention and autonomous intervention. An ordinary intervenient may undertake the same actions which are open to the party with whom she or she takes sides (intervenor), but must not act in conflict. An autonomous intervenient may act in conflict with the intervenor. An autonomous intervenient may probably add new grounds, appeal against the judgment, neutralise an acknowledgment of the claim, but may not bring new claims. Typically, ordinary intervention is used where a judgment would have an evidentiary effect in subsequent proceeding between the intervenient and one of the primary parties. Autonomous intervention is typically used in situations where the judgment will have a *res judicata* effect as against third parties (e.g. claims for invalidation of patents), but that is disputed in the literature and court practice is somewhat ambiguous. It may be argued that an intervenient who would be bound by the judgment under private law rules, would gain an unfair advantage as he or she to have the possibility to intervene autonomously. Still, it seems the wording of law points straight to these kinds of situations and it seems like the courts, at least half the time, have favoured this view. Thus, the law of today is rather uncertain when it comes to autonomous intervention.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Ordinary and autonomous intervention is decided by the court and cannot be influenced by the parties. In Ch 14 section 12 it is provided that a party who considers that a third party should intervene may publicly request that the party intervenes. There are no procedural consequences of such a request, but there may be some consequences under private law. Still, the would-be intervenient, with or without request, decides to apply for intervention and the court decides if intervention should be allowed under the law.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

There is a special act on Group Actions (2002:599) which provides for group actions in general and furthermore it is specially provided for in the Code on the Environment to bring group actions in environmental cases. A group action may only be brought with the group represented by the claimant, not by the defendant. Thus, the group members are not parties to the proceedings, but they may intervene autonomously. The judgment binds those members of the group who have opted in to the action. There are three kinds of group actions: 1) actions

brought by an individual (physical or legal person), 2) actions brought by organisations and 3) actions brought by a public authority which have been entrusted by the government to bring public group actions.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

There are no particular requirements of standing in group actions. Under the wording of the act all claims which may be subject of a civil action before an ordinary court may also be brought as a group action. The claimant decides whether or not the claim will be brought individually or as a group action. The court then decides on whether the particular requirements for group actions are met before the commencement of proceedings. The requirements are the following:

- 1) Where a group action is brought by an individual, the claimant must have an individual claim which will be covered by the group action.
- 2) A group action brought by an organisation requires, that the organisation's regulations submits that it has as one of its objectives to protect consumer or employee interests in disputes between consumers and a business on some commodity, service or other good, which the business offers consumers.
- 3) A public group action may be brought by a public authority which, when considering the subject-matter of the dispute, is suitable to represent the group members. The Consumer Ombudsman is entrusted by the government to bring public group actions and the National Environmental Board is authorised to bring public group actions before the Environmental courts.
- 4) A group action may be brought if the grounds contain facts which are identical or similar for the potential claims of the group members.
- 5) A group action must not be considered unsuitable due to some group members' claims differing from the rest of the group.
- 6) The major part of the claims must not be possible to bring as individual claims as easily as a group action.
- 7) The group must be suitably determined, i.e. considering its size and identification.
- 8) The claimant must be suited to represent the group members, under consideration of his or her or its interest in the matter, economic capability to bring a group action and other relevant circumstances.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

As said above, there is a specific act on group actions in general, which on the one hand connects to the rules of the Code of Civil and Criminal Procedure, and on the other to special provisions on group actions in environmental cases.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

Apart from the three kinds of group actions, there are ordinary procedural rules on intervention (see supra) and joinder of cases. But these are of course quite weak when seen in the perspective of multi-party litigation.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

Prospective consumer interests may be protected by action taken by the Consumer Ombudsman before the Market Court. The Ombudsman may make claims concerning prohibition of certain standard contract terms if they are considered to



be unfair to consumers in general. The Competition Authority fulfils a supervisory function and may also bring claims before the district court in Stockholm and the Market Court concerning e.g. fines for breach of EU or Swedish competition rules. There are no special standing requirements and there is no distinctive standing test in cases like that. However, under Swedish law generally there is no possibility for an individual who is not concerned to bring an action for the protection of diffuse interest. Still, a group action by an organisation set-up for the purpose may in practice be opening for the judicial protection of diffuse interests.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

Apart from the possibility for organisation to bring group actions (which is a general possibility) the protection of general and/or diffuse interests is provided for sector-specifically. As said above in 5.2 there are possibilities for authorized public organs to protect the interests of consumer welfare and the environment.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

As is probably apparent from what has been submitted above, the *locus standi* requirements in private law actions are quite lenient themselves, as the law stands today. This has been a development over some decades and in that effect it may be said that court practice, particularly by the Supreme Court as from the 1970s and onwards, has been gradually more and more lenient or relaxed. And this is particularly so in respect of claims for specific performance in disputes where there are no mandatory rules involved.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

All claims for declaratory judgment are subject to the requirement of declaratory interest, while generally claims for specific performance are not subject to a test of *locus standi*. Still, claims for injunctions or for injunctive relief, although being claims for specific performance, may trigger a more thorough test of *locus standi*, similar to the test embedded in the test for declaratory interest. So, in Sweden you cannot say that the requirements of standing differ depending on the type of remedy sought but rather on the type of claim brought.

- 7.2.2. the field of substantive law at hand?

In disputes over which the parties are free to dispose, you do not really see a case dismissed due to lack of standing, not even when the dispute concerns a third party interest or where the claim substantively should be brought by another party. In cases partly involving rules which the parties may not dispose over, such as environmental or family law cases, there is generally a strict test of *locus standi* requirements. I would say that the field of substantive law does not influence the standing requirements but rather if the substantive law allow the parties to dispose of their legal relations and if there are special, written rules of legal *standi*.

- 7.2.3. the nature of the claimant?

In principle the nature of the claimant should not matter for the question of

standing.

7.2.4. the nature of the claim?

The nature of the claim should not matter. Still, first, if a claimant makes a claim against a defendant explicitly for performance to a third person, the claim will probably get dismissed due lack of standing. And second, where a claimant brings a claim against a public body for performance which should be dealt with under administrative procedural law, the claim will be dismissed due to lack of jurisdiction.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

Merits, importance or abusiveness do not influence the application of rules on standing. Merits and abusiveness are still important for whether or not a court should rule in substance without issuing a writ to the defendant. And all three factors are decisive when deciding to grant permission to appeal.

7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

This a difficult question to answer; I do not know what the courts consider. The objectives which are explicit or implicit in the reasoning of court practice are protecting the defendant to unnecessary litigation, avoidance of trivial cases, and a sort of underlying idea that no one should have the opportunity to have an obviously incorrect claim tried in substance. In respect of injunctions and claims for declaratory judgment you may also sense a fear of flooding the courts with a lot of claims that are not really disputes. However, these reasons for rejecting a claim based on lack of standing have essentially lost their significance. As submitted above under 2.2 deficiencies in the legal basis of the claim may result in a judgment without a writ being issued. That means that where a claimant is clearly not substantively entitled to the claim he or she makes, or if it is otherwise clear that the case is unfounded, there is no need for rejecting the claim on formal basis, since there is opportunity to make a swift judgment on the substance. This has influenced court practice and has heavily marginalised the importance of the requirements of standing.

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

The transposition of secondary EU law has not required a change in rules on standing in private law cases. (There has been a great change, though, in respect of standing before *administrative courts* due to the principle of effective judicial protection.) It may be mentioned in this context, though, that the directive on unfair consumer contracts and the judgment of ECJ in the *Oceano* case, has made evident that Swedish rules on jurisdiction have to be altered. In the *Oceano* case, the ECJ makes it clear that domestic courts must dismiss claims founded on unfair terms on forum ex officio, while Swedish law provides that this can be done only after objection by the defendant. However, no alteration has been undertaken.

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

As said above, in civil law cases the standing requirements have not changed due to European influence. Under this heading, though, I would like to draw attention to the context of the Unibet case (C-432/05). The claimant made a claim for a declaration under Ch 13 section 2 that it should be entitled to advertise cross-border betting in Sweden. In all three instances the claim was dismissed due to lack of declaratory interest and for being in breach of the (uncodified) prohibition to judicial review in abstracto, with which the ECJ agreed, although it held that it was necessary for the effective protection of Unibet's right that it had opportunity to have its right to advertise judicially determined. The ECJ agreed with the Swedish Supreme Court that Unibet could bring a claim for damages and have its right to advertise determined that way. A critical remark to the decision would be that a claim for damages is a hopeless route for someone in Unibet's position. Under substantive law it would not be entitled to damages before the harm of not being allowed to advertise had occurred. More generally though, you may well expect that the requirements connected to bringing a claim for declaratory judgment (and the prohibition on abstract judicial review) may have to be altered, at least in cases where prospectively determination of a legal position is considered to be necessary for the effective protection of individual rights.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

As said above, in civil law cases the standing requirements have not changed due to European influence. Under this heading I cannot find anything to add.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

As said above, in civil law cases the standing requirements have not changed due to European influence. Under this heading, though, I would like to mention the application of Ch 42 section 5, which is a substitute for requirements of standing by providing the court an opportunity to deliver a judgment in substance without issuing a writ in cases where the claim is apparently unfounded. In NJA 1998 p 278 the Supreme Court held that the provision should be applied in a restrictive way. Since it submits a significant deviation from normal contradictory proceedings the European Convention on Human Rights must be considered. Under article 6:1 a dispute must be genuine and serious, but that limitation should be interpreted restrictively and there should be a clear presumption that all disputes on civil rights are serious. This must be considered to be the law as it stands in Sweden, which means that also in civil law proceedings the European Convention on Human Rights has exercised an influence on standing related questions in Sweden. Still, there is at

least one subsequent case where the Supreme Court has upheld the application of the provision, although it made impossible an effective hearing in a case concerning real estate (see NJA 2007 p 125).

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

## QUESTIONNAIRE FOR REPORTERS ON ADMINISTRATIVE LAW (SWEDEN)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

Sweden has general administrative courts for the appeal of administrative decisions and ordinary courts for civil and criminal cases. The ordinary courts consist of 48 district courts, 6 courts of appeal and the Supreme Court (HD). The procedure in the general courts is regulated by the Code of Judicial Procedure (1942:740). The general administrative courts consist of 12 county administrative courts, 4 administrative courts of appeal and the Supreme Administrative Court (HFD). The procedure in the administrative courts is regulated by Administrative Court Procedure Act (1971:291, FPL). The administrative appeals procedure in Sweden is as a general rule reformatory, meaning that the administrative courts decide cases on the merits, replacing the appealed decision with a new one. It should also be noted that the administrative court procedure is simpler and more relaxed than the civil procedure. Another vital difference is that in the administrative procedure, the ultimate responsibility for the investigation of the case rests with the court according to the "ex officio principle". It is also worth mentioning that the reformatory procedure – together with the fact that a case may be retried in three or even four instances – can make the appeal quite time consuming. It is not unusual that each instance takes at least one year.

Governmental decisions can be challenged by seeking judicial review in the Supreme Administrative Court (HFD) pursuant to Act 2006:304. This procedure furnishes a legality control in accordance with the European Convention on Human Rights (ECHR). It should be noted, that this procedure is not reformatory. Instead, it is based upon the continental concept of judicial review, meaning that the court decides from the arguments of the applicant on the legality of the decision in a "cassatory" procedure.

There is no Constitutional Court in Sweden. The legality of some municipal decisions – typically those which cannot be appealed through an ordinary administrative appeal – can be challenged in administrative courts by any of the municipality's inhabitants according to the Local Government Act (1991:900).

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

See above.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

Within the general administrative court system, there are few exemptions to the procedural order described under 1.1-2. However, migration cases are dealt with by three of the administrative courts, which are called Migration Courts when they hear these cases. Appeal can be made to the Migration Court of Appeal, located at the

Administrative Court of Appeal in Stockholm. The Migration Court of Appeal is the final instance for migration cases.

Administrative control within the ordinary courts is a peculiarity of the Swedish court system. It was established in 1999 along with the Environmental Code, which created a system of five Environmental Courts and one Environmental Court of Appeal. These courts are all divisions within the ordinary courts, but essentially act as administrative courts for environmental decisions made by the authorities. The environmental courts' jurisdiction covers all kinds of decisions made pursuant to the Environmental Code (1998:808, MB) and the Planning and Building Act (2010:910, PBL). They are also competent in cases concerning damages and private actions against hazardous activities. The route for appeals in cases concerning the environment is (almost) always the same and quite simple: Local Environmental Board in the municipalities → County Administrative Board → Environmental Court → Environmental Court of Appeal (MÖD). Cases starting in an authority cannot be appealed beyond MÖD. Cases starting in the Environmental Court can ultimately be brought to the Supreme Court (HD). Thus, if appealed, all environmental decisions follow this route, although the starting-point and terminus differ.

The Environmental Court has some of the characteristics of a tribunal. It consists of one professional judge, one environmental technician and two expert members. Industry and national public authorities nominate the last two. The underlying philosophy is that experts will contribute their experience of municipal or industrial operations or public environment supervision. The Environmental Court of Appeal is comprised of three professional judges and one technician. All members of the courts have an equal vote.

Administrative decisions pursuant to MB and PBL are taken by the local or regional authorities, as well as by national public authorities, such as the Environmental Protection Agency, Chemicals Agency or the National Board of Health and Welfare. Permits are granted by local or regional authorities and – concerning water operations and larger industrial installations – by the environmental courts. The latter situation is unique in Europe and the courts are then “exercising administrative powers” (C-263/08 DLV p. 37).

In addition to this, there are other special courts and tribunals that are worth mentioning. Decisions by the Swedish Patent and Registration Office are appealed to the Court of Patent Appeal according to Act 1977:729. This court comprises of professional judges and technicians with equal vote. The judgments of the court are appealed to the Supreme Administrative Court (HFD).

Moreover, the Swedish Competition Authority is working to safeguard and increase competition and supervise public procurement, not least to fulfill union law on the subject (see Act 2008:579). According to Act 1970:417, the authority's decision is appealed to the Stockholm District Court and/or the Market Court, the latter being final instance in those cases. According to Act 2008:486, the Consumers Ombudsman (KO) – who is the Director General of the Swedish Consumer Agency – can issue certain orders and prohibitions to counteract unfair marketing. His or her decisions can also be appealed to the Stockholm District Court and/or the Market Court.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

The division of competence between the general courts and the administrative courts is dealt with in Administrative Procedure Act (1986:223, FL), in comparison with the Chapter 10 of the Code of Judicial Procedure. Broadly speaking, the general courts are competent unless other is stated in law. Such statements are commonly made within the administrative acts on a certain area, thus pointing out the administrative courts for appeal in those matters. In addition to this, there is a general statement in section 22a FL, that – together with section 3 in the same act – make clear that administrative decisions are appealed to the administrative courts. The latter provision is safeguarding the right to a fair trial according to the European Convention of Human Rights (ECHR). As showed above, some administrative decision will be dealt with by the general courts. This is however an exemption from the general rule on the competence of the administrative courts. All kinds of administrative decisions can be brought to the administrative courts by way of appeal. The definition of a “decision” is quite broad, also including rather vague statements without any specific addressee. For example, in the cases RÅ 2004 ref. 8, a communication from the National Food Agency “informing” the public about some hazards of olive oil was considered by the Supreme Administrative Court to be an appealable decision, challengeable by the producers of such oil. According to case law on some areas, this is also true about administrative omissions. In environmental cases, any member of the public who is affected by a certain activity can notify the supervisory authority and ask for administrative action in his or her interest. According to the jurisprudence of the Parliamentary Ombudsman, the authority must then issue a decision on the case, be it to take action or not (a decision not to take action is called a 0-decision). That decision is appealable along the route described under 1.3, and accordingly, the matter will be dealt with in substance by the environmental courts. An illustrative example is found in the MÖD’s judgment 2008-04-09 on Karlstorp Camping (M 8160-06). In that case, the neighbours of a campground wanted the municipal Environmental Board to intervene against loud nightly activities. The municipality was quite reluctant to do so, but following an administrative appeal the County Board ordered some measures to be taken by the operator. Further measures were required by the Environmental Court and even more by the Environmental Court of Appeal.

The ordinary courts deal with criminal law and claims between individuals, including actions/omissions by the authorities when they act as a private body, for example when purchasing land, setting up contracts or entering agreements with private entities. Individuals’ claims for damages from public authorities based on administrative misconduct are made to the ordinary courts. This is for example the case when losing parties in a public procurement competition claim such damages. Thus, according to the Act 2007:1091, an appeal on the outcome of the tender is made to the administrative courts, whereas the claims for damages for administrative misconduct are made to the general courts. It should however be noted along the lines described above, that the administrative court are competent to deal with any matter that are designated to them by law. To this end, it is also important to understand that what one legal order describes as damages, in another is described as administrative cost recovery. For example, in Sweden, the latter is the case when an authority claims its costs for undertaking certain measures recovered by the party who is liable for the damage. Thus, there is no need for a “twee weegenleer” in Sweden.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

As a general rule, administrative decisions/omissions cannot be brought to the ordinary courts. As showed above, there are exemptions.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

Standing is defined generally in section 22 FL (and section 33 FPL) as belonging to the "person whom the decision concerns". Additional criteria are that the decision affects him or her adversely and that it is appealable, which it always is as long as the decision involves the "exercise of authority" in a very broad sense. In some pieces of legislation or case law, you can find definitions relating to "an interest which is protected by the law" or even "rights that have been infringed", but basically the delimitation of who is entitled to appeal – the "public concerned" – goes back to the general and quite vague definition in FL. To get a clearer picture of those persons, one must study the case law that has been established in each administrative area or even under specific pieces of legislation. For example, people living in the vicinity of an activity or an area can be regarded as concerned by administrative decisions according to the MB, but not according to the PBL. In some areas of administrative law which are heavily influenced by EU law – such as environmental law, competition law and procurement law – the progression of legislation and case law on standing has been quite rapid. However, also in other areas of modern administration there has been a development of the concept of standing along the lines of "good government", such as laws concerning children (custody, detention, etc). In other areas influenced by European law, even competitors and other stakeholders can challenge an administrative decision by way of appeal. This is for example the case according to decisions on public procurement, patents and marketing. Generally, one can therefore claim that there has in recent years been a broadening of the circuit of actors who can appeal and represent themselves before the administrative courts. As examples of this trend, one may mention the following two cases: RÅ 2006:9 where the HFD allowed a competitor to appeal a registration decision of a pharmaceutical drug by the Medical Products Agency and RÅ 2006 ref. 10 where HFD allowed an under aged child to launch an appeal of her own against a court judgment to quash an administrative decision on detention for drug abuse, despite the fact that her parents did not appeal.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

The Swedish concept of standing in administrative cases is strongly "interest-based". If the provisions in an Act are aiming at protecting certain interests, the representatives of those interests can challenge the decision by way of appeal. Generally speaking, there is no *actio popularis* in Sweden. As stated above, the



exception to this, is the possibility for a legality control of certain municipal decisions under KL (see 1.1) Broadly speaking, such an action can be brought against any statement by the local council (municipal or city) or decisions by their authorities, but only if the decision is not challengeable by way of ordinary administrative appeal. Any "member of the municipality" (citizen) can launch an action for such a legality control, including companies and other legal entities which own real estate in the municipality. The scope of the trial is decided exclusively from what the applicant has invoked in his or her written representation to the court and the procedure is cassatory.

To my understanding – and if such a comparison is possible – the Swedish administrative procedure is similar to the Dutch/French idea of "recours subjectif".

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

The reconsideration of administrative decisions is a duty for the deciding authority if it finds the decision manifestly wrong due to new circumstances or other reasons (sections 27 and 28 FL). The authority may undertake such a measure of its own accord or when the decision is appealed. In the latter situation, the appeal lapses if the authority decides in full congruence with the complaint. It is common for reconsiderations to be dealt with by the deciding authority. However, under certain administrative legislation, reconsiderations are done by a higher level or a special organ within the administration, for example in the Swedish Insurance Agency and National Tax Authority. It should be noted, however, that asking for administrative reconsideration of a decision is not a prerequisite for bringing appeal.

Decisions by the municipalities commonly are appealed to the County Board within the normal procedure of administrative appeal, but otherwise, those two levels are distinctly separate. There are no connections between the regional and the municipal level and the County Board can – outside the appeals procedure – intervene in local decision-making only if explicitly allowed in specific legislation, which is so in just a few situations relating to the protection of certain national interests.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

On the generality of the question, see 2.1. Commonly, it is not very problematic to determine who belongs to the "public concerned" in a typical "two-party case", that is a case between an applicant and the authority or an authority and an addressee. The applicant/addressee can appeal if the decision affects him or her adversely. If the appeal body subsequently alters the decision, the deciding body can then appeal. Things become more complex when a decision affects a wider circuit of people. Obviously, "multi-party cases" can be found in environmental and planning law, but also in many other cases such as decision-making concerning permits for serving alcohol in public places. In some of these "other" areas of multi-party cases, case law on standing has become more generous in letting, for example, neighbours complain when they are affected by such decisions.

The criterion for standing in a case is one and the same throughout all instances in the appeal procedure. Leave for appeal is required to bring an appeal to the administrative courts of appeal and Environmental Court of Appeal), the Supreme Administrative Court (HFD) and the Supreme Court (HD). However, it is not required when the public concerned seeks judicial review of a governmental decision in the HFD pursuant to Act 2006:304.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

As said above, the administrative procedure is reformatory and therefore includes all kinds of "actions" (annulment, performance, altering the decision, remit, etc.). In some areas – such as market law and competition law – the court has the power to intervene with even stronger instruments, such as positive injunctions. The standing criterion in an administrative case is always one and the same. Actions for damages can only – as a general rule – be brought in the ordinary courts. In such an action, everybody but clear fools or busybodies are allowed to bring the case at the risk of having to pay for their own as well as their opponents' litigation costs ("loser pays principle" in full).

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

As already stated, the concept of standing is case law driven and differs from one area of administrative law to another. To be able to fully answer the question, one must study every specific piece of legislation and the body of case law developed under it. However, additional requirements for standing are expressly made in certain legislation, e.g. a demand for activity. To be able to appeal a decision on a local plan according to PBL, the public concerned must have voiced their opinion during the participation phase – when the proposed plan is exhibited – of the decision-making.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

The standing criteria do not change according to the nature of the claimant so long as the person, company or organisation represents their own interest as a member of the public concerned, stakeholder, operator of a business, owner of real estate, etc. As with civil rights and obligations protected by the ECHR and its case law, both natural and legal persons represent interests that they can defend by legal means in the administrative courts.

There are no connections between the regional and the municipal level, and the County Board can only – outside the appeals procedure – intervene in the local decision making if it is so afforded by law. This is rarely the case, only in a few circumstances to protect certain national interests, for example "areas of national interests" for reindeer husbandry, fishing, nature conservation, outdoor recreation, shore protection, minerals, energy production and defence according to the MB.

The general means for protecting regional and national interests lie within the possibility for public authorities to appeal administrative decisions. As mentioned above, the deciding body – be it a municipal body or national/regional body (“state authorities”) – always has the ability pursuant to the Administrative Court Procedure Act (1971:291, FPL) to appeal a judgment repealing the original decision. In addition to this, in case law, municipalities have been granted standing to protect their interests before the administrative courts, appealing decisions by other administrative bodies. State authorities are able to appeal administrative decisions only if allowed by explicit legislation. In almost every piece of administrative legislation, such provisions exist, allowing different regional bodies (mostly county boards) or national agencies to protect their “sector interests”.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No such variations are made in the standing rules or case law.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

In earlier years, Article 6 of the ECHR and its demand for a fair trial were referenced, which allowed for individuals to appeal certain administrative decisions affecting their interests. However, in other cases, the courts were surprisingly reluctant to allow standing even in clear cases of the exercise of authority against individuals. For example, the decisions of the Swedish/Finnish Border River Commission never were appealable, clearly in breach of the ECHR. Today, the Commission is closed and since 2006 there is an opening provision in section 3 FL, stating that the Act is always applicable when it is necessary in order to provide for a fair trial in the determination of civil rights and obligations according to Article 6 of the ECHR. Other articles of the Convention, however, have left few traces in Swedish administrative case law on the issue of standing, despite the fact that the Convention has been part of Swedish law since 1995 (Sweden has a monistic tradition with regard to international agreements). In substance, however, the Convention has had a tremendous importance, for example in cases concerning police powers and custody of children. Also, in cases concerning misconduct by public authorities, the Supreme Court has decided that damages can be granted based directly on ECHR, even in situations where Swedish law is not applicable (see for example NJA 2009 s. 463).

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

According to the basic idea of administrative procedure, all parties that are affected by an administrative decision and its preparation are able to participate and – at the end of the day – appeal the final outcome. In principle, this is true irrespective of the nature of the administrative decision making. Such “multi-party cases” exist within several areas of administrative law, and are most common in areas concerning the environment, planning and building, security, public order, etc. If

someone other than the primary parties in an administrative case appeals and is granted standing, he or she can vindicate his or her own interest. Thus, such an "other counter-party", "withstanding party" or whatever they are called in the administrative courts is not at all dependent on the primary parties to advocate his or her interest. The time-frame for "third party intervention" – which actually is a concept belonging to civil procedure and less suitable for use in the administrative court procedure – is the same as for all parties in the administrative procedure, that is the time-frame for appeal, normally three weeks from publication or notification of the decision. As always in the Swedish administrative procedure, natural and legal persons are treated alike as long as they defend their own interests.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

No.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

An expanded right of civil action is afforded by the Act on Group Action (2002:599, LGR), containing provisions on "group action" and "NGO action". A group action can be brought to a general court and it can be initiated by a private person representing the interest of a group. An "NGO action" can be initiated by a non-profit association which, according to its statutes, has the purpose of defending the interests of consumers or employees in a dispute concerning purchases, services, conditions of employment, etc. with professional counterparts. In addition to this, both group actions and NGO actions can be brought to claim damages or protective measures from an operator of environmentally hazardous activities according to the Environmental Code (MB). Organisations awarded such a possibility in the MB are "non-profit organisations which according to their statutes are defending the interests of nature conservation or environment protection" or associations of professionals within the fishing, agricultural, reindeer herding or forestry sector.

In addition to this, according to the Act on Group Action, a public authority representing a certain interest may initiate a "public group action" if so afforded by other legislation. Such rights have been granted, for example, the Consumer Ombudsman (KO) and the Equality Ombudsman (DO), the latter being a government agency that seeks to combat discrimination on grounds of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age. In addition to these two institutions of ombudsmen, there is also an Ombudsman for Children (BO). His or her assignment is to represent children as regards their interests on the basis of the UN Convention on the Rights of Children (CRC). Although the BO can require information and summon parties to negotiations, he or she cannot bring any cases to court.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

See above

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

See above

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

The Parliamentary Ombudsman (JO) and the Chancellor of Justice (JK) both are designated to ensure that public authorities and their staff comply with laws and other statutes. They have a disciplinary function and act through opinions and – rarely – prosecution for administrative misconduct. The Ombudsmen cannot intervene in an individual case and the institution is therefore not regarded as an effective remedy according to Article 9 of the Aarhus Convention. However, although the JO can only examine a case after it has been decided, and his or her scrutiny is limited to the handling of the case, the opinions have great importance for the understanding of the concept of “good governance”.

## 6. General (“diffuse”) interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The possibility to protect a “diffuse interest” in administrative law lies mostly and most importantly within in the environmental area. According to Chapter 16 sections 13 and 14 of the Environmental Code (MB), a “non-profit association whose purpose according to its statutes is to promote nature conservation, environmental protection or outdoor recreation interests” may appeal decisions on “permits, approvals or exemptions” pursuant to the Code. Additional criteria for such NGO standing are that the organisation has been active for at least three years and has 100 members or else can show that it has “support from the public”. The possibility for NGOs to appeal certain environmental decisions originally was established in the Environmental Code in 1999, although then the numeric criterion was 2,000 members. However, due to the judgment by the CJEU in the DLV case (C-263/09), the legislation was reformed in 2010. Further reforms have been made to meet the access to justice provisions in the ELD (2004/35), enabling NGOs to appeal supervisory decisions concerning contaminated land.

The provision on access to justice by NGOs in the Environmental Code has also been expanded to certain other laws dealing with infrastructural projects, mining, electric power lines, and so on. A similar provision has been introduced in the Planning and Building Act, however, that deals only with activities that are relatively insignificant to the environment. Important is the possibility open to NGOs to apply for judicial review of governmental decisions in accordance with Act 2006:304. Here, it is stated that NGOs meeting the criteria of the Environmental Code shall have the possibility open to them to challenge any such governmental decisions to which Article 9.2 of the Aarhus Convention applies.

However, NGO access to justice is not provided by important environmental legislation outside the Code, such as the Forestry Act and the legislation on hunting. Although vital parts of the Habitats Directive are implemented by this legislation, decisions pursuant to those laws cannot be challenged by NGOs. The devastating effects of this fact have been illustrated by recent legislative reforms to increase the hunting of wolves in Sweden. As everyone is aware, this reform has triggered the European Commission to launch infringement proceedings against my country for

breach of Article 12 of the Habitats Directive.

The experience of NGO standing has been very positive in Sweden and the general opinion is that the organisations have used the possibility in a responsible manner. The most common appeals made by the Swedish environmental NGOs – mainly the Swedish Society for Nature Conservation (SNF) and the Swedish Ornithological Society (SOF) – since 1999 have been concerning permits to industrial installations and water works, exemptions to species and habitats protection and shore protection. At several occasions since 1999, there have been proposals from governmental commissions to expand NGO standing to all kinds of decisions under the Environmental Code, for example in the recent report from the Commission on the implementation of ELD (SOU 2012:XX). Due to fierce resistance from industry and despite the threat of another infringement case brought by the Commission on this matter, these proposals have not survived negotiations within the governmental offices.

Outside of environmental law, there are some provisions on NGO standing here and there in administrative law. For example, organisations representing employers and employees can appeal certain administrative decisions according to express provisions in the legislation concerning safety at work and food safety. According to case law, groups of tenants have been allowed to appeal decisions about serving alcohol in the vicinity (RÅ 1994 ref. 82).

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

See above

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

I would say that the traditional stance of the courts on individuals' standing is rather generous in most areas of administrative law. In addition to this, they have also been quite sensitive to modern developments in the concept of standing. As a contrast to this, stands the negative role played by the courts regarding NGO standing. One would have thought that such a closed system as the Swedish would have resulted in judges "making right what ought to be right". In other countries, such as the UK, the courts have been at the forefront of facilitating access to justice for environmental NGOs. No such perspective has been present in the Supreme Court or the Supreme Administrative Court in Sweden. Not even the Environmental Court of Appeal, which in other issues has taken a distinctly environmentally friendly position, has played a progressive role with respect to this issue. The only exception has been the Council of Legislation, when dealing with legislative efforts to implement the Aarhus Convention. A reason for this is perhaps that one of three justices of the Council who dealt with Aarhus issues from the beginning was also chairman of the Swedish Tourist Association.

It is also worth mentioning that the Swedish position differs greatly from that of Finland, our neighbouring country with which we share administrative and legal traditions. The Finnish Supreme Administrative Court (HFD) has regarded itself as the ultimate defender of the primacy of EU law on environmental issues. With reference to the Finnish Constitution, where the protection of the environment is

emphasised, and with reference to international development in the area, HFD has in two landmark cases expanded the right of NGOs to appeal in situations where no such right previously existed. The most recent case dealt with a decision on hunting the wolf. Two regional environmental NGOs were allowed to appeal, although the hunting legislation left no room for NGO access to justice. An important rationale behind HFD's position was that someone has to be able to challenge decisions concerning the implementation of EU law.

The statements above can be illustrated by the following landmark cases on standing in environmental law in Sweden. Summaries of all of them are published on the Clearinghouse for Environmental Democracy, a website under the Aarhus Convention (<http://aarhusclearinghouse.unece.org/>).

a. Supreme Court:

NJA 2005 s. 590 I: Public concerned (neighbours) – The ambition of the Swedish Environmental Code is to introduce a uniform and generous definition of “the public concerned”. Each person who may suffer any damage or nuisance from an activity – if the risk of such an impact concerns a legally protected interest and is not merely theoretical or insignificant – shall have the possibility to appeal a permit for that activity.

b. Supreme Administrative Court

RÅ 1993 ref. 97: Public concerned and the public interest – When an individual appeals a permit decision, both private and public interests can be invoked to advocate his or her cause.

RÅ 1997 ref. 38: Standing for individuals – the right of appeal is given to any person at risk of suffering harm or detriment caused by a decision, if that risk is not merely theoretical or completely insignificant.

RÅ 2005 ref. 44: The public interest and the scope of EIA – Individuals, who are affected by a local development plan are able to invoke the public interest to advocate their cause. An environmental impact assessment for such a plan should cover all relevant impacts of the development in order to be able to take them into account in the decision making.

c. Environmental Court of Appeal

MÖD 2001:29: The definition of public concerned (neighbours) – Neighbours cannot appeal decisions which only concern the public interest as their individual interest is not affected.

MÖD 2002:82: The definition of the public concerned – Individuals living 5 km from an incineration plant and thus at risk of being affected by air pollution were allowed to appeal the permit decision for that operation.

MÖD 2003:19: Public concerned and omission by public authority – A decision of a supervisory authority not to intervene in a certain activity (a so-called 0-decision) can be appealed and its substance can be challenged by the public concerned.

MÖD 2003:98 & MÖD 2003:99: The definition of the public concerned – When deciding on whom should be given the right to appeal a permit decision, decisive

factors are the distance to the activity, the nature of the emissions (discharged substances) and the likely effect from them.

MÖD 2004:31: Public concerned and omission by public authority – A decision of a supervisory authority not to intervene in a certain activity (a so-called 0-decision) can be appealed and its substance can be challenged by the public concerned.

MÖD 2011-12-12; M 2554-11: Public concerned and omission by public authority – A decision of a supervisory authority not to apply for revocation or updating of a permit (a so-called 0-decision) can be appealed and its substance can be challenged by those who are affected by the activity.

7.2. Are there significant variations in the courts' approach based on:

7.2.1. the type of remedy requested?

No, see above.

7.2.2. the field of substantive law at hand?

Yes, the standing criteria is defined in case law under each specific area within administrative law, see above.

7.2.3. the nature of the claimant?

No, see above.

7.2.4. the nature of the claim?

No, see above.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

There is no such tendency. The issue of standing is strictly separated from the substance of the case and is adjudicated by the court as a "preliminary issue" no later than the first round of communication (written appeal and first response from the counterpart). The preliminary decision exclusively concerns the standing issue, thus leading to situations where even clear cases of administrative misinterpretation of law or misuse of power never can be tried in court because the appellant is not regarded as affected by the decision.

7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

See above

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

Not in general and not immediately. Some private bodies dealing with "environmental information" according to the Aarhus Convention and directive 2003/4 were regulated in a separate piece of legislation (2005:181), which enables the public to ask for such information and appeal to a court if this request is rejected, in line with the Swedish principle of open government.



- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

The reforms of the NGO standing provisions after the ratification of the Aarhus Convention in Sweden in 2005 and the implementation of directive 2004/35 have been made generally applicable to all activities that are covered by the Environmental Code and related legislation, see above under 6.1-2. Thus, the provisions also cover permits, approvals and exemptions outside the scope of EU law. The same goes for supervisory decisions on contaminated land according to the Code.

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

In the aftermath of the DLV case, the Swedish courts set aside the numeric criterion for NGO standing in the Environmental Code, referring directly to the CJEU's judgment and to the "direct effect" of the provision in directive 85/337. There has not been any reference made in case law directly to provisions of international and EU law on environmental rights or access to justice in either Article 47 in the Charter of Fundamental Rights of the European Union, Article 19 in the Treaty of the European Union or Articles 6 and 13 of ECHR, be it in lower courts, the Environmental Court of Appeal, the Supreme Administrative Court or the Supreme Court of Sweden. However, in some cases – for example in MÖD 2011:XX mentioned above – the courts have referred more generally to "our international obligations" in the area.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

See above.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

See above.

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

There has been a vague tendency among the lower administrative courts and environmental courts towards widening NGO standing in environmental matters even outside the scope of EU law. This has for example been the case concerning a controversial decision by the Swedish Forest Agency on a clear-cutting operation in a sensitive area in the mountains (the Änok case). However, it remains to be seen how the higher instances will react to these efforts from the lower courts to expand access to justice. As mentioned above, so far, both the Environmental Court of Appeal and the Supreme Administrative Court of Appeal have been quite reluctant

to accept such a legal development. A decision on the hunting of a wolf where SNF was denied standing in the lower courts lies for the moment in the Supreme Administrative Court awaiting a decision on leave to appeal. To my knowledge, if SNF is denied standing here, the organisation will bring the case to the Aarhus Convention Compliance Committee.

**9. Other**

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(SWEDEN)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

There are three main types of courts in Sweden: general courts, general administrative courts and several special courts. General courts have jurisdiction over both civil and criminal cases and they can hear civil claims in criminal proceedings in certain circumstances. The general courts are organised in a three-tier system. The district court is the court of first instance. There are 48 district courts across the country. They vary in size, from about ten to several hundred employees. The next level is the court of appeal. There are six courts of appeal. The Supreme Court is the court of last resort. It consists of a minimum of 14 justices.

If it is suspected that a crime has been committed, the police are under a duty to investigate the suspicion through a so-called 'preliminary investigation'. The police work under the conduit of a state prosecutor. The police or the prosecutor is responsible for the preliminary investigation. The prosecutor has the obligation to decide on the issue of whether the case should be pursued further to court. If the evidence of a crime is strong the prosecutor has an obligation to bring it to court. Criminal cases are normally instituted when a public prosecutor initiates prosecution proceedings against a suspect by submitting a summons application to a district court.

The hearings in court are open to the public. Normally it is mandatory for the defendant to be present at the hearing. The underlying principles of the process are those of orality, immediacy and concentration. This means that the court rules on cases after a main hearing attended by both parties, who orally state their claims and other circumstances relating to the case. During the main hearing any witness and expert is heard and other evidence is also presented. Witnesses shall be questioned before the court and their testimony can only be presented that way. However it might happen that a witness is present via telephone.

Criminal cases are normally tried by one judge and three lay judges. In general, a party is free to lodge an appeal against a district court's decision with the court of appeal. In certain cases, a case can only be given a full review by a court of appeal after the court has granted leave to appeal. In the Courts of Appeal, criminal cases are decided by three judges and two lay judges, each of them with one vote. A party who is discontent with the verdict of the Court of Appeal may take it to the Supreme Court. Although there is no obligatory rule of stare decisis, the Supreme Court is meant to establish jurisprudence and its rulings are highly persuasive. A case can only be given a full review after the court has granted leave to appeal. This is granted by the Supreme Court itself. A belief that the court of appeal has adjudicated incorrectly in a matter, is consequently not sufficient for leave to appeal to be granted. This means that the court of appeal is in practice the final instance

for most cases. If leave to appeal is granted, the case is normally heard by five justices.

In cases of a simple nature, the court normally delivers its judgment immediately. If the defendant in a criminal case is detained, the court is to pronounce its judgment no later than one week after the completion of the hearing.

1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

A victim of a crime has a central role before the court in a criminal case. The prosecutor regularly needs the victim's testimony before the court as evidence. Within the prosecutors need for evidence the victim has a right to be heard in court.

According to the Swedish Code of Judicial Procedure, Chapter 46 section 6, paragraph 1 (hereafter 46:6, 1), the aggrieved person shall, to the extent required, be furnished with an opportunity to present his action. When a main hearing is held despite the absence of the aggrieved person or the defendant, the court shall see to it that the absentee's statement shall be presented from the documents to the extent needed. (46:6, 3) If the aggrieved person is not a party to the proceedings and it is not improper in view of the circumstances, the court may direct that the aggrieved person shall not be present at the main hearing prior to his examination. (46:8)

In a criminal case the aggrieved person may not be heard as a witness under penalty of fine or detention even if he is not a party to the proceedings (37:1 and 37:21). Instead, the aggrieved person is examined for the purpose of obtaining evidence. An aggrieved person, who is a party to the proceedings, has a right to put additional questions to the defendant and to witnesses. (37:1 and 36:17)

The aggrieved person can claim damages from the defendant. If necessary, the prosecutor can assist with this. Such a claim is in reality a civil matter but if the claim is presented in the criminal proceedings the victim has the benefit of a free trial with no risk of trial costs. If claiming compensation the victim becomes a party in the trial. However in most cases the prosecutor takes the legal responsibility to present and argue for the compensation claims. There is a limited possibility of private prosecution (20:8) and all the prosecutor's decisions can be reviewed.

If a private claim in a criminal case has been disposed of as a separate case in the manner prescribed for civil actions the examination of one or both parties for the purpose of obtaining evidence may occur under truth affirmation. (37:2)

In the event the victim needs a lawyer, the court provides a lawyer to prepare the victim for the proceedings and to be at the victim's side during the proceedings presenting the claim for compensation. That does not cost anything for the victim and is part of the legal aid system.

1.2.1. Is there a possibility of private prosecution?

Yes, although unusual in practice.

In the case of most crimes, the prosecutor has what is known as an absolute duty to prosecute. This means that the prosecutor is obliged to initiate a prosecution if he or she considers there to be sufficient evidence to prove that a crime has been

committed and that a certain person has committed it. This in turn means that not even the victim of the offence can decide what is to happen in connection with the investigations. In other words, there is nothing on the lines of "withdrawing the charges". The prosecutor must make sure that the crime is investigated, irrespective of the feelings or wishes of those involved. The reason for this is that society has an interest in ensuring that the perpetrators of the crime are also tried for it. Hence, all offences, other than those expressly excluded (defamation, gross defamation, insulting behaviour), fall within the domain of public prosecution (20:3, 1). Unless otherwise prescribed, a public prosecutor is empowered to prosecute offences falling within the domain of public prosecution (20:2, 1). Unless otherwise prescribed, prosecutors must prosecute offences falling within the domain of public prosecution (20:6).

Exceptions are made for certain offences where it may be felt that the interests of the general public in legal proceedings are not strong enough. Certain offences may be prosecuted by a prosecutor only if the injured party reports the crime for prosecution or if prosecution is called for in the public interest. A prosecutor's decision not to prosecute such an offence may be challenged, ultimately by the Prosecutor General. Examples of such offences are defamation, breach of domiciliary peace and crimes of unlawful appropriation within the family.

Sweden permits a private prosecution by a victim for an offence falling within the domain of public prosecution, provided the victim has reported the offence to a prosecutor and the prosecutor has declined to act (20:8, 1). When a public prosecution is withdrawn on the ground that there is insufficient reason to believe that the suspect is guilty of the offence, the aggrieved person may take over the prosecution.

When a prosecutor has instituted a prosecution, the aggrieved person may support the prosecution; he or she may also appeal to a superior court (20:8, 2). The victim may support a prosecution that has been commenced by a prosecutor by posing questions to the accused and witnesses, adjusting the description of the criminal act and presenting views on the punishment to be invoked.

#### 1.2.2. Can a victim request review of a decision not to prosecute?

Yes, it is possible to request a review of a prosecutor's ruling concerning, for example, a discontinued preliminary investigation or a decision not to bring charges. (7:2 and 7:5)

If a request for a review is received by a public prosecution office, first of all the prosecutor who made the ruling shall decide whether or not any new circumstances have come to light in the matter. If new circumstances are cited, the prosecutor reconsiders his/her decision. If this reconsideration fails to result in any change to the original ruling, the matter is referred to the prosecution development centre. The same applies if there are no new circumstances to be considered in the case.

At the prosecution development centre, the case will be reviewed by the Director of Public Prosecution, who will then make a decision on, for instance, the resumption of a discontinued investigation or that certain investigation measures should be taken. The case is then referred back to the original public prosecution office, but to a different prosecutor. Decisions made by a prosecution development centre can

also be reviewed, and the matter will in this case be handled by the Office of the Prosecutor-General.

During 2008, over 2000 rulings by prosecutors were reviewed at the four prosecution development centres. This is less than 1 per cent of all the prosecutor rulings that were made during the course of the year. Prosecutor rulings were revised in 220 cases (approximately 11 per cent of the reviews conducted and some 0.04 per cent of all prosecutor rulings).

At the time being rulings by prosecutors cannot in principle be appealed. The exception in the Swedish 1986 Administrative Procedure Act that the provisions on the right of parties to be informed and appeals, etc. do not apply to the executive activity of the police authorities and public prosecutors, is under review and might be repealed within short. (Section 32). (Preparatory work, see Swedish Government Official Reports series, SOU 2010: 29)

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

If you are summoned to the police or the public prosecutor, you are entitled to reimbursement for expenses incurred in connection with the questioning. This may be expenses for travelling and accommodation, compensation for loss of income or other kinds of financial loss. However, there is a maximum limit for reimbursement for loss of income.

If you have been summoned to appear in court at the request of a public prosecutor, you have the right to be reimbursed for expenses you have incurred in order to come to court. Sometimes, the presiding judge will ask whether you have any such claims directly after you have been heard. However, it is more common that the matter of reimbursement is dealt with at the court's reception desk after the hearing. Then you request reimbursement and will be told how much you can be given. The amount will be paid out to you straight away. If you have high costs, you may be able to receive advance payment.

In principle, you can claim damages for all damage and injury incurred in connection with the crime. A claim for the return of property is also permitted and will be handled the same way. As a rule, a claim for damages is assessed by the court simultaneously with its assessment of whether or not the defendant is guilty of the crime. It is the injured party who must claim damages from the person who has committed the crime and caused the injury or damage. To facilitate this, the prosecutor must prepare and present the claim for damages at the hearing if you so request. The prosecutor can make exceptions if the question of damages requires extensive investigation or if the claim is clearly unjustified, that is either it has no connection with the crime or is much higher than is normal in similar circumstances.

If the prosecutor is not presenting your claim for damages and if you do not have a counsel, you yourself can bring action for damages. If you have incurred expenses in this connection, for example for your own lawyer or for the provision of evidence, you have the right to demand compensation from the defendant for such legal expenses. If the defendant is sentenced to pay the damages you have requested, then as a rule he or she will also have to pay your legal expenses.

#### Criminal injuries compensation

In principle, a person who commits a crime is obligated to pay for the damage or injuries the crime gives rise to. If the offender cannot pay the damages and if you do not have insurance that covers the injuries fully, you may be able to receive financial compensation from the state, known as criminal injuries compensation.

In order for criminal injuries compensation to be paid out when the offender is unknown, there must have been an inquiry such as a preliminary investigation which shows that you have been subjected to a crime and not merely had an accident. The crime must always have been reported to the police. If the suspect has been identified, a conviction or a summary imposition of a fine is required in principle.

Compensation is paid out primarily for personal injuries. You may receive compensation for both psychological and physical injuries arising from the crime. A number of criminal acts entitle a person to compensation for violation of personal integrity. This right applies if the crime is considered to be a serious violation of your personal integrity, your private life and human dignity. The chances of receiving criminal injuries compensation for loss of or damage to property, for example through theft, or a pure financial loss, for example through fraud, are severely limited. Such compensation will normally only be paid if the offender, when he or she committed the crime, was an inmate of a prison, a certain type of institution for the care of young people or substance abusers, or a police arrest cell. A child who has witnessed violence in a close relationship may be entitled to criminal injuries compensation. One prerequisite is that the crime would typically be assumed to harm the child's confidence and trust in a person with whom he or she has a close relationship. In order to receive criminal injuries compensation, you must submit a written application, using the form provided by the Crime Victim Compensation and Support Authority. The general rule is that an application must be submitted to the Authority no later than two years after the conclusion of legal proceedings.

#### Measures for personal protection

There are a number of measures intended to improve the safety of threatened persons. A contact ban means that the person threatening and harassing you is forbidden to visit you, follow you or contact you in any other way, such as by letter, text message, telephone or through friends. Such an order may also be extended so that the person in question is forbidden to come near your home, place of work or any other place you normally visit. It is the prosecutor who decides whether to impose a contact ban. If the prosecutor decides not to impose a contact ban, you may request the District Court to review the decision. A person who violates a contact ban may be sentenced to pay a fine or to imprisonment for up to one year.

If you have been subjected to a crime and the offender has been sentenced to imprisonment or is undergoing institutional psychiatric care as a result, the prison management has an obligation to inform you if the convict is granted leave, if he or she escapes, is transferred to another prison or is released. As an injured party you will be asked whether you want this kind of information.

If you need to keep your address secret to avoid threats and other kinds of harassment, you may request restricted public access to your personal data stored

in the National Population Register. Such a measure also involves all other official registers updated via the National Population Register, for example the Motor Vehicle Register or the Driving Licences Register. Another way of protecting personal data is to register a threatened person who has moved or who intends to move under his or her old address in the National Population Register. Another way of increasing your personal protection is to change your name.

People subjected to severe threats may sometimes be issued with a security package, comprising a mobile telephone and an alarm system. The package can be borrowed from the local police authority after special review. If there is a risk of very serious crime against your life, health or freedom and none of the other protective measures are deemed adequate, you may be granted permission to use an assumed, that is, fictitious, identity. An application to use an assumed identity is made to the National Police Board.

#### Insurance

Some insurance policies, for instance, household insurance, include a legal expenses clause. This means that your insurance company may reimburse you for the cost of employing a lawyer etc. in connection with a civil action for damages. Insurance policies usually contain a clause requiring that you pay part of the cost as excess.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

The general courts have jurisdiction in both criminal and civil cases. The possibility for a party to select a court is very restricted in our jurisdiction. An action against the suspect or a third person for a private claim in consequence of an offence may be conducted in conjunction with the prosecution of the offence. When the private claim is not entertained in conjunction with the prosecution, an action shall be instituted in the manner prescribed for civil actions. (22:1)

During the inquiry of an offence, if the investigation leader or the prosecutor finds that a private claim may be based upon the offence, he shall, if possible, notify the aggrieved person in sufficient time prior to the institution of the prosecution (22:2, 2). If the aggrieved person desires to have his claim entertained together with the prosecution, he shall notify the investigation leader or the prosecutor of the claim and state the circumstances upon which it is based (20:2, 1). When a private claim is based upon an offence subject to public prosecution, the prosecutor, upon request of the aggrieved person, shall also prepare and present the aggrieved person's action in conjunction with the prosecution, provided that no major inconvenience will result and that the claim is not manifestly devoid of merit.



- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

In brief the police and the prosecutor are obliged to inform you of the following:

- your possibilities of receiving damages and criminal injuries compensation,
- that the prosecutor, if you so request, is usually obligated to prepare and present your claim for damages in court,
- the regulations governing visiting bans, legal counsel for the injured party, and a support person,
- how to apply for legal aid and legal advice,
- authorities and organisations offering additional support and assistance,
- the investigation not being initiated or being discontinued,
- bringing a legal action or not.

If the public prosecutor or the police have decided to discontinue the preliminary investigation, you as the injured party, will normally be notified. You will also be informed if the prosecutor decides not to initiate an investigation or to waive prosecution. If you are not satisfied with a decision made by the police, you may request that it be reviewed by the public prosecutor. If you are not satisfied with a decision made by the prosecutor, you can request that a senior public prosecutor reviews it. A discontinued preliminary investigation that shows that you have probably been subjected to a crime can entitle you to damages via an insurance policy or to criminal injuries compensation from the states.

The prosecutor shall be given notice to appear at the main hearing. The aggrieved person shall also be given notice to appear if he joins in the prosecution, or otherwise is a party to the proceedings together with the prosecutor or shall be heard on account of the prosecution's action. If the aggrieved person shall appear in person, the court shall direct him to do so under penalty of fine. (45:15, 1)

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Yes, the summons application shall be dismissed if the court finds it plain that the person initiating the prosecution is not harmed by the crime, or that the case, by reason of any other procedural impediment, cannot be heard and determined (45:8).

When by an act or ordinance the prosecution of an offence may be instituted by a private person other than the aggrieved person, he shall be regarded as the aggrieved person in relation to matters concerning the right to report and prosecute an offence and to institute a prosecution.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

A criminal penalty is of such intervening nature that the legislature has reserved the right to initiate a criminal proceeding, beside the general rule of public prosecution,

to those against whom the offence was committed or who was affronted or harmed by it, i.e. the aggrieved person. "The aggrieved person is the person against whom the offence was committed or who was affronted or harmed by it." (20:8, 4) The aggrieved person is bearer of the interest the penal provision aim to protect. Of interest are also the functions of redress and control underlying the aggrieved person's possibility to prosecute.

The right of the aggrieved person is seen as a right of a personal nature. The right of private prosecution is not transferable and the right of the aggrieved person cannot pass by inheritance. When a criminal act has resulted in the death of a person, the decedent's surviving spouse, direct heir, father, mother or sibling succeeds to the right of the aggrieved person to report the offence or prosecute the offence (20:13, 1). Nevertheless, dependent persons amongst this group of persons might be regarded as aggrieved persons under 20:8, 4). When the person against whom the offence was committed, or who was affronted or harmed by it, dies, the persons related to him as aforesaid have the same right to report or prosecute the offence if the circumstances do not indicate that the deceased would have chosen not to report or prosecute the offence (20:13, 2).

A legal person including a governmental or non-governmental organisation can be considered a victim if the necessary preconditions for an aggrieved person are fulfilled. There are several examples of cases where public authorities have been granted standing to bring an action concerning crimes threatening the authority's private interests.

An aggrieved person, who is examined in aid of the prosecution's case, may be accompanied at the examination by a suitable person as support (supporting person "stödperson") during the trial. A supporting person known to the court shall, if possible, be given notice of the trial. (20:15, 1).

In certain cases, counsel for the aggrieved person "målsägandebiträde" can be appointed pursuant to the Act concerning Counsel for the Aggrieved person. (20:15, 2). According to this act, victims have a right to a legal representative if the alleged act may lead to imprisonment. The legal representative helps the victim to raise the claim before and during a trial, and to appeal the judgment if necessary. Counsel can be appointed as soon as the preliminary investigation has been initiated. You can also make a request for counsel direct to the District Court. It is the District Court that decides whether you are entitled to a counsel and if so, the court will appoint the counsel. You are allowed to make a request regarding whom the court shall appoint. Counsel, who is usually a lawyer, will look after your interests and give you guidance and support during the investigation and the hearing. Counsel can also help you by assisting the prosecution and presenting your claim for damages. Counsel is free of charge for you. However, counsel's mandate ceases after the hearing and does not include help to bring about the payment of damages or other compensation.

Counsel for the aggrieved person shall be summoned to the main hearing, or other sessions of the court, at which the aggrieved person or the legal representative of the aggrieved person is to be examined. (20:15, 3).

If the preconditions for acquiring the services of a legal advisor are not fulfilled, the

prosecutor may inform the victim of the possibility to instead seek the help of an assistant from a voluntary organization. A number of associations work voluntarily to provide crime victims with help and support. The most widely established, found in many places all over the country, are women's shelters and crime victim support centres. In addition there are a growing number of more specialized crime victim support organisations. The larger centres may have paid staff but most active members work on an entirely voluntary basis. All the people who work for such organisations are bound by professional secrecy.

Victim support centres provide help to victims of all types of crimes, for example assault, burglary, bag-snatching, molesting, robbery and unlawful threatening. When a crime is reported to the police, the victim will be informed of the local victim support centre and other support activities. The police will also ask the victim whether he or she wants to be contacted by the victim support centre. The victim support centres can offer help through a support person and many also run a witness support service. The nationwide organisation is called the Victim Support Sweden (BOJ).

In addition, there are a number of acts that although not applicable in criminal proceedings, still deserve to be mentioned as a comparison.

For example, each Member State amended its national legislation to a greater or lesser extent to introduce the provisions of the Directive on injunctions (Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest.) One very important result of the Directive is certainly the introduction in every Member State of an injunction procedure to protect the collective interests of consumers. This procedure is currently the only procedure specifically concerned with protecting consumers that exists in all the Member States. It enables illicit practices to be stopped in the collective interest of consumers, regardless of any harm actually caused. The injunction procedure introduced by the Directive does not, however, provide for consumers who have suffered harm because of an illicit practice to obtain compensation. Some Member States, notably Germany, Slovenia and Sweden, have extended the scope of injunctions, at national level, to include commercial practices (such as misleading advertising) detrimental to the collective interests of companies. A major benefit of the Directive has been to introduce in each of the Member States a procedure for bringing injunctions to protect the collective interests of consumers. This procedure is being used by the consumer associations with some success for national infringements. (COM(2008) 756 final REPORT FROM THE COMMISSION concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest). This directive has been implemented in Sweden ("lagen (2000:1175) om talerätt för vissa utländska konsumentmyndigheter och konsumentorganisationer samt marknadsföringslagen"). These laws grant certain governmental or non-governmental organisations standing.

Non-governmental organisations may in certain cases have standing before Environmental courts concerning damages. In addition, non-profit organisations whose purpose according to their statutes is to promote nature conservation or environmental protection interest may appeal certain judgements or decisions. The associations must have operated in Sweden for at least three years and not have

less than 100 members. This last criterion has been changed from 2,000 to 100 members upon being ruled to be in breach of EU law (Case C-263 Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun, ECR, 2009, p. I-9967.)

In accordance with any sanctioned environmental provision, an aggrieved party may bring a private prosecution (Chapter 47 Procedural Code). To date, there is however no general right to bring proceedings against persons who do not comply with the environmental provisions.

To date, the Swedish provisions on class actions are only applicable in civil cases. In other words, it is not possible to cumulate a class action concerning private claims with a prosecution. It has been suggested that the Swedish Act on Class Actions, could easily be made applicable also when a prosecutor brings a private claim on behalf of a group of aggrieved parties.

Nevertheless, in a private claims case that has been separated from a criminal case, the special rules on class action can still be used. For example, a group of consumers who had booked tickets by Aer Olympic were allowed to bring a class action in accordance with section 8 of the Code once the case was separated from the criminal case. (Bo Åberg ./ Elfeterios Kefales)

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

In practical legal life you hardly ever see a victim taking legal action by themselves. The victim is presented by the state prosecutor and has the most important role as evidence. Within that crime-procedure the victim normally raises claims for compensation, etc. A precondition both for supporting a public prosecution and for bringing a private claim based upon an offence subject to public prosecution is that the person is an aggrieved person according to the Swedish Code of Judicial Procedure Chapter 20 section 8.

The aggrieved person is the person against whom the offence was committed or who was affronted or harmed by it (20:8, 4).

When a prosecutor has instituted a prosecution, the aggrieved person may support the prosecution; he may also appeal to a superior court (20:8, 2).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

There are two preconditions for private prosecution. The aggrieved person must have reported the offence for prosecution and the prosecutor must have decided not to institute a prosecution (20:8, 1). In the absence of provision to the contrary, the court shall take notice of such procedural impediments on its own motion (34:1, 2).

The condition stated in the first paragraph does not limit the right of an aggrieved person to institute a prosecution for false or unjustified prosecution, false accusation, or any other untrue statement concerning an offence. (20:8, 3)

#### Review of prosecutor's decisions

It is possible to request a review of a prosecutor's decisions concerning, for example, a discontinued preliminary investigation or a decision not to bring charges. Requests for review are made by one of the Prosecution Authority's prosecution development centres. Decisions made by a prosecution development centre can also be reviewed, and the matter will in this case be handled by the Office of the Prosecutor-General. A request for review of a decision not to prosecute is admissible if brought by someone with a legitimate interest in bringing proceedings. Suspects, defendants and aggrieved persons, as well as public authorities with supervisory functions in the relevant area do have such a legitimate interest. The review procedure is not statutory but is developed in practice and is based mainly on the statements made in the preliminary works for the budget 1984/85. (Prop 2001/02:107 s 186)

#### Private claims in consequence of offences

There are three ways in which a private claim can be raised in a public prosecution. The standing requirements may differ for claims raised in civil actions.

##### 1. Private claim in conjunction with the public prosecution

An action against the suspect or a third person for a private claim in consequence of an offence may be conducted in conjunction with the prosecution of the offence. When the private claim is not entertained in conjunction with the prosecution, an action shall be instituted in the manner prescribed for civil actions. (22:1)

If the aggrieved person desires to have his claim entertained together with the prosecution, he shall notify the investigation leader or the prosecutor of the claim and state the circumstances upon which it is based. (22:2, 1)

During the inquiry of an offence, if the investigation leader or the prosecutor finds that a private claim may be based upon the offence, he shall, if possible, notify the aggrieved person in sufficient time prior to the institution of the prosecution. (22:2, 2)

When an action for private claims has been consolidated with the prosecution, the court may order that the action be disposed of as separate case in the manner prescribed for civil actions, if further joint adjudication would cause major inconvenience (22:5)

##### 2. When there is already a private claim in an ongoing civil action

When an action for private claims in consequence of an offence is entertained by the court in a separate case, the court, where appropriate, may order that the action be consolidated with the prosecution. (22:3)

##### 3. The initiation of a private claim in an ongoing public prosecution

After the institution of a prosecution, the prosecutor or the aggrieved person may initiate, without a summons, an action for a private claim based upon the offence if the court, considering the inquiry and other circumstances, finds it appropriate. The same rule shall apply when the claim has been transferred to another person. (45:5, 2)

3.3. Are there specific standing rules applicable to certain types of claims?

Yes, depending on how the aggrieved person is defined for each claim. For example, only the "aggrieved person" in an alleged breach against the Freedom of the Press Act can bring a claim for damages due to such a crime. (NJA 1978 s. 3).

3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

Given that it is so difficult to clearly deduce from the text of the fourth paragraph who is an aggrieved person, case law plays a major role in order to delimit the circle of aggrieved persons. There are specific rules for children and vulnerable persons of a supportive nature.

Counsel for the injured party

For certain types of crimes, you as a crime victim have the right to your own legal counsel. This applies primarily for crimes of a sexual nature and those involving violence in close relationships but if there are special needs it also applies for other crimes. Counsel, who is usually a lawyer, will look after your interests and give you guidance and support during the investigation and the hearing. Counsel can also help you by assisting the prosecution and presenting your claim for damages. Counsel's fees are not paid by the victim but the state. However, counsel's mandate ceases after the hearing and does not include help to bring about the payment of damages or other compensation.

For injured parties who need legal assistance, information and support, it is important that this is provided as soon as possible after the start of a preliminary investigation. It was already concluded ten years ago that the injured party counsel should have a more prominent role in the preliminary investigation. It has now been shown in various contexts that in gross sexual crimes the injured party counsel has not been appointed to the extent envisaged by the legislator or at the time intended. The time when the injured party counsel is appointed affects the standing of the injured party during the legal proceedings and is of great importance for how the injured party experiences the preliminary investigation and the court hearing. In the view of the inquiry, one way of clarifying the remit of the injured party counsel is to appoint the injured party counsel when the need for legal assistance and personal support is greatest. The same applies to the special legal representative for children. (SOU 2007:6)

Special legal representative for children

If a person who has custody of a child (usually a parent) is suspected of committing a crime against that child, the child is entitled to a special legal representative. This is also the case if the suspect has a close relationship with the person who has custody of the child. The intention is that the special legal representative will safeguard the child's rights during the investigation and at the hearing. A lawyer, assistant lawyer at a legal practice or some other person may be appointed as special legal representative. The person chosen must be experienced and have a sound knowledge of these matters and have personal traits that make her or him especially suitable for this task.

The social services

Considerable responsibility for crime victims and their relatives lies with the social services. This responsibility has been formulated in a particular section on crime

victims in the Social Services Act Chap.5 Sect.11 which has the following wording: "One of the tasks of the social welfare board is to facilitate for a victim of crime and his or her close relatives to receive support and assistance. The social welfare board should pay particular attention to the fact that women who are being or have been subjected to violence or other abuse by a person close to them may be in need of support and help in order to change their situation.

The social welfare board should also pay special attention to the fact that children who have witnessed violence or other abuse by or towards adults close to them are victims of crime and may be in need of support and help."

This could mean various forms of psychological and social support and also financial and practical assistance. Some towns can offer other forms of support too, for instance, support centres for young victims of crime, Children's Advocacy Centres (Barnahus) and sheltered accommodation.

Offences that are directed against children are particularly difficult to investigate and are therefore usually handled by prosecutors with special training and experience.

If the aggrieved person is a minor, and the offence concerns either property over which he does not exercise control or a legal transaction that he is not competent to effect, his legal representative may report or prosecute the offence. The same right to proceed on behalf of an aggrieved person is afforded to an administrator appointed pursuant to the Code on Children, Parents and Guardians with respect to property or a legal transaction covered by the administrator's assignment. If the offence involves a personal injury to the minor, the person who has custody of the child may report or prosecute the offence. The provisions in Chapter 11, Sections 2 through 5, concerning parties and legal representatives in civil actions, shall apply with regard to an aggrieved person even if that person is not a party. (20:14)

The provisions in Chapter 12 shall apply to attorneys for aggrieved persons (20:14)

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

Leave to appeal is required for the court of appeal to review the district court's judgment or decision in cases of minor crimes. (49:12)

See also Council Regulation 861/2007 of 11 July 2007 establishing a European Small Claims Procedure that seeks to improve and simplify procedures in civil and commercial matters where the value of a claim does not exceed 2000 €.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

A private claim can be brought in conjunction with a public prosecution, support a public prosecution or be brought when a public prosecution has not been instituted. (20:8 and 20:9.) These rights are not protected under the Swedish Constitution concerning fundamental freedoms. Neither is there any equivalent in the European Convention on Human Rights.

There has been a development where the Supreme Court has had to decide whether damages under the Swedish tort liability act and general principles fulfil the requirements of article 13 of the Convention. (NJA 2005: 462).

#### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In general, the courts are rather lenient. In practice, the concept of an aggrieved person is seldom put at test. Often, it is enough that the court can establish that there might be an aggrieved person for the particular crime. If the court establishes that there might be an aggrieved person concerning a certain crime, this does not necessarily mean that the aggrieved person in the case at hand has suffered an injury. If the court would find that there cannot be an aggrieved person for the particular crime, this only means that the claim should be dismissed and that the preconditions for trying the private claim in conjunction with the prosecution are not fulfilled. (NJ 1969 s. 364; NJ 1978 s. 3; cf. NJ 1997 s. 81. In this last case, the Supreme Court decided that a question, whether a certain claim for damages in conjunction with a prosecution of defamation could be transferred, related to the material claim and was not to be dealt with as an issue of inadmissibility. See also NJ 1994 s. 751). This does not mean, however, that the victim lacks locus standi should the claim be put forward in the manner prescribed for civil actions.

- 4.2. Are there significant variations in the courts' approach based on:  
4.2.1. the type of remedy requested?

Yes, a claim for damages can be successfully brought even if the aggrieved person is not allowed to bring forward a private prosecution. The test in criminal proceedings is more strict concerning locus standi than in civil actions. Even if the precondition for trying a private claim in conjunction with a prosecution are not fulfilled, the victim might be granted locus standi if the corresponding claim would be put forward in the manner prescribed for civil actions. Similarly, an agreement entered into by a foundation might have different legal consequences concerning different type of remedies requested, such as claims for compensation for environmental damage on the one hand, and application for prohibition and restrictions on the other. (NJ 1994 s 751). Further, to be an aggrieved party, the injury must have occurred by a punishable act. As a consequence, even if there is a valid civil claim, this may not entail injury caused by a punishable act and hence there is no aggrieved person in the formal sense (Supreme Court decision in case B 87-07).

- 4.2.2. the nature of the claimant?

Private prosecution is unusual in practice. Not often is a private prosecution successful where the public prosecutor has decided not to institute a prosecution since the prosecutor has an absolute duty to prosecute, i.e. the prosecutor is obliged to initiate a prosecution if he or she considers there to be sufficient evidence to prove that a crime has been committed and that a certain person has committed it.

The status of a partner in a legal person might be of interest concerning the constituent elements of an aggrieved party. (NJ 1887 s. 398; 1909 s. 625; 1912 s. 344, 1915 s. 318.) When a legal person has ceased to exist, a representative might be authorised to institute proceedings, even though the representative has lost the civil right to represent the legal person.



The state compensation scheme for crime victims is applicable to direct victims. When the criminal offence has led to the death of the victim, the dependants and relatives of the victim are eligible for compensation. Persons injured in connection to a crime are eligible for compensation, as long as the injury is caused by intent or negligence severe enough to constitute a crime.

There are no rules or practices impeding women subjected to violence in a close relationship with a man from receiving compensation. The possibility of reducing compensation if the victim has increased the risk of being injured through his/her own conduct is not generally applied on this sort of crime. Women whose former partners have infringed a contact ban are eligible for compensation for moral damage. Applications from abused children are generally accepted even if they are filed after the expiration of the time limit.

On 1 July 1998, a law entered into force in Sweden, which introduced two new criminal offences; "gross violation of a woman's integrity" and "gross violation of integrity". The purpose of the former is to deal with repeated punishable acts directed by men against women with whom they have a close relationship. The latter covers equivalent situations where the acts are directed towards children or other closely related persons, such as siblings or parents. By means of this new law, the courts are given the possibility to take the entire situation of the abuse into account and to increase the penal value for the above-mentioned acts, in situations where they are part of a process, which constitutes a violation of the victims' integrity.

#### 4.2.3. the nature of the claim?

The state compensation scheme for crime victims is applicable to victims of criminal offences. Compensation is awarded primarily for intentional offences. Compensation for moral damage will only be awarded for offences caused by negligence if the negligence borders on an intentional offence. Compensation for traffic offences is not ruled out in the act, but these offences will in most cases be compensated by the compulsory traffic insurance. The victim must have suffered a loss, an injury or damage in order to be eligible for compensation. Under certain circumstances, victims are also eligible for compensation for damage to property and pecuniary losses.

#### 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

Depending on the crime or claim at hand.

#### 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Several provisions provide victims with an easy way to get a decision on compensation. There are three ways in which a private claim can be raised in a public prosecution. A private claim may be conducted in conjunction with the prosecution of the offence. Typically, the prosecutor shall also prepare and present the aggrieved person's action in conjunction with the prosecution. If the aggrieved person desires to have his claim entertained together with the prosecution, he only

needs to notify the investigation leader or the prosecutor of the claim and state the circumstances upon which it is based. If the investigation leader or the prosecutor finds that a private claim may be based upon the offence, he shall notify the aggrieved person in sufficient time prior to the institution of the prosecution. A private claim may only be disposed of as a separate case if further joint adjudication would cause major inconvenience. When there is already a private claim in an ongoing civil action the court may order that the action be consolidated with the prosecution. After the institution of a prosecution, the prosecutor or the aggrieved person may initiate, without a summons, an action for a private claim based upon the offence if the court, considering the inquiry and other circumstances, finds it appropriate. When the private claim is not entertained in conjunction with the prosecution, an action shall be instituted in the manner prescribed for civil actions.

When circumstances are similar, clearly, joint adjudication allow for saving operations. As a rule, a claim for damages is assessed by the court simultaneously with its assessment of whether or not the defendant is guilty of the crime. If the prosecutor is not presenting your claim for damages and if you do not have counsel, you yourself can bring action for damages. If you have incurred expenses in this connection, for example for your own lawyer or for the provision of evidence, you have the right to demand compensation from the defendant for such legal expenses. If the defendant is sentenced to pay the damages you have requested, then as a rule he or she will also have to pay your legal expenses.

Even if the court orders the defendant to pay you damages, this does not mean that you will automatically receive the money. In many cases, offenders either cannot or will not pay voluntarily. In that case, the Swedish Enforcement Authority (Kronofogdemyndigheten) can help you collect the damages. The court automatically sends a copy of the sentence to the local enforcement agency. Some time after the hearing, you will receive a letter from this agency asking whether you would like them to collect the damages on your behalf. If you wish to have this kind of assistance, you should fill in the form sent to you and return it to the Swedish Enforcement Authority who will then investigate the offender's financial situation. If he or she is found to have executable assets or income, the agency will ensure that you receive your damages. The service provided by the Swedish Enforcement Authority is free of charge.

## **5. Influence of EU law**

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

A number of important measures to better satisfy the interests of victims of crime began to be seriously undertaken in Sweden in the middle of the 1980s. Since then a number of reforms on a wide variety of matters have been carried through. This may explain why many of the provisions of secondary EU law are already in place. In June 1995, the Swedish government decided to initiate a special inquiry for the purpose of giving a broad account of the measures taken over the last ten years on behalf of victims of crime, analysing the effect of such measures and examining the need for legislative and other changes concerning further measures on behalf of victims of crime. A judge assisted by a panel of experts was appointed to conduct the inquiry. A summary of the report of the Governmental Commission on Victims of Crime entitled, in translation from the original Swedish, "Victims of Crime: What has

been done? What should be done?" is identified as SOU 1998:40.

The transposition of the following acts did not change the Swedish standing rules:

- Council Directive 2004/80/EC relating to compensation for crime victims which aims at facilitating access to compensation in cross-border situations (Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L 261, 6.8.2004, p. 15))
  - o Förordning (2005:956) om ändring i brottsskadeförordningen (1978:653)
  - o Lag (2005:955) om ändring i brottsskadelagen (1978:413)

The following instruments and proposals are not yet transposed:

- Trafficking in human beings, where protection of victims' rights has been introduced in Council Directive 2011/36/EU, including specific focus on children who are particularly vulnerable to trafficking (Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.)
- Sexual abuse, sexual exploitation of children and child pornography, where a proposed new directive addresses the specific needs of child victims of those crimes (Proposal for a directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing FD 2004/68/JHA)
- An EU Agenda for the Rights of the Child, which sets a key objective of making the justice systems more child-friendly. Negative experiences of child victims who are involved in criminal proceedings should be reduced and child victims should be given the opportunity to play an active part in criminal proceedings (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child - COM(2011) 60, 15.2.2011.)
- Combating violence against women, being a strategic priority in the 2010-2015 Strategy on Gender Equality, and the focus of the Daphne III Programme (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Strategy for equality between women and men (2010-2015) - COM(2010) 491. (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Strategy for equality between women and men (2010-2015) - COM(2010) 491.)
- Protection of the rights of terrorist victims. (Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism as modified by Council Framework Decision 2008/919/JHA of 28 November 2008 (OJ L 330, 9.12.2008, p. 21-23))

Although placed in Chapter 16 of the Swedish Penal Code on crimes against public order, a child may be an aggrieved person for child pornography crime according to the preparatory works. Also procuring and buying of sexual services are crimes that could be directed against persons although primarily crimes against public order. An examination needs to be done in each individual case. (SOU 2010: 49)

See also REPORT FROM THE COMMISSION Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) COM(2009) 166 final)

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

Influence is at hand.

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

Most notably is Case C-432/05 Unibet. In this case the ECJ ruled that there was no need for Swedish law to provide a self-standing action to challenge the compatibility of a national provision with EU law, since there were other domestic legal remedies available which enabled the compatibility question to be raised indirectly and which complied with the twin principles of equivalence and practical possibility. In sum, the Swedish legal system was fulfilling the requirements of effective judicial protection of individual rights under EU law.

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

Not on the part of victims.

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

The position taken by the Convention organs is that the right to a fair trial in Article 6(1) is the general right. This applies to both civil and criminal proceedings. The various rights set out in Article 6(2) and 6(3) apply only to criminal proceedings and are specific expressions of the general right, or complements to it. The requirement of a fair trial applies to the whole procedure, from the initial judicial or police/prosecutorial investigation to the execution of the judgment. A global and retroactive, approach tends to be taken to determining whether an applicant has received a fair trial. Different actors are added together and if the end result is in imbalance the trial is considered unfair.

Until 1 January 2011, there was no equivalent provision in the Swedish Instrument of Government (RF). A right to a fair trial within a reasonable time has now been added (RF 2:11). This is framed in wider terms than Article 6 and covers, e.g. migration issues and tax issues.

The last major amendments to the state compensation scheme for crime victims were made in 1999 when the possibilities for taking the conduct of the victim into consideration when determining compensation were extended. The provisions on review were changed so as to comply with the demands in article 6(1) of the European Convention on Human Rights.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

The principle of effective judicial protection is a general principle of Community law

stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

In *X and Church of Scientology v. Sweden* the Market Court had forbidden a church to use certain statements in its membership letters. The European Court made an exception from the rules for right of appeal to the Church's advantage as the difference between the church and its members were found to be artificial. With artificial the European Court meant that churches, when they litigate alleged violations, they in effect make it on behalf of their members

In *Unibet* the question arose whether there is sufficient legal protection that the only way it can prompt a review of a national rule's compliance with EU law is by breaching a rule and thereby expose themselves to sanctions in the form of prosecution or administrative action. ECJ found that Unibet's demands for effective legal protection was considered satisfied since there were other domestic legal remedies available which enabled the compatibility question to be raised indirectly.

## **6. Other**

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

State compensation is considered to be a legal right. If the requirements set out in the act are fulfilled, the right to compensation is unconditional. In this sense, the decision-makers have no discretion. In the *Gustavsson* case (see in the concluding observations), the European Court of Human Rights stated that the Swedish Criminal Injuries Compensation Act establishes a civil right to compensation. The Court argued that the conditions and procedures which a claimant has to comply with, are defined in clear and regulatory terms. Accordingly, a claimant who complies with those requirements has a right to compensation under the act.

## TURKEY

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## QUESTIONNAIRE FOR REPORTERS ON CIVIL LAW (TURKEY)

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### 1. The court system

- 1.1. Give a short overview of the court system in civil law cases in your legal system in no more than half a page.

Turkish court system consists of three major parts: Constitutional jurisdiction, administrative jurisdiction and ordinary jurisdiction, the latter including a criminal and civil jurisdiction. Civil jurisdiction has two parts, claims regarding disputes (also known as actions) and claims pertaining to no dispute but requiring a court's intervention by law (changing one's name or surname, death in absentia etc.). Civil jurisdiction consists of general courts and specialised courts. Civil Courts of Peace (*Sulh*) for smaller claims, Civil Courts of General Jurisdiction (*Asliye*) and Commercial Courts are general courts. Before October 2011, Civil Courts of Peace had jurisdiction for monetary claims under a limit, and some other less complicated matters such as rent disputes, evacuation of a property and partition actions. The new Code of Civil Procedure ("nCCP") No. 6100 which entered into force in October 2011, slightly changed the jurisdiction of Civil Court of Peace. Monetary claims "under a limit" criteria for jurisdiction is abolished, moreover these courts now have jurisdiction for all the cases regarding rent disputes along with specifically listed matters including *ex parte* cases (nCCP Art. 4/4). According to the Turkish Commercial Code ("TCC") of 1956, commercial courts are classified as general courts, which may pass judgments on non-commercial disputes unless the defendant subjects the jurisdiction of the commercial court at the beginning of the trial (TCC Art. 5/3). The same provision will be in effect in the new Commercial Code entering into force in 2012. Therefore, they are not classified as specialised courts. Specialised courts are discussed in "1.2" below. General courts (civil courts of peace, civil courts of general jurisdiction, commercial courts) and specialised courts are all together called courts of first instance. According to the nCCP, the decisions of courts are subject to review first by a newly introduced second instance and subsequently the Court of Cassation (*Yargitay*). However, District Civil Courts as the second instance have not yet been established. According to the temporary provisions of the nCCP, the two-instance system of the old Civil Procedure Code is still in effect (nCCP Provisional Art. 3). In this system Court of Cassation is the court of appeal, but instead of a second review court, the same Chamber of the Court of Cassation re-evaluates its own decision, which is known as "rectification of judgment".

- 1.2. Does your country have specialised courts that are competent only in certain areas of civil law (labour law or other)?

There are many specialised courts in Turkish legal system. These are cadastral courts, labour courts, bankruptcy and enforcement courts, consumer courts, maritime courts, intellectual property courts and family courts. Cadastral courts deal with claims arising from land surveying. Bankruptcy and enforcement courts try bankruptcy issues and actions as well as, solving problems

which may arise during the enforcement procedure of court decisions, and enforcement orders or proceedings which may be initiated without having to obtain a (prior) court order. Maritime courts deal with private claims regarding maritime commerce. Divorce and other family related subjects are in the jurisdiction of family courts.

Specialised courts are courts of first instance, and the relationships between different courts of first instance are subject to mandatory provisions, and affiliated with public order.

1.3. Which kind of claims may be brought before a civil court? How is a civil claim defined in your jurisdiction?

Any claim based on private law is regarded as a civil claim and can be brought before civil courts. Civil Courts of General Jurisdiction are regarded as primary courts (accordingly, the Turkish name of the courts can be translated as "primary"). Therefore, any claim that is not specifically attributed to the jurisdiction of another (general or specialised) court is deemed to be in the jurisdiction of Civil Courts of General Jurisdiction (nCCP Art. 2/2).

Whether a claim can be brought before a civil court is determined as follows:

- If the dispute can be resolved by the application of private law, then the claim must be brought before the civil courts. If the claim is relevant to administrative acts or *de facto* actions of the administration, then administrative courts are to resolve the dispute. Criminal proceedings are initiated by public prosecutors.
- If the claim is a civil one, it should be determined whether the subject matter is in the jurisdiction of a specialised court. If so, the claim shall be brought before that specialised court.
- If the claim is not in the jurisdiction of a specialised court or there is no clarity in the law about the authority of the courts on the given matter, the local Court of General Jurisdiction is to resolve the dispute.

There might be some exceptions of this process. The most important example is the disputes regarding the amount of compensation for expropriation. Expropriation compensation is the payment ruled by the court for the expropriated real property. If the owner of the immovable property finds the expropriation compensation insufficient, civil courts have jurisdiction over the determination of the free (private) market value of the expropriated immovable property. Civil courts are expected to be more attentive and apt in the determination of this amount. However the determining the amount of compensation for expropriation is an administrative process which should be under the jurisdiction of administrative courts.

Similarly claims for personal injury caused by the actions of the administration were in the jurisdiction of civil courts upon the nCCP entering into force (nCCP Art. 3). This provision has been found unconstitutional and removed by the Constitutional Court in 02.16.2012. The full decision (including the grounds of the removal) has been published in the Official Gazette of May 19th, 2012 No: 28297. The decisions of the Constitutional Court are non-retroactive, therefore the cases brought before the civil courts until the stay of execution prior to the removal will be resolved by the civil courts.



## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in civil law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing defined in your jurisdiction?

As a rule, standing is not a distinct procedural requirement. As a person (the claimant) claims to have a right, that person is deemed to have a legal and valid interest to stand before the court. Furthermore, standing is defined as the need for a legal protection and, as such, a person is expected to have such a need to resort to a court.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in civil actions at first instance and on appeal? Is standing, for example, related to the nature of the claim or the nature of the relation between the parties?

The courts grant legal protection through cases brought before them. If a person requires no legal protection then that person has no legal interest to be before a court. This is a general rule, applicable to not only cases but also to all kinds of claims directed at the courts; such as injunctions, intervention to actions and appeals (nCCP Art. 114/1/h).

Standing is regarded as an essential element of the action. The judge must declare the action inadmissible if the party lacks standing at the initiation or even in the course of the initiated action.

A person has a legal interest, therefore standing, for a civil action, if that person has a legal and legitimate claim accepted by the law. This legal interest must be actual and relevant to the claimant. Furthermore, legal protection requested from the court must be appropriate for the restitution of violated right.

Only an actual legal interest enables standing, an anticipated one, which might or might not exist in the future will be insufficient to grant standing. "Legal interest" is a key concept because an idealistic or pure economic interest does not enable standing.

Lastly, if the same protection might be acquired with an easier method other than an action, a person is deemed to have no legal interest and therefore no standing for such an action.

## 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in civil claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

As stated before, there is not any distinct procedural requirement for standing, although its absence is regarded as a reason of inadmissibility. However, there are certain occasions where the court must examine it before the trial. These examples are determined by law, courts or legal scholars. Partial actions and declaratory judgments are explained below (please refer to 3.2, para. 3-4).

First example is monetary limit for appeals. Against judgments under a certain monetary limit, a party is deemed to have no standing for appeal before the Court of Cassation (nCCP Arts. 362, 369/2). If the claimant's claim was found fully eligible by the court of first instance or the rejected part of the claimant's claim is under the monetary limit, the claimant has no standing for the appeal. On the other hand, if the other party appeals, the claimant can respond the appeal request, thus

"gaining" standing (nCCP Art. 348). This rule also applies for the Court of Cassation. nCCP Art. 361/2 states that "The party whose claims are granted can appeal, too, if that party has a legal interest"; while the monetary limit is set higher in nCCP Art. 362/1/a. A party has no standing before the Court of Cassation unless the party has exhausted the second instance, once these courts become operational as planned.

Another example is a creditor's action to rescission of a debtor's disposition. When a debtor sells or donates property, the rescission of that disposition may be requested from the court. But such a request requires "evidence of insolvency", a document given by the enforcement office at the end of the legal proceedings if the creditors are not paid in full. A creditor has no standing for actions of rescission, if that creditor does not have such formal evidence of insolvency.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. injunctive relief or a compensatory remedy)?

The requirements of standing do not change according to the type of remedy. However, the remedy requested from the court must be appropriate and in proportion to the violated right. Furthermore, standing is examined differently for each case. For example, a claimant is deemed to have standing to request for specific performance, only if the claim is deferred; on the other hand the claimant has no standing to request performance before the fixed time.

Declaratory judgments in Turkish Law determine the existence or nonexistence of a contractual relationship (nCCP Art. 106). A person must prove that the declaratory judgment will be sufficient to negate the dispute without requiring another action (lawsuit). If a second lawsuit might be required, the claimant is deemed to have no valid interest in a declaratory judgment. For instance, a person cannot have a declaratory judgment determining that the other party owns the claimant some money, because a lawsuit for the payment of that money might be required next. Therefore the claimant should bring the action for the payment of money, in which the court will have to decide whether the money is owned or not. The claimant has no legal interest for such a case, and if the case is brought before the court, it would be found inadmissible on the grounds of *locus standi*.

Partial actions are based on partial claims which are related to divisible obligations and the exact amount of that obligation is not determinable by the claimant. If the claimant can determine or has means to determine the exact amount, that claimant is deemed to have no valid interest for a partial action. The total amount must be claimed in full. If such a case is brought before the court, it would be found inadmissible on the grounds of standing (nCCP Art. 109).

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (e.g. consumer law, labour law, etc)? Are there specific standing rules applicable to certain types of claims?

As stated in 3.2. standing is examined on a case by case basis. There are no specific requirements for specialised courts. However, for certain disputes a claimant must apply to the arbitration committee for consumer problems, and only after that the case might be brought before the consumer court (Consumer Protection Act, No. 4077, hereinafter CPA, Art. 22/5).

It must be noted that, the subject matter jurisdiction between courts of first

instance (including specialised courts and general courts), as an issue pertaining to public order, are regulated by mandatory provisions (nCCP Art. 1). Choosing the wrong court will make the action inadmissible for that court solely due to lack of jurisdiction, i.e. not standing.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, public and private claimants)? Are there special requirements to be met where legal persons are involved in the civil action, either as claimant or defendant? Is it possible for public authorities to initiate a civil action before a civil court on its own behalf? May an action be brought against the State or its organs before such a court, and if so, what specific requirements need to be met (including whether the grounds for starting such an action are limited in comparison with other cases)?

The requirements of standing do not change according to the nature of the claimant. When a legal person is involved, the court must examine its capacity, both to acquire rights and to act (nCCP Art. 114/1/d). In the case of a deficiency in capacity the action will be found inadmissible by the court (nCCP Art. 115/2). Other than the capacity, there are no special rules for legal persons.

In Turkish civil procedure law, as a rule, parties have nearly absolute power to initiate, continue and end an action. Therefore, public authorities cannot start a civil action. (Naturally, the term "public authority" excludes legal persons owned or controlled by the State which are established, for example, as commercial companies.) There are a few very limited exceptions to the rule, such as an action to nullify marriage. In this case a public prosecutor can bring an action (nCCP Art. 70). In practice, actions initiated by the public authorities are very uncommon. Resolution of disputes regarding actions of the administration is the subject of administrative courts, which have their own trial procedure determined in special codes, *inter alia* Code of Administrative Procedure, No. 2577. However, as mentioned above (please refer to 3.1), the determination of the amount of expropriation compensation is in the jurisdiction of civil courts (nCCP Art. 3), because the Law Maker considers these courts more apt in making such determinations. In these cases State (or their organs) might be a party in civil litigation. Some similar examples include claims regarding damages for the inaccuracy of land registry, damages arising from a judge's faulty actions during trial; damages arising from the actions of an enforcement officer shall all be directed against the State before civil courts. There are no specific standing rules for such lawsuits, the afore-mentioned rules also apply here. All these actions are in the jurisdiction of civil courts because there are explicit provisions for civil court's jurisdiction.

In *ex parte* cases, i.e. when there is no controversy, but the involvement of a court is required, a relevant administrative body may have to be included in the proceedings as a concerned party. For example, changing the name of a natural person requires a court order, and the census bureau must be included as a concerned person. Because there is no controversy, these types of proceedings are not classified as actions (nCCP Art. 382). For these proceedings, the applying person must have a legal and legitimate interest for the request; otherwise the application will be denied.

- 3.5. Does your jurisdiction allow interpleader actions, in which a claimant may initiate litigation in order to compel two or more other parties to litigate a dispute (e.g. an insurer who owes insurance money but is unclear about the question to whom of the other parties the money is owed)? If not, how would this matter be approached in your jurisdiction?

Interpleader actions are not possible under Turkish Law. A person cannot be forced to start an action. Substantive law determines how to perform a debt, if the creditor is not obvious or known. For example if a person knows that a payment is due but does not know who the creditor is, that person might apply the court to determine the place of performance (usually a bank) and deposit the money there. This procedure is not an action, however, the person must have a legal interest (e.g. if the debt is not yet due ) or the application will be denied.

- 3.6. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

There are no variations in the rules of standing.

- 3.7. Is human rights law used as an (additional) basis for standing? Please provide some recent case-law if applicable.

Cases related to human rights law appear mostly in the jurisdiction of criminal and administrative courts, therefore human rights law has had no observable effect related to standing in civil courts (nCCP Arts. 27, 375/i).

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g., timing, requirement that the Articles of Association provide this as an explicit possibility for a company)?

Turkish civil procedure law is a two party system. Multiple persons in one party are possible, but there are always one claimant party and one defendant party. Third party (whose Turkish term can literally be translated as "third person", not "party") intervention is possible in two ways: primary and secondary intervention. Primary intervention is in fact not an intervention, but an independent action. A third party claiming to be the real owner of a right that is subject of a continuing trial must bring an action before the same court against the two parties of the first case. Third party becomes the claimant; the claimant and the defendant of the initial pending action become the defendant of the subsequent (second) action. Due to the affiliation between the two cases, if the third party eventually obtains a verdict in its favour, the first action becomes moot and inadmissible. If the second action is rejected, the court continues the proceedings of the first action (nCCP Art. 65). Secondary intervention comes about when a third party applies to court for a pending trial and becomes an assistant, a helper for one of the parties (nCCP Art. 66/1). Third party does not become the part of the action, the court's verdict will include the primary (original) parties but not the third party. To use secondary intervention a third party must have standing. Standing in this case is defined as the potential danger for the third party to eventually face recourse claims from one of the primary parties upon its loss of the pending (original) case. To intervene the

third party must prove the possibility of recourse.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

Primary intervention cannot be prevented because it is an independent action. Secondary intervention is not possible in *ex parte* judicial proceedings. Otherwise secondary intervention can be prevented if the parties object the request of the third party and this objection is found admissible by the court (nCCP Arts. 67/2, 163, 164). Naturally, such an objection might have consequences when the objecting party subsequently tries to take recourse to the third party whose intervention request had been denied.

## 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Although far from the Anglo-American scope, class actions have been recently introduced to Turkish Law by nCCP as a new procedure, although a similar regulation could be found in the Consumer Protection Act (CPA Art. 23/4). Class actions can be initiated by associations and other legal persons in their own name to protect the interests of their members, their interest holders or the group of persons that they represent (nCCP Art. 113/1) to determine the rights of the same; or to prevent the rights of the same from being violated presently or in the future. Damages cannot be claimed in a class action.

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

To be a party in the class action one must be a legal person (nCCP Art. 113/1). Other than that, there are as yet no established requirements because of the novelty of the action. Of course, individuals can bring actions on the same subject before and after a class action, but the rulings at the end of these actions will be binding only on the parties of the action. Needless-to-say, general standing requirements will be valid for these actions. For example, a person can sue for damages after a class action determines a breach of law, but the same person will not have standing if that person requests the court to determine the mentioned breach of law for a second time.

- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

Class actions in general were recently introduced in nCCP since 1 October 2011, and, as such, relevant case law is yet to follow. A type of class action is regulated in Consumer Protection Act (CPA), according to which such an action may be brought by only consumer organisations or the Ministry of Customs and Trade (CPA Art. 23/4). If the violation of the law pertains also to an individual right of a consumer, the consumer is allowed to sue as well. As seen, it is not a different requirement for standing, it is rather another example of having a legal interest and therefore standing to initiate proceedings.

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the civil rights and duties of large groups of claimants and defendants?

A court ruling will be binding only for the parties of the action. Even if the actions are based on similar legal interests, each case is deemed to be independent of each other. Other than the newly introduced class actions, there are no multi-party actions to protect civil rights. However during a civil trial, a party may challenge the law to be in contradiction to the Constitution (Constitution of Turkish Republic (1982, as amended), Art. 152). If the court finds this challenge admissible, the court can resort to the Constitutional Court whose decision is a pre-judicial issue for the trial court. The Constitutional Court may declare a certain law or provision to be applied in the given case unconstitutional, thus annul it for all. By means of such a constitutional challenge, rights and duties of a large group of persons can be affected by one individual.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in civil law cases and if yes, under which conditions?

General interest and ideals are not regarded as legal interest; therefore, a person will not have standing for such actions.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations for the defence of general interests in your legal system?

There are no regulations for general interest litigation.

## 7. Court practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

In my humble opinion, the courts are lenient in the control of standing requirements. A person is deemed to have standing if that person has a request, which is one of the reasons why the courts are lenient in the control. Until the nCCP entered into force, the courts accepted partial actions, even if the obvious reason for the partial claim (nCCP Art. 109) was to avoid relatively higher procedural fees.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

There are no significant variations in the courts' approach based on the type of remedy requested.

- 7.2.2. the field of substantive law at hand?

There are no significant variations in the courts' approach based on the field of substantive law at hand.

- 7.2.3. the nature of the claimant?

There are no significant variations in courts' approach based on the nature of the claimant. For non-resident and foreign claimants, the courts, upon an objection of the respondent, examine reciprocity between the country of the claimant and Turkey before exempting the claimant from making an initial security deposit. (nCCP Arts 84-89, Act on International Private and Procedural Law (AIPPL), No. 5718 Art.

48/2). The failure to comply the courts order to pay this security deposit, makes the case inadmissible. However this is not technically defined as "lack of standing".

7.2.4. the nature of the claim?

There are no significant variations in the courts' approach based on the nature of the claim other than "the lack of legal interest" test for declaratory judgments mentioned above (please refer to 3.2). In fact, case law on standing is mostly related to declaratory judgments.

7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting standing?

Sometimes courts prevent abusive claims by means of standing. For example, courts do not grant standing to a creditor requesting the payment of a certain debt in small parts in order to obtain the payment of relatively higher judicial costs granted by the court in his/her favour. (Normally, after the conclusion of each action the court also grants a certain amount of money to be-paid as judicial costs to the successful party). Courts decide against a person who would use his/her right to action solely to harm the other party on grounds of standing (nCCP Art. 114/1/h).

7.4. Do the courts consider standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Although there is a huge number of cases (approximately 3000 new cases per court per year in Istanbul for 2010), courts do not consider standing as a tool for the administration of justice. On the contrary, even for the smallest claims, the claimant is deemed to have standing. The detailed "right to be heard" (nCCP Art. 27) prevents the courts from an easy way out in this respect. Many claims that could be solved by negotiation or mediation are added to the judicial load of the courts. The Act on Mediation has been accepted by the Parliament, but not published in the Official Gazette as of 14.06.2012. Most Turkish Bar Associations were against the legislative possibility of non-lawyers to act as mediators which has become a hot topic. These objections were taken into considered, amending the draft by allowing only lawyers to become mediators.

## 8. Influence of EU law

8.1. Did the transposition of secondary EU law, e.g. in the area of consumer law, require a change in the standing rules in your legal system?

Transposition of secondary EU law did not change the standing rules, which have been already quite harmless for the right to seek justice. Turkey is not yet a member of the EU. However, as a candidate, she is been constantly updating her laws.

8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

There is no change in the standing rules outside scope of application of EU law, either.

8.3. Did the courts use:

8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

Although the principle of effective judicial protection is regarded as one of the fundamental principles of Community legal order, the courts do not relate this principle to legal proceedings. EU law is regarded as affecting mostly the substantive law, and the rights pointed there can be claimed before the courts without hesitation.

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

Turkish courts understand the right to an effective remedy from the other edge of the concept. It is understood as the relation between the protection requested from the court and the restitution of the violated right. Therefore it is not the courts' duty to provide an effective remedy, rather it is the claimant's duty to request an effective remedy from the court. Issues related to public order are exceptions of this rule, as civil law courts shall in principle only grant remedies which have been specifically requested by the claimant (nCCP Art. 26). This understanding in Turkey is independent of the EU terminology, as it is not based on the European Convention on Human Rights.

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Although the freedom to claim rights is granted under the Constitution of Turkish Republic (1982, as amended) Art. 36, we might say that the right of access to court was not a popular subject for legal scholars in Turkey. However it has recently being discussed by legal scholars but less by legal practitioners. Turkey's court system might appear complex, having many specialised courts and different jurisdictions besides the general courts. With regards to civil trials the State cannot offer sufficient legal aid. Bar associations offer legal aid (nCCP Arts. 334-340) which is reimbursed by the State Treasury; however these amounts are mostly insufficient. Citizens can easily initiate an action even without the help of a legal practitioner. But sometimes even lawyers have a hard time to find the effective remedy in a given case, considering different court decisions and practices. It suffices to say that, standing rules are not a barrier to the right of access to courts. Therefore, the courts use the right of access to courts in order to set aside or interpret the national standing rules.



- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

The courts did not use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules outside the scope of application of EU law.

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Standing is not a distinct procedure in Turkish Law. A person, as a rule, is deemed to have standing for his / her requests from the court. Before the nCCP, the courts would not always examine standing carefully. In practice, the issue of standing is still regarded mostly an objection for the other party to notice and consider. It should be remembered that even if the other party did not object on this ground, a final judgment as to the merits of the case may eventually be quashed by the Court of Cassation if it was rendered without valid standing. In other words, standing is an essential element of trial procedure and the judge (of both first instance or appeal) can take this into consideration *ex officio*. In order to reduce the possibility of a last-minute observation or objection, the nCCP (Art. 140) requires the trial court to pre-examine all similar procedural issues in a specific early procedural stage before going into the merits of the case.

## QUESTIONNAIRE FOR REPORTERS ON **ADMINISTRATIVE LAW** **(TURKEY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in administrative law claims in your legal system in no more than half a page.

Turkey has a two tier administrative court system. While administrative courts and tax courts are first instance administrative courts, the Council of State (Danıştay) and the High Military Administrative Court (Askeri Yüksek İdare Mahkemesi) are higher administrative courts. Also, regional administrative courts are included in this structure. The Council of State and the High Military Administrative Court are based on the Constitution, article 155 and 157 respectively. The Council of State was established in 1866 at the period of Ottoman Empire as a counterpart of the French Conseil d'Etat. It has continued its existence in modern Turkey. Today, the Council of State performs primarily as the court of appeals for administrative courts and tax courts. However, for a very limited number of cases, such as challenges to decisions of the Council of Ministers or the statutory instruments of the Ministries, review by the Council of State as the first instance administrative court. The Council of State also has administrative duties as one of the adviser bodies for State. It consists of one administrative division and fourteen judicial divisions. Each division convenes with five members and renders its judgments by majority. By being established in 1971, the jurisdiction of the High Military Administrative Court is more restricted than the Council of State. It is the first and last instance court of disputes arising from administrative acts and actions involving military personnel and relating to military services, even if such acts and actions have been carried out by the civilian authorities. However, in disputes arising from the obligation to perform military service, it shall not be required that the claimant must be military personnel. It consists of two divisions. Each division convenes with five members and renders its judgments by majority. Administrative courts, tax courts, and the regional administrative courts are relatively new ones because they were founded in 1982. Administrative courts have general jurisdiction in all administrative disputes. Tax courts review only tax cases. Regional administrative courts are not "appellate" but "objection" courts. Those both review the decisions rendered by a single judge of administrative and tax courts and non-single judge decisions which are listed in law of the same courts. Decisions of the regional administrative courts are final, appeal cannot be brought. Administrative courts, tax courts, and regional administrative courts convene with three members and render their judgment by majority. In some disputes, administrative courts and tax courts exceptionally convene with one member.

- 1.2. Does your country have courts or special divisions of general courts that are in particular competent in administrative law disputes?

According to the Turkish Constitution, recourse to judicial review shall be available against all actions and acts of administration (Art. 125/1). In Turkey, as a general principle, all administrative acts and actions fall within the competence of the administrative courts unless otherwise stated by law. Some administrative disputes

as expressly provided for could fall within the competence of general courts. But these disputes are very few.

- 1.3. Does your country have specialised administrative courts that are competent only in certain areas of administrative law (tax law, social security cases or other)?

In Turkey, the Council of State and the High Military Administrative Court when they act as a first instance administrative court, and tax courts are special authorised administrative courts. For instance, tax courts review only tax cases. On the other hand, administrative courts have general jurisdiction in all administrative disputes.

- 1.4. Which kind of claims may be brought before the administrative courts? How is the jurisdiction divided between civil and administrative courts? Which kind of administrative action or omission can be challenged before the administrative courts?

Unless otherwise stated by law, all actions and acts of administration shall be brought before the administrative courts. Therefore, it is possible that general courts could be empowered by the legislator for settling administrative disputes arising from administrative acts and actions. This is an exceptional situation. As regards litigation, there are two available remedies for a complainant. Thus, a complainant has the right to seek the annulment of illegal administrative acts by way of "action for annulment". An administrative act consists of five elements as "competence", "form", "reason", "subject" and "aim". Also, a claimant could bring a full remedy action or action for compensation if his personal rights are breached by the administrative acts or actions. In other words, full remedy actions are brought by those whose personal rights have been directly affected by the administrative acts or actions. It is simply a compensation case. Civil courts have restricted jurisdiction over administrative disputes so provided by law. Administrative actions can be challenged before the administrative courts if there is service fault or liability without fault of administration.

- 1.5. If the answer to question 1.4 is that certain kinds of administrative action or omission cannot be challenged before the administrative courts, is it possible to challenge these administrative actions or omissions before other (civil, general) courts?

Yes. See 1.4.

## 2. The rationale of standing (*Prozesbefugnis, Intérêt à agir*)

- 2.1. Is standing a distinct procedural requirement in administrative law claims (e.g. *pas d'intérêt, pas d'action*)? If so, how is standing before administrative courts defined in your jurisdiction?

According to the Procedure of Administrative Justice Act numbered 2577 standing is a distinct procedural requirement in administrative law claims. The Council of State applies the well-known procedural principle: no interest, no action. A personal, legitimate and actual interest is required in administrative law suits. In other words, in order to maintain an action for annulment of an administrative act, the claimant must demonstrate that he has a personal, legitimate and actual interest in its annulment. Thus having an interest is the first requirement in order to institute proceedings.

For instance, a slum house owner residing without having a valid deed cannot bring an annulment action for a new development plan, due to lack of legitimate interest.

(See, The Council of State, Sixth Division, Registration No: 2006/2392, Judgment No: 2008/5255, the Date of the Judgment: 14.11.2006, The Journal of Council of State, Year 2007, no. 115, pp. 225-227).

A mayor who attended the city council meeting and voted in favour of the decision cannot bring an action against the decision for lack of legitimate interest. (See, The Council of State, Eighth Division, Registration No: 2004/4729, Judgment No: 2005/3142, the Date of the Judgment: 22.06.2005, The Journal of Council of State, Year 2006, no. 111, pp. 249-250).

A person who graduated from Istanbul University, Law Faculty in 1942 cannot bring an action against the decision of Istanbul University with regard to conferring honorary doctorate to the President of the Republic, because there is no infringed personal interest. (See, The Council of State, Eighth Division, Registration No: 1991/2225, Judgment No: 1992/525, the Date of the Judgment: 25.03.1992, The Journal of Council of State, Year 1993, no. 86, pp. 457-458).

An employee can bring an action for privatization of his workplace (See, The Council of State, Tenth Division, Registration No: 1997/2003, Judgment No: 1998/2445, the Date of the Judgment: 09.06.1998, The Journal of Council of State, Year 1999, no. 98, pp. 577-579).

The interest may be either "material" or "moral".

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* in administrative actions? Does your legal system follow an interest-based or a right-based model of standing or even an *actio popularis* approach? Are standing requirements connected to the purpose of the system of administrative justice in the sense of *recours subjectif* or *recours objectif*?

Although standing limits the access of the claimant to the court, a claimant must be have valid reason for administrative law suits in Turkish law. Otherwise, the administrative court will decide that the claimant "lacks standing" to bring the suit, and will dismiss the case without taking into account the merits of the claim. The main reason of the requirement for locus standi in administrative law suits is ensuring proper and effective operation of public administration, as well as reducing the workload of the courts. In other words, to permit a broad test of standing, regardless of whether the purported claimant is personally interested, is likely to hamper effective public administration and administration of justice.

Although action for annulment requires an interest-based model of standing, action for compensation demands right-based model of standing. From this perspective it is acknowledged that as an action for annulment is *recours objectif*, an action for compensation is *recours subjectif*.

The Council of State adopted an *actio popularis* approach in a few decisions. For instance, after invasion of Kuwait by Iraq on August 1990, the Council of Ministers adopted a decision aiming to deploy NATO troops to Turkey. Since a citizen applied to the Council of State, the court held that each Turkish citizen both to establish the rule of law in Turkey and to prevent emergence of a war has interest for seeking review. (See. The Council of State, Tenth Division, Registration No: 1990/4944, Judgment No: 1992/3569, the Date of the Judgment: 13.10.1992, The Journal of Council of State, Year 1993, no. 87, pp. 478-483).

- 2.3. How does standing before administrative courts relate to objection procedures before the administration itself (*Widerspruchsverfahren*, administrative appeal) or judicial review organs not being part of the judiciary, such as tribunals in the UK?

There are close links between standing before administrative courts and objection procedures before administration. No one could bring the suit and object to administration for acts or actions without valid and justified interest.

### **3. The variations in standing**

- 3.1. Please give an overview of the general standing requirements applicable in your legal system in administrative law claims. Please include whether or not specific requirements need to be met in order to bring a case in first instance, in ordinary appeal (second instance) to a higher or a final appeal to the Supreme Court. Is permission of the court a quo or the appellate court required in order to bring an appeal?

It is a general principle of Turkish administrative justice procedure law that the claimant must have some interest in action for annulment. This means that the claimant must be able to show that the administrative act is injurious to his interests. In other words, a claimant does not have standing to sue for an act unless he is interested in and adversely affected by the act of which he seeks review. Interest must be of a personal, legitimate and actual. It is not necessary that the act of administration must directly affect to the claimant. The claimant who has based his petition on his position only as a parliamentarian or a citizen and could not rely on any other interest, does not show that he has a personal interest in seeking review. (See, The Council of State, Fifth Division, Registration No: 1990/509, Judgment No: 1990/1087, the Date of the Judgment: 17.05.1990, The Journal of Council of State, Year 1991, no. 81, pp. 181-184; The Council of State, Plenary Session of the Administrative Law Divisions, Registration No: 1972/586, Judgment No: 1974/80, the Date of the Judgment: 25.01.1974, The Journal of Council of State, Year 1975, no. 16-17, pp. 162-163; The Council of State, Plenary Session of the Administrative Law Divisions, Registration No: 1982/350, Judgment No: 1982/449, the Date of the Judgment: 24.12.1982, The Journal of Council of State, Year 1983, no. 50-51, pp. 170-171; The Council of State, Tenth Division, Registration No: 1993/2258, Judgment No: 1993/2798, the Date of the Judgment: 01.07.1993, The Journal of Council of State, Year 1995, no. 89, pp. 578-580; The Council of State, Tenth Division, Registration No: 1996/5207, Judgment No: 1998/6855, the Date of the Judgment: 21.12.1998, The Journal of Council of State, Year 1999, no. 100, pp. 531-534; The Council of State, Plenary Session of the Tax Law Division, Registration No: 1999/21, Judgment No: 1999/392, the Date of the Judgment: 24.09.1999, The Journal of Council of State, Year 2001, no. 103, pp. 252-253; The Council of State, Tenth Division, Registration No: 1998/2251, Judgment No: 1999/4119, the Date of the Judgment: 23.09.1999, The Journal of Council of State, Year 2001, no. 103, pp. 915-917).

By way of an example, a wife cannot bring an action against the loss of citizenship to her husband because, the right to citizenship is bound to the individual concerned. (See, The Council of State, Tenth Division, Registration No: 1986/1906, Judgment No: 1987/769, the Date of the Judgment: 14.04.1987, The Journal of Council of State, Year 1988, no. 68-69, pp. 703-704). Also a wife cannot bring an action against the appointment of another province to her husband. (See, The Council of State, Fifth Division, Registration No: 2006/1524, Judgment No: 2006/4911, the Date of the Judgment: 30.10.2006, The Journal of Council of State, Year 2007, no. 114, pp. 193-194).

On the other hand, as regards action for compensation, the claimant must be able to show that the action of administration is injurious to his "rights". Some specific

requirements need to be met in order to bring an administrative law suit before administrative courts. For instance, a claimant must obey the time limit to bring a case and indicate the adverse party in the petition. This is not required of the appellate court's permission to the first instance court in order to bring an appeal. Various interests of the claimant have been held sufficient to justify an action for annulment by him. It is generally recognised by the Council of State that a tenant, a taxpayer, a competitor, a consumer, a public service user, a district, municipal or village resident and an employee or official have suffice interest in bringing an action for annulment.

For instance, a taxpayer could bring action for annulment against administrative acts pertaining to tax. (See, The Council of State, Eleventh Division, Registration No: 2007/6930, Judgment No: 2007/7002, the Date of the Judgment: 25.09.2007, The Journal of Council of State, Year 2008, no. 117, pp. 329-332; The Council of State, Seventh Division, Registration No: 2001/4997, Judgment No: 2003/555, the Date of the Judgment: 11.03.2003, The Journal of Council of State, Year 2003, no. 2, pp. 248-253).

Article 13 (1) of Municipal Law numbered 5393 reads "everyone is a fellow-citizen of the county in which he lives. They shall be entitled to participate in the decisions and services of the municipality, to acquire information on the municipal activities and to benefit from the aids of the municipal administration. It is a principle that aid is provided without harming human dignity". According to this article a fellow-citizen as a municipal resident can bring an action for annulment. For example, a citizen may bring an action with regards the transfer of the operation right of the geothermal centre to bidder. (See, The Council of State, Thirteenth Division, Registration No: 2007/4549, Judgment No: 2008/5019, the Date of the Judgment: 23.06.2008, The Journal of Council of State, Year 2009, no. 120, pp. 415-418).

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. action for annulment or action for performance or action for damages)?

As mentioned above, the Turkish administrative justice system has two types of administrative law suits. As regards action for annulment, the claimant must be able to show that his "interests" are adversely affected by the act of administration. However, as regards action for compensation the claimant must be able to show that his "rights" are adversely affected by the act or action of administration.

- 3.3. Do the requirements of standing change according to the field of substantive law at hand (tax law, social security law, environmental law, etc)? Are there specific standing rules applicable to certain types of claims?

The requirements of standing are not changed according to the field of substantive law. However, as regards action for annulment, interest of the claimant has been widely or liberally interpreted by the Council of State in certain cases. For instance, if a claimant seeks the annulment of an act for environmental reasons, interest could be widely interpreted by the court due to superior public interest. Turkish Environmental Act numbered 2872 in its article 30 (1) asserts that anyone who is injured or has been informed of any activity causing environmental pollution or degradation can apply to the administrative bodies and demand cessation of that activity. This article provides that natural or legal persons have a right to apply to administrative bodies and then courts for safeguarding the environment. In such a case the standing requirement is widely interpreted by the administrative courts.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. between natural and legal persons, NGOs, or other entities)? May public authorities (the State, regional authorities, municipalities or other organs) initiate an administrative action before an administrative court against another public authority? If so, what specific standing requirements need to be met?

As regards action for annulment, the requirements of standing are not changed according to the claimant's nature. Infringement of interest is prerequisite for bringing action for annulment. A natural or legal person must have some interest in bringing action for annulment.

There is no doubt that associations, foundations, trade unions (syndicates) and professional organisations (such as Union of Turkish Bar Associations, Turkish Medical Association, and The Banks Association of Turkey) may seek an annulment of an act if it adversely affects their interests. In other words, these groups may bring a law suit on condition that the act concerns their legal personality, aims and activities.

Though the principal interested party is the one to whom actual harm has been suffered, representation of the collective interests is permitted by these groups because, they were authorised by law to bring an action for the defence of the rights of their members. Although there are different decisions of the Council of State, associations may seek an annulment of an administrative act if it adversely affects collective but not individual interests of their members. Trade unions, may seek an annulment of an act if it adversely affects collective interests of their members. Also trade unions, both employee and employer trade unions in private sector and public official trade unions in public sector, in some situations, could sue an act infringing individual interests of their members. For instance a public official trade union may seek an annulment of disciplinary measure applying to its member by the administration if the official or his successor gives written permission to trade union. It must not be forgotten that this individual measure is about to status of public personnel. On the other hand the same trade union may not seek an annulment of expropriation decision applying to its member's property by the administration, even if written permission is acquired by the trade union.

Public persons, such as the ministries, the universities and the municipalities also have standing to litigate. For instance, the Ministry of Interior cannot seek annulment of the Health Ministry's decision; a County Governor cannot seek annulment of a District Governor's decision. On the other hand, local government authorities, such as municipalities and villages, both seek central public authorities' decisions and each other's decisions. In this case there are no extra standing requirements. Violation of interest is sufficient for action for annulment, violation of rights is sufficient for compensation action. However, central public authorities cannot initiate an administrative law suit before an administrative court against other central public authorities.

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.6. Is human rights law used as an (additional) basis for standing and to which extent has it been successful? Please provide some recent case-law if applicable.

Human rights law is not used as an additional basis for standing.

#### 4. Third party intervention

- 4.1. Can parties outside the (primary) parties to the dispute be granted standing in your legal system? Can or must third parties intervene either to support one of the parties' positions or to vindicate a right of their own and under which conditions (e.g. timeframe, requirement that the Articles of Association provide this as an explicit possibility for a company)?

According to the general rule acknowledged as "no interest, no action" in the Turkish administrative justice system only interested parties may bring actions. Therefore, a third party to the dispute cannot be granted standing on his own unless his interests are violated. Article 31 of the Procedure of Administrative Justice Act enables two opportunities to third parties. Participation of third parties is possible in proceedings as is notice of litigation to third parties. Notice of litigation to third parties means that when an action is brought against an administrative authority the claimant could want to add another party to the suit. As a consequence, third parties, on acceptance of the court can intervene in the proceedings either to support the primary party or to vindicate a right of their own. Participation of third parties in proceedings is possible to render a decision on the merits before the first instance court. Also, it should be borne in mind that as mentioned above, associations, foundations, trade unions and professional organisations in some instances can intervene in the dispute of the primary party.

- 4.2. Can third party intervention, if allowed, be prevented by the original parties to the action? If so, how?

The primary parties to the action only "object" to the third party intervention. Objection is made before the court.

#### 5. Multi-party litigation

- 5.1. Is there a possibility for multi-party litigation in your legal system, e.g. class actions, group actions or other types of actions aimed at vindicating the rights of a large group of litigants? Please specify which types of such actions are available and provide a short definition.

Turkish law does not allow for class action in administrative law disputes as understood in the United States. On the other hand, Turkish law allows associations, trade unions and professional organisations to bring an action for annulment. For instance, a consumer association can represent the collective interests of consumers, therefore it may seek to annul the Council of Ministers' decision concerned. However, a consumer association cannot bring a compensation action on behalf of its members because compensation actions in administrative justice system require right based standing. In addition, article 5/2 of the Procedure of Administrative Justice Act declares that "in order that more than one person can bring an action with a mutual petition, the claimants must have a mutual right or benefit and the events that gave rise to the action or the legal reasons must be same".

- 5.2. Which requirements need to be met by the claimant(s) in order to have legal standing in the various types of multi-party actions available in your legal system?

In line with their founding objectives, associations, trade unions and professional organisations could bring an action for annulment for safeguarding their collective interests of members. A legal base is required.



- 5.3. Is multi-party litigation regulated generally or are there sector-specific regulations for the various types of multi-party litigation in your legal system?

- 5.4. Are there other ways than multi-party litigation available in your legal system to establish the administrative rights and duties of large groups of claimants and defendants?

See 5.1.

## 6. General ("diffuse") interests

- 6.1. Is there a possibility for the (collective) defence of general interests in your legal system in administrative law claims and if yes, under which conditions?

The term "public interest" is more common than "general interest" in administrative law. In general a person cannot institute an action in defence of public interest if he is not affected by the administrative act to be challenged. Nevertheless, it might be proposed that the claimant who seeks judicial review of administrative acts does not merely vindicate his personal interest but also vindicates the public interest. It is in the interest of the community that illegal administrative acts are not left untouched. Environmental, cultural and historical values are under protection in Turkish law due to higher public interest concern. From this perspective, an action could be brought for this aim, but the condition of interest is still required.

- 6.2. If so, is general interest litigation regulated generally or are there sector-specific regulations (e.g. in environmental law) for the defense of general interests?

The collective defence of general interests is not regulated generally in Turkish law.

## 7. Courts practice

Please illustrate your answers in questions 7.1, 7.2 and 7.3 with case-law.

- 7.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Administrative courts are mostly lenient in the control of the locus standi requirements, especially in environmental cases. In the context of the locus standi, administrative courts are more lenient in action for annulment than action for compensation.

- 7.2. Are there significant variations in the courts' approach based on:

- 7.2.1. the type of remedy requested?

No

- 7.2.2. the field of substantive law at hand?

No

- 7.2.3. the nature of the claimant?

No

- 7.2.4. the nature of the claim?

No

- 7.3. Do the courts take other considerations (e.g. merits, importance and/or abusive nature of the claim) into account when granting or refusing standing?

No. Because standing is a prerequisite for bringing an action. In preliminary

examination of the petition stage the court examines, inter alia, the locus standi requirement and then carefully investigates the merits of the case.

- 7.4. Do the courts use standing as a tool for the administration of justice? If so, how (e.g. to keep the amount of litigation below a certain threshold; to avoid trivial cases; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

No. But, remember that standing is an elastic concept and can be interpreted by the courts.

## 8. Influence of EU law

- 8.1. Did the transposition of secondary EU law, e.g. the Directives transposing the Aarhus Convention, require a change in the standing rules in your legal system?

No

- 8.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

No

- 8.3. Did the courts use:

- 8.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

- 8.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights) and/or;

- 8.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

- 8.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

## 9. Other

- 9.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

The basic principle with regard to standing in Turkish administrative law is still that the claimant's interest must have an individual, legitimate and actual in action for

annulment. It is the fact that the Turkish administrative courts have interpreted the requirement of standing liberally. In their recent judgments, administrative courts refer to the judgments of the European Court of Human Rights. As of January 2012, the Council of State, the High Military Administrative Court, twenty eight Regional Administrative Courts, forty four Administrative Courts and thirty three Tax Courts are operating in the Turkish administrative justice system.

## QUESTIONNAIRE FOR REPORTERS ON **CRIMINAL LAW** **(TURKEY)**

Where necessary, please quote specific statutory law and leading case-law when answering the questions.

### **1. The court system**

- 1.1. Give a short overview of the court system in criminal law cases in your legal system in no more than half a page.

The Turkish criminal justice system is inquisitorial in nature, influenced to a large degree by continental Europe. In 2005, both the Penal Code and the Code of Criminal Procedure were replaced in toto (entry into force: 1 June 2005). Although hailed as big reforms towards joining the EU, the expected benefits of these laws have not materialised given the prevalence of structural problems such as inefficiency and delay. Indeed, the high number of applications to and violations found by the European Court of Human Rights indicate critical problems remain such as wide use of phone tapping; overuse of pre-trial detention and overly broad application of the definition of terrorism. Further, the so-called reform took a very traditional view of the criminal justice system with its focus on crime and criminal defendants rather than victims and their protection.

The first stage of the criminal justice process is the investigation stage. Proceedings may be initiated by a complaint filed by the victim of a crime or who has been affected by the crime or ex officio by the prosecutor. However, it is the prosecutor who decides whether or not to issue an indictment based on the evidence collected by the police (there is no judicial police in Turkey that works under the authority of the prosecutor to collect evidence). If, after the investigation, the prosecutor has strong suspicion that a crime has been committed, the suspect is referred to the judge for pre-trial detention. If there is sufficient evidence to press charges, an indictment is prepared and submitted to court. Once the indictment is accepted, the person is called a criminal defendant. During prosecution, the court gathers evidence. Illegally obtained evidence cannot be used as a basis for conviction such as statements obtained by the police from the criminal defendant in the absence of a defence lawyer unless confirmed by the suspect/criminal defendant before the court.

The legal determination for filing an indictment is less stringent (sufficient level of suspicion) than the one required for pre-trial detention. Nevertheless, it has been claimed that the meaning of all these standards of reasonable suspicion, strong suspicion and sufficient evidence need clarification by the Court of Cassation. It is pretty standard that months pass between pre-trial detention and preparation of indictment as well as between hearings.

- 1.2. What type of standing does a victim of crime have before a criminal court (e.g. compensation, right to be heard etc.)?

The type of standing of a victim is regulated under art. 234 of the Code of Criminal Procedure. In the investigative stage, the victim can ask the prosecutor for the collection of evidence; may request for copies of documents; if (s)he doesn't have an attorney may request the appointment of an attorney through the bar if the act

involves sexual crimes and a crime for which the minimum sentence is five years. If the victim is under aged or is disabled to the extent of not being able to defend him/herself then the appointment of an attorney is mandatory. The victim may also request through an attorney review of investigation documents and seized property. In the prosecution stage, the victim may ask to be notified of the hearing; participate in the public prosecution; ask for copies of documents; ask for invitation of witnesses; ask for appointment of counsel from bar and appeal if he or she participated in the prosecution. It should be underlined that the exercise of the said rights by the victim is subject to filing a motion to be accepted as a participant. Thereupon, pursuant to art. 238 of CCP, the court shall make a determination regarding this request after asking the prosecutor, the defendant and his/her counsel. If the request is denied, the victim cannot resort to legal remedies (art. 234/1/b/6 CCP). However, the victim can appeal the decision to deny him participant status along with the judgment.

1.2.1. Is there a possibility of private prosecution?

No. In accordance with the new Code of Criminal Procedure, all instances of private prosecution before criminal courts have been eliminated by way of art. 9 of the Implementation Law on the Code of Criminal Procedure. On the other hand, specific crimes such as banking or smuggling, as regulated in different codes than the Criminal Code, may give the right to compensation before a criminal court.

1.2.2. Can a victim request review of a decision not to prosecute?

Yes, pursuant to art. 234/1-a-5 of ACP.

1.2.3. Does the victim have the right to ask for compensation or other measures (return of property, reimbursement of expenses, measures for physical protection)?

The way this is regulated in the law is focused on the actions of the criminal defendant rather than the victim's demand for compensation. In other words, there is no explicit reference to the victim or his/her demands of compensation or similar. To explain, the law provides (art. 73/8 of Penal Code) that if the criminal defendant agrees to take responsibility in victim-offender mediation and compensates the victim in full or to a large extent, then the case against him/her may be dropped. Similarly, sentencing can be postponed (art. 51/2 PC) if the victim is compensated by return of property; restitution or compensation. In cases where the subject of crime is a property, its return or compensation may serve as a mitigating circumstance (art. 168 PC). In this case, the victim shall have a say and be able to request its return as well. The prosecutor may postpone the indictment (art. 171 CCP) but this requires full compensation (or restitution) of the victim. Further, the judge has discretion to postpone execution of sentence for a convict on the condition that he or she returns property; restitution or compensation (art. 50/1 PC). In this case, unless the convict pays the compensation he or she serves the time. Likewise, a short term jail sentence can be converted into return of property, restitution or compensation. As these examples show it is rather the criminal defendants' actions that are decisive than victim's demands. Therefore, the victim does not have any say on the amount to be paid as compensation or restitution except in victim-offender mediation. Accordingly, the victim may seek his/her remaining damages before civil courts. Victims of terror offences might request compensation from the state pursuant to the Law on the Compensation of Damages arising from Terrorism and the Fight against Terror. In terms of physical protection, victims can benefit from this only as witnesses.

Under art 58 CCP, witnesses can be heard anonymously. Witnesses to crimes for which the lower limit of punishment is no less than ten years of imprisonment and witnesses in organised crime or terror offences may take advantage of the Law on Protection of Witnesses.

- 1.2.4. If the victim can ask for compensation or other measures, is there a division of jurisdiction between criminal and civil courts? If so, can the victim choose, or does a specific court have exclusive jurisdiction in this matter?

As described in 1.2.3, some of the measures can be provided during prosecution of the criminal defendant before a criminal court. However, if the criminal defendant fails to provide any of the measures, the victim may still pursue personal right claims including compensation, return of property or requests for payment of attorney's fees or similar, before civil courts. It should be added that a civil claim arising from a criminal offence shall not be time barred until the crime itself is time-barred. In fact, when a civil claim is pursued in parallel to the criminal prosecution, the civil court stays the proceedings pending the outcome of the criminal case. This practice sometimes deters people to pursue compensation claims in a quick fashion. Lastly, there is a draft Code on Assistance to Crime Victims which envisions the establishment of an Assistance Board to provide financial assistance to victims of crime if they lost their ability to gain livelihood or in case of death to their families. However, this Board cannot be called a court or a venue that has exclusive jurisdiction.

- 1.3. Are victims informed of their rights to participate in criminal proceedings as mentioned under 1.2.1 to 1.2.4.? If so, how is this done?

According to art. 234/3 CCP, the victim should be informed of his or her rights by the police or the prosecutor during the investigation. In the first hearing of the prosecution stage, victims are asked to provide personal data and recollection of facts. After their statement, victims are asked whether they want to become a party to the proceedings. Pursuant to art. 234/3 of CCP, victim must be explained and clarified about these rights. The hearing record (dictated by the judge) should reflect that. In practice, however, the judge does not have the time to explain all of this to the victim and solely asks the victim whether he or she wants to participate. Victims don't always know what this actually means. This contributes to the fact that most victims refuse to participate especially if the victim has no attorney. Nevertheless, judges make sure the hearing record reflects their reminder and clarification of the issue even if this is not the case in practice.

## 2. The rationale of standing

- 2.1. Is standing a distinct procedural requirement in claims that may be brought by a victim of crime before a criminal court?

Yes but only in cases that need to be pursued with a complainant. Otherwise, it is the job of the prosecutor to pursue a criminal matter even if there is no victim or a person affected by the crime participates in the matter along him.

- 2.2. What is the general legal theory (idea) of the requirements for *locus standi* of victims of crime? How is the victim of crime defined in your system? (e.g. does the definition also include the victim's family)? Can a legal person, including a governmental or non-governmental organisation, be considered a victim? Can a

legal person, including a governmental or non-governmental organisation, represent the interests of victims in before a criminal court?

There are two types of persons who have a right to participate in criminal proceedings. First is the victim and second is the person affected by the crime. The victim of a crime has been interpreted as a person who has been directly affected by the commission of a crime. S(he) is the person who is the owner of a right or interest. Where additional damage is inflicted or right/interest violated of others than the victim by the commission of a crime, one can talk about indirectly affected persons. For instance, if someone has been murdered, the victim is the dead person but his/her family is affected by the crime. It is also possible for a legal person whether a governmental or non-governmental to be a victim of a crime if the crime is of a nature that can be committed against a legal person.

### 3. The variations in standing

- 3.1. Please give an overview of the general standing requirements of victims before criminal courts applicable in your legal system.

Please refer to 2.2.

- 3.2. Do the requirements of standing change according to the type of remedy requested (e.g. private prosecution, review of decision not to prosecute, compensation or other measures)?

No. The relevant person still must be affected by the commission of a crime in a direct (or indirect) way. As mentioned under 1.2, the victim must, however, first file a motion to be a participant.

- 3.3. Are there specific standing rules applicable to certain types of claims?

No. It is possible to intervene to each prosecution as long as someone is affected.

- 3.4. Do the requirements of standing change according to the claimant's nature (e.g. natural and legal persons, juveniles and vulnerable persons)?

Rather than making a distinction between natural and legal persons, I would make a decision between legal persons that are governmental and non-governmental. Case law shows that courts are more sympathetic to legal persons that are governmental than non-governmental. Children and disabled victims are appointed mandatory counsel. In addition, crimes against children or the disabled who cannot look after themselves shall be investigated and prosecuted regardless of a complaint if the perpetrator has been caught *in flagrante* ( art. 90/3 CCP).

- 3.5. Are there any other variations in the standing rules (e.g. according to the value of the dispute)?

No.

- 3.6. Is human rights law used as an (additional) basis for standing and if yes, to which extent has it been successful? Please provide some recent case-law if applicable.

Not applicable.

### 4. Courts practice

Please illustrate your answers in questions 4.1, 4.2 and 4.3 with case-law.

- 4.1. Do you consider the courts rigorous or lenient in the control of the *locus standi* requirements?

Courts in Turkey have a propensity to accept the participation of legal persons that have a direct connection with the case. In that regard, the courts' practice is rigorous and requires for instance legal persons to have been directly affected by the crime such as being the employer in a theft case or similar. In that regard, women's NGOs that want to participate in the prosecution of defendants in honour crime cases (notably the death of Güldünya Tören) have been often refused for not having been directly affected by the crime. On the other hand, in the notorious article regarding insulting Turkishness case against the later assassinated journalist Hrant Dink, even associations claiming to represent the victims of Armenian massacres in various Anatolian cities have been accepted to the case. One can therefore conclude that some claimants are favoured by courts, a practice, that is of course criticised. In addition, there are many cases where the Court of Cassation denied the standing requirements for professional associations in cases of illegal practice (CGK, 10 May 1993, 2/122-148, p. 1412).

- 4.2. Are there significant variations in the courts' approach based on:

- 4.2.1. the type of remedy requested?

Being granted participant status remains the biggest challenge. People want to interfere/join not for the satisfaction of their personal interests, damages or other remedies but to ensure the punishment of the criminal defendant by supporting the prosecutor. Therefore, the issue of type of remedy remains irrelevant. It should be emphasised that as a rule, compensational claims are to be pursued before criminal courts.

- 4.2.2. the nature of the claimant?

There are instances where courts are more lenient to grant standing where it is a governmental body (usually the Treasury) that requests standing and a participant status (CGK 29 June 1992, 4/176-201, CGK 20 March 1995, 6/50-79).

- 4.2.3. the nature of the claim?

Courts are equally more lenient to grant standing when the crime is committed against the state or against the family and sexual crimes whereby a large number of family members are granted participant status.

- 4.3. Do the courts take other considerations (e.g. merits, importance, complexity) into account when granting standing?

The right to standing of religiously married couples (no civil marriage) could be mentioned here. In newer decisions, the Court of Cassation began to grant standing to such couples. In one such case, a person who has been living with the deceased victim and had three common children with him was given participant status (1.C.D, 06 December 2006, 2006/289-2006/5503).

- 4.4. Do courts consider standing as a tool for the administration of justice? If so, how (e.g. to provide victims with an easy way to get a decision on compensation and keep the amount of civil litigation below a certain threshold; to adapt to saving operations or cutbacks in expenditure for the judicial system)?

Please refer to 4.1.



## 5. Influence of EU law

- 5.1. Did the transposition of secondary EU law require a change in the standing rules in your legal system?

- 5.2. If so, did these changes affect the standing rules also outside the scope of application of EU law?

- 5.3. Did the courts use:

- 5.3.1. the principle of effective judicial protection (as developed by the European Court of Justice);

- 5.3.2. the right to an effective remedy (as enshrined in Article 47 of the Charter of Fundamental Rights or Article 13 of the European Convention on Human Rights); and/or

The Constitution specifically provides that if there is a conflict between international agreements concerning fundamental rights and freedoms duly put into effect and domestic laws, the provisions of the former shall prevail. However, this is done very rarely. Since all decisions of courts are not published, it is not possible to know this.

- 5.3.3. the right of access to court (as enshrined in Article 6 of the European Convention on Human Rights and according to the European Court of Human Rights and the European Court of Justice's case law)

in order to set aside or interpret the national standing rules in cases falling within the scope of application of EU law?

Not applicable.

- 5.4. Did the courts use the principle of effective judicial protection, the right to an effective remedy or the right of access to court in order to set aside or interpret the standing rules also outside the scope of application of EU law?

## 6. Other

- 6.1. Please include any other relevant observations you may have apart from the answers to the questions mentioned above.

Turkey ratified the European Council Convention on the Prevention of Victimization. As discussed above in 1.2.4 there is a draft law on victim support that awaits enactment. Overall, the goal of the criminal justice system is not protection of victims. As a result, structurally there are also no victim support institutions or units.



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

## POLICY DEPARTMENT **C** CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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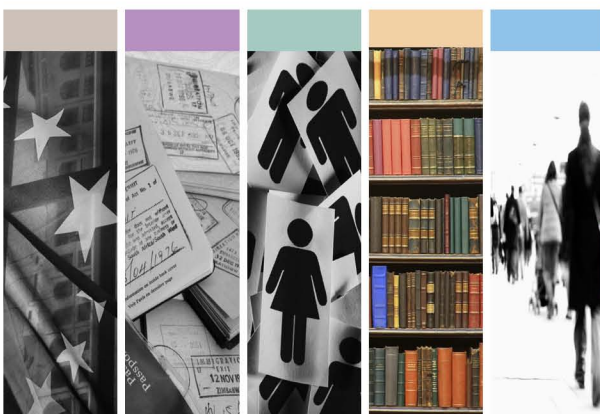
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