

# EFFECTIVE NATURE LAWS

Executive summary for policymakers





**A major interdisciplinary  
empirical study**  
of how the design of our nature  
governance rules affects compliance.

November 2021

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For further details, see <https://effectivenaturelaws.ucd.ie/>.

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# INTRODUCTION

The EU has some of the world's most ambitious and highly-developed environmental laws on its books, but their effectiveness is severely compromised by non-compliance. Poor implementation is one of the key weaknesses of the EU's environmental policy.

With the UNECE Aarhus Convention (1998), Europe launched an innovative legal experiment, democratising environmental enforcement by conferring citizens and environmental NGOs (ENGOs) with legal rights of access to environmental information, public participation, and access to justice in environmental matters.

At the same time, the European Commission has scaled back its own public enforcement efforts, citing its preference that Member State enforcers should take the lead,<sup>1</sup> and emphasising the important role of civil society as a 'compliance watchdog' supporting the European Green Deal, the Von der Leyen Commission's flagship initiative aiming to fundamentally transform the EU into a carbon-neutral economy by 2050.<sup>2</sup>

**Against the background of unprecedented climate and environmental challenges, ongoing declines in biodiversity in Europe,<sup>3</sup> and the EU's 2030 Biodiversity Strategy aim to improve implementation of the EU's nature laws, there is an urgent need for policymakers to understand whether enabling private environmental governance through the Aarhus Convention is achieving its intended policy outcomes and, if not, why not.**

This 5-year empirical research project, funded by the European Research Council,<sup>4</sup> breaks new ground in mapping the evolution of EU environmental governance laws in the EU. We examined the effectiveness of the EU's nature governance laws in three Member States over a 23-year period from 1992, the date of adoption of the EU's flagship nature law, the Habitats Directive. Using novel and complementary methodologies, including the coding of over 6,000 nature governance laws, over 2000 surveys and interviews across France, Ireland and the Netherlands, and a behavioural economics lab experiment, we show how nature governance laws have evolved over time, how they have been used in practice, how this has impacted landowners compliance decisions, and how it has impacted traditional public enforcement. Our results point to practical ways in which nature governance laws might be made more effective.

**This briefing summarises our main findings as to how regulators and policymakers may maximise the effectiveness of environmental governance rules and use law as a positive force to help change environmental social norms.** More details on the project and our publications can be found at <https://effectivenaturelaws.ucd.ie/>.

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<sup>1</sup> A Hofmann (2018) 'Is the Commission levelling the playing field? Rights enforcement in the European Union', *Journal of European Integration* 40, 737-751.

<sup>2</sup> European Commission (2020) Communication on the EU Biodiversity Strategy for 2030, Bringing Nature Back Into Our Lives, COM(2020) 380. European Commission (2020) Communication on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643.

<sup>3</sup> *ibid.*

<sup>4</sup> This work was funded by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 639084).

The United Nations Economic Commission for Europe (UNECE) 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention") established a number of rights for the public and environmental non-governmental organisations ("ENGOs") concerning the environment. Parties to the Convention are required to make the necessary provisions so that public authorities (at national, regional, or local level) will enable these rights to become effective. The Convention provides for:

**1. Access to environmental information.**

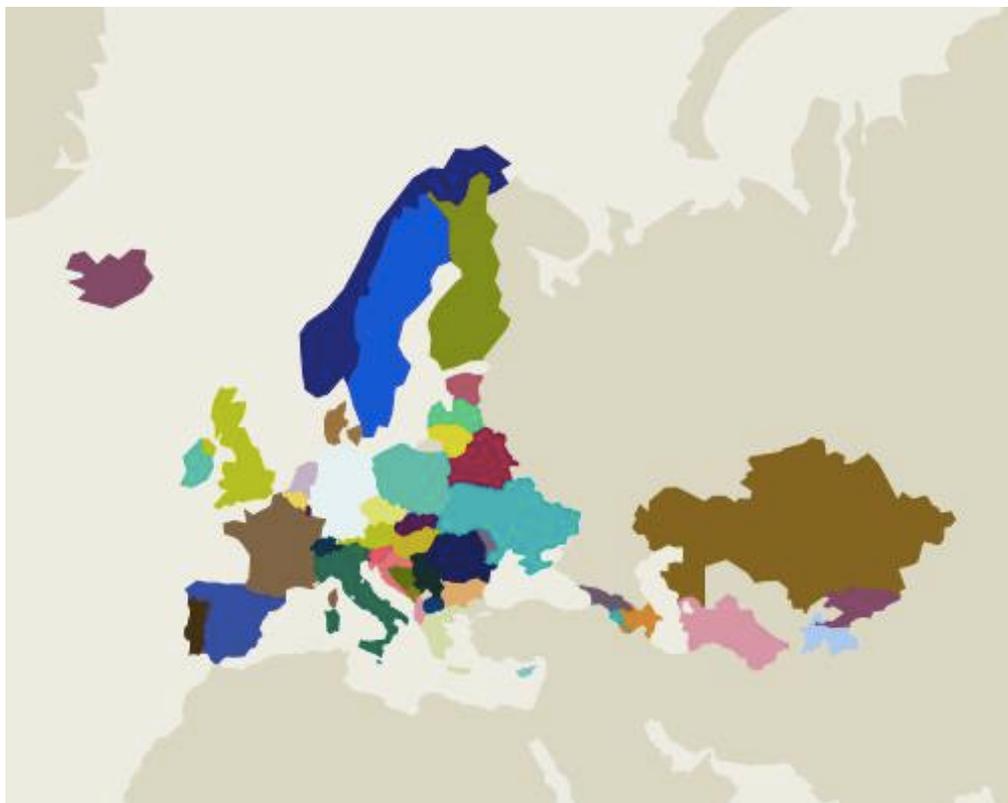
The right of everyone to receive environmental information that is held by public authorities. This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment.

**2. The right to participate in environmental decision-making.**

Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, and for these comments to be taken into due account in decision-making.

**3. Access to justice.**

The right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.



Aarhus signatory parties. Source: <https://www.unece.org/env/pp/aarhus/map.html>.

# The Aarhus Convention in Ireland, France, and the Netherlands: an overview.

## 01 | IRELAND

Ireland was a laggard in formally ratifying the Aarhus Convention: it was the last EU Member State to do so, in 2012.

Citizens and ENGOs can seek access to environmental information from public bodies and can make submissions on applications for planning permission and consent procedures, on payment of a fee. Planning appeals may be made to An Bord Pleanála, an independent administrative planning appeals body.<sup>5</sup>

Citizens can bring a judicial review before the Irish High Court in planning matters where there are substantial grounds for the case, and they can show a sufficient interest. ENGOs have standing (i.e. a sufficient interest to participate in a case) as of right, and do not need to prove a sufficient interest.<sup>6</sup>

Further, in a number of areas within the scope of EU law, including Environmental Impact Assessment as well as the Habitats and Birds Directives, special costs rules apply whereby each party pays their own costs,<sup>7</sup> and applicants may also be awarded their costs in the event that they succeed in their case. This significantly reduces the risk that an environmentally-motivated application might have to pay a large costs award if he/she loses the case. Legal aid is only available in limited circumstances and does not extend to ENGOs.

## 02 | FRANCE

The rights of access to information and public participation in environmental decision-making enjoy constitutional status,<sup>8</sup> and have been implemented in the French Environmental Code.<sup>9</sup>

However, the implementation of access to environmental information in practice has been problematic. In May 2020, the French Ministry for Ecological Transition acknowledged that the right to access environmental information is “not very well-known” by citizens, and that certain public authorities have been slow to comply with their obligations to inform the public in this area.<sup>10</sup> This followed the European Commission’s decision to send a Letter of Formal Notice noting that the legal requirements for an expeditious response to access to information appeals were being “repeatedly” exceeded in France.<sup>11</sup>

Public participation procedures have required fewer changes as a result of the Convention.<sup>12</sup> As concerns access to justice, legal standing is affor-

<sup>5</sup> Planning and Development Act 2000, s. 37.

<sup>6</sup> Planning and Development Act, s. 50A(3).

<sup>7</sup> Planning and Development Act, s. 50B; Environment (Miscellaneous Provisions) Act 2011, s. 3.

<sup>8</sup> Charte de l’environnement, Article 7.

<sup>9</sup> Code de l’environnement, L.124-1; Article L. 110-1 II.4°-5°.

<sup>10</sup> Ministère de la transition écologique et solidaire, 2020.

<sup>11</sup> European Commission (2020) Access to environmental information: Commission urges France to improve citizens’ access to environmental information (INF/20/859).

<sup>12</sup> B Drobenko (1999) La Convention d’Aarhus et le droit français. *Revue Juridique de l’Environnement* 24, 31-61.

## 03 | THE NETHERLANDS

ded to those who prove a “personal or direct, actual and legitimate interest” in taking the case before the civil courts or, before the administrative courts, where the decision infringes a right or legitimate interest.

A specific feature of the French system is that certain ENGOs may benefit from a special legal status by applying for an *agrément* (governmental approval) if they meet certain conditions.<sup>13</sup> If approved, ENGOs benefit from a variety of rights, including the right to participate in national or regional environmental consultative bodies, and a presumption of legal interest when bringing legal proceedings.

In terms of legal costs, the “loser pays” principle generally applies, but legal aid is available to citizens or ENGOs to cover legal costs if a claimant does not have sufficient resources. o participate in national or regional environmental consultative bodies, and a presumption of legal interest when bringing legal proceedings.

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The Freedom of Information Act was amended in 2005 to implement the Convention, laying down a right of access to information. The Environmental Management Act further requires public agencies to actively disseminate environmental information.

As concerns public participation, making submissions is free of charge; an appeal can then be made before an administrative judge.<sup>14</sup> Although there is a long tradition of public participation in the Netherlands, the Convention broadened the type of plans where the right of public participation applies.

By contrast, no significant changes in Dutch law were made in implementation of the Aarhus access to justice provisions. Claimants must generally show they are an ‘interested party’ having a “*direct, own, personal, objective and actual interest*” in bringing proceedings,<sup>15</sup> and a claimant must have participated in the original public participation procedure. As to standing, ENGOs need not show they are directly affected by a decision, but are required to establish that the interests they seek to defend are reflected in their statutory aims and actual activities undertaken.

In terms of legal costs, while the ‘loser pays’ principle applies, legal costs are typically less than in common law systems such as Ireland, and means-tested legal aid is available for private citizens and ENGOs.<sup>16</sup>

<sup>13</sup> Code de l’environnement, Article 141-2.

<sup>14</sup> Government of the Netherlands (2017) *Uitvoeringsverslag Verdrag van Aarhus (Aarhus Convention Implementation Report)*. Available at: [https://www.unece.org/fileadmin/DAM/env/pp/mop6/NIR\\_2017/2017\\_The\\_Netherlands\\_NIR\\_in\\_Dutch.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/NIR_2017/2017_The_Netherlands_NIR_in_Dutch.pdf)

<sup>15</sup> CW Backes (2012) ‘The implementation of Article 9.3 of the Aarhus Convention on access to justice in the Netherlands’. Available from URL: <https://cris.maastrichtuniversity.nl/en/publications/the-implementation-of-article-93-of-the-aarhus-convention-on-acce>.

<sup>16</sup> Government of the Netherlands (2017) *Uitvoeringsverslag Verdrag van Aarhus (Aarhus Convention Implementation Report)*. Available at: [https://www.unece.org/fileadmin/DAM/env/pp/mop6/NIR\\_2017/2017\\_The\\_Netherlands\\_NIR\\_in\\_Dutch.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/NIR_2017/2017_The_Netherlands_NIR_in_Dutch.pdf)

## 01 ***Qualitative research (surveys and interviews) on how we can design more effective nature governance laws to encourage voluntary environmental behaviour.***

We conducted over **2000 surveys and 165 in-depth semi-structured interviews** across Ireland, France, and the Netherlands in 2018-2019.

These three States were selected to present a variety of geographic size of Member State, environmental conditions, and record of compliance with EU environmental law, legal 'family' of the State at issue (common law or civil law), and length of time taken to ratify the Aarhus Convention.

Surveys and interviews broken down by group:

<b>Farmers/ landowners:</b>	<b>400 surveys, 80 in-depth interviews.</b> Care was taken to ensure a sufficient spread of both intensive and high nature value farmers.
<b>ENGOS:</b>	<b>80 surveys, 27 in-depth interviews.</b>
<b>Citizens:</b>	<b>Over 1700 surveys, 60 in-depth interviews.</b>

*A more detailed description of the survey and interview frameworks, including data underlying choice of jurisdiction, is provided in our scientific publications and on our website.*

## 02 ***Quantitative research (statistics and regression) mapping the evolution of nature governance laws at national, EU, and international levels, and their use in practice.***

- We developed the *Nature Governance Index* ('NGI'), by coding over 6,000 nature governance laws, at international, EU, and national levels, from the birth of the EU's flagship nature conservation law, the 1992 Habitats Directive (Directive 92/43/EEC) to 2015 inclusive. This provides the first systematic data showing the transformation of European nature governance regimes over time.
- At the national level, we focused on three EU Member States (France, Ireland, and the Netherlands) to enable a fine-grained measurement of the changes in national nature governance laws over time.

- We also developed the *Nature Governance Effectiveness Indicators* ('NGEIs'), a novel set of indicators measuring the impact of these new governance rights in practice since 1992. We regress the NGEIs against the NGI to provide a first quantitative insight into whether these changes in nature governance laws have actually made a difference in practice, and their impacts on levels of traditional State enforcement.
- We collected data for the NGEIs from a combination of publicly available information and over 300 formal and informal requests for access to environmental information made over a period of 3 years to the European Commission and to national and sub-national bodies within Ireland, France and the Netherlands.
- In compiling our data, we worked with a team of over 50 legal researchers and law students from Universities in France, Ireland and The Netherlands.
- A more detailed description of our methods and data, collected over five years, is provided in our scientific publications and on our website.

## 03

### ***Experimental behavioural economics research testing how nature governance rules affect compliance.***

- We tested the impacts of different nature governance rules on compliance decisions and behaviour in a novel behavioural economics lab experiment.
- We recruited 300 participants from students at University College Dublin to play a one-shot game that tested how traditional and private/Aarhus governance mechanisms made a difference to the behaviour of landowners and environmentally-motivated citizens in practice.
- Players took decisions and interacted with each other, by means of bespoke computer programme in a behavioural economics computer lab. The levels of tokens (money) earned by each player at the end of the game depended on the decisions taken.

# RESULTS



# QUALITATIVE FINDINGS

## A. *Designing more effective nature governance laws to encourage voluntary environmental behaviour.*

The results of our surveys and interviews reveal a range of factors that magnetise/encourage, and repel/discourage, pro-environmental action on the part of landowners subject to EU nature law, and potential private environmental enforcers.

**Table 1** Law's effects on potential private environmental enforcers

	<b>Encouraging factors</b>	<b>Discouraging factors</b>
<b>Factors affecting ENGO enforcement</b>	<ul style="list-style-type: none"> <li>Belief that State is not doing enough (IE, NL)</li> <li>Need to counteract strong agricultural lobby (IE)</li> <li>Need to counteract underfunding of State nature conservation agency (IE)</li> <li>Belief in the transformative potential of EU nature conservation law (IE)</li> <li>Belief in the effectiveness of complaints from the ENGO sector (NL)</li> <li>Light-touch role of the European Commission (NL)</li> </ul>	<ul style="list-style-type: none"> <li>Lack of ENGO resources and expertise (IE, FR, NL)</li> <li>Unwillingness to act against farmers (IE, NL)</li> <li>Belief in State's primary role as enforcer (FR)</li> <li>Exclusionary effect of requirement to have <i>agrément</i> (FR)</li> <li>ENGO resources used to support State enforcement (FR)</li> </ul>
<b>Factors affecting citizen enforcement</b>	<ul style="list-style-type: none"> <li>Would get involved if personally affected (IE, NL)</li> <li>ENGO support of citizen action (NL)</li> </ul>	<ul style="list-style-type: none"> <li>Lack of awareness of the mechanisms (IE,FR,NL)</li> <li>Belief in farmers' autonomy over own land (IE,FR,NL)</li> <li>Cost and time (IE, NL)</li> <li>Social ostracisation (IE, NL)</li> <li>Complexity (FR, NL)</li> <li>The State should enforce; citizens' role is to comply not to enforce (FR)</li> <li>Environmental activism is for ENGOs (IE, NL)</li> <li>Unwilling to restrict economic progress (NL)</li> </ul>

**Table 2** Law's effects encouraging/discouraging farmers' voluntary pro-conservation activity.

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<b>Factors encouraging farmers' voluntary pro-conservation activity</b>	<p>Belief in importance of nature in protected areas and farmers' role as guardian of the land (IE, FR, NL)</p> <p>Involvement of local farmers in creating the specific rules to be applied and enforced (IE, FR, NL)</p> <p>Direct engagement with farmers in publicising the rules and the reasoning behind them (IE, FR, NL)</p> <p>Engagement with those ENGOS who have conservation expertise (IE, NL); communication and consensus-building (NL)</p>
<b>Factors discouraging farmers' voluntary pro-conservation activity</b>	<p>Perceived procedural unfairness in Natura 2000 designations (IE) Perceived lack of publicisation of substantive Natura 2000 rules (IE, FR, NL)</p> <p>Perception that rules are imposed/policed by outsider State/ENGO city-dwellers who do not understand farming (IE, FR, NL)</p> <p>Perception that the rules do not make environmental sense (IE, FR)</p> <p>Inconsistencies between laws implementing Natura 2000 and agri-environmental subsidy schemes, and belief that agricultural schemes favour intensive farmers (IE)</p> <p>Disconnect between State's environmental and agricultural bodies (IE) Involvement of ENGOS/citizens who have no connection with the local area (IE, FR, NL)</p> <p>Perception of certain ENGOS as serial objectors (IE) who vilify farmers (FR) and/or exaggerate (NL)</p> <p>Perception that ENGO/citizen may be using enforcement for their own selfish/NIMBY end (IE, FR)</p>

## FARMERS' PERSPECTIVES ON PRIVATE ENFORCEMENT

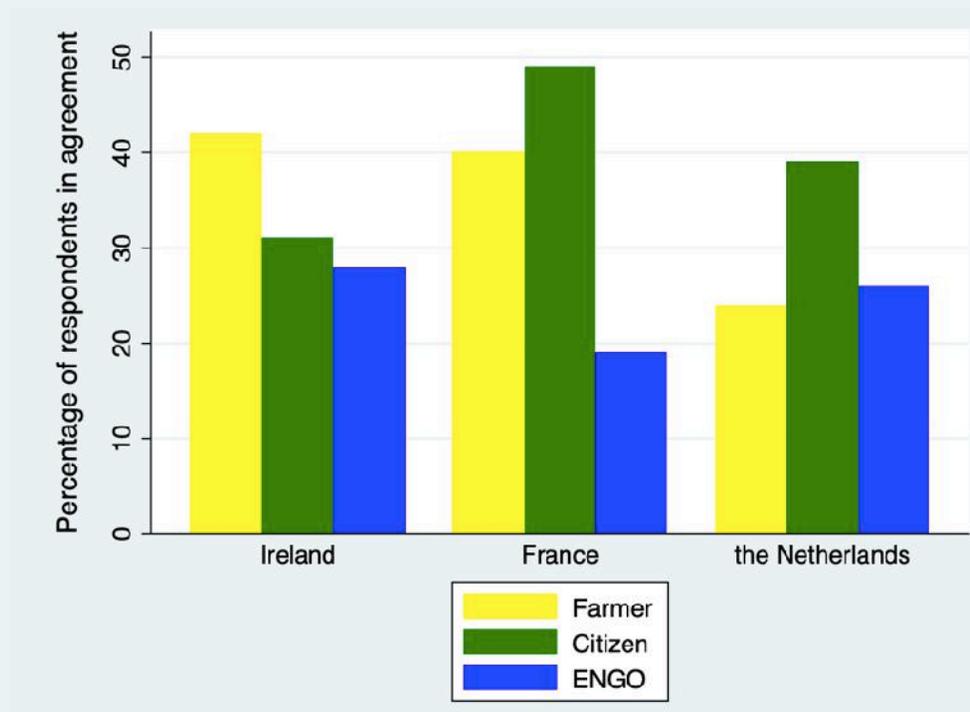


Figure 1: Respondents agreeing that "It's up to Farmers to take environmental decisions about their property, and others should not get involved."

43% of Irish farmers and 40% of French farmers considered that others should not get involved at all in environmental decisions concerning their property (Figure 1). This figure was significantly lower in the Netherlands (25%). Citizens in France and the Netherlands showed an even greater belief in farmers' right to autonomy.

Unsurprisingly, ENGOs in all three jurisdictions largely rejected the proposition that environmental issues arising on farmers' land should be left to the farmer.

## Farmers' perspectives in Ireland

The importance of **consultation, local knowledge and the involvement of local farmers** in rule-making and enforcement was a recurrent theme.

While farmers often recognised the *"important role"* that ENGOs and private parties could play in bringing issues to the public's attention, most reported a suspicion of those from outside the locality seeking to get involved in protected areas.

While farmer interviewees indicated that they cared about protecting the environment, there was a strong sentiment that the manner in which the EU nature rules had been implemented in Ireland was **unfair, lacked transparency and led to unrealistic demands**.

However, the rangers that we interviewed from the Irish State nature agency, the National Parks and Wildlife Service ('NPWS'), considered that most farmers in protected areas knew the basics, if not the detail, of the nature rules.

Most farmers in EU protected areas reported having intrinsic pro-environmental motivations, irrespective of profit.

These motivations were however displaced where farmers felt the rules restricting activities on EU protected areas did not make sense, unfairly favoured intensive farmers active in non-protected areas, or had been unfairly imposed upon them.

We found particular disillusionment with agri-environment subsidy schemes where they had been designed in a way that was not appropriate for the high nature value farmland in protected areas. Most high nature value farmer interviewees considered subsidies under the Common Agricultural Policy to be aimed largely at intensive farmers increasing production, rather than paying farmers for conserving nature.

Fragmentation of responsible State agencies, and in particular the disconnect between the approach of the NPWS and the Irish Department of Agriculture, led to difficulties.

## Farmers' perspectives in France

Most French farmers we interviewed considered that central role in ensuring compliance was for the farmer him/herself *"The State has its role to play, but really it's up to farmers themselves in the first place"*.

As with Ireland, many farmers viewed the State as too *"detached"* from reality, considering that civil servants do not understand farming: farmers should be more involved in nature governance, with farmers teaching other farmers best practice.

Farmers active in protected areas reported difficulties in knowing what the rules were, complaining of a lack of personal communication and overreliance on internet as a source of information for farmers, and considering nature law breaches to be due often to the complexity of the current laws.

A particular feature of interest in the French legal framework is the use of (a) steering committees and (b) Natura 2000 contracts to manage Natura 2000 sites.

Steering committees enable actors concerned by the designation of a site to be involved in the management of these sites, which may include farmers. Natura 2000 contracts enable landowners to agree on nature conservation measures with local authorities, in exchange for financial incentives.

In this way, farmers have a say in the definition of nature rules imposed on them.

As concerns third-party enforcement, as with Irish farmers, most French interviewees felt strongly that the local public should make decisions for their own communities.

There was a distrust of third-party involvement in the governance of their land. ENGOs were often, but not always, perceived as “outsiders” who frequently “*don’t know what they are talking about*” and do not understand the practical reality of farming on the ground.

**Certain farmers reported feeling vilified in public opinion as responsible for all environmental problems.**

## Farmers’ perspectives in The Netherlands

Dutch farmers emphasised the vital importance of a clear legal framework, more communication regarding what the nature rules are, better explanation of why these rules exist, and what their added value is both for nature and for the farmers themselves.

As with Irish and French farmers, Dutch farmers acknowledged their desire to be able to feed back into the regulatory regime on the nature rules, what works, and what does not.

**Some farmers acknowledged the importance of engaging with ENGOs in their work, both as a source of knowledge and expertise, as well as a way to increase the legitimacy of their business.** However, other farmers felt that ENGOs’ involvement in nature enforcement may be beneficial, but only if they have the relevant expertise and “***know what they are talking about.***”

Most considered that citizens’ involvement was only appropriate if linked to the locality.

## ENGO PERSPECTIVES ON PRIVATE ENFORCEMENT

In Ireland, France and the Netherlands, a high proportion of ENGOs consider the State should play the central role in environmental enforcement. This sentiment was particularly high in France where our survey data showed that fully 100% of French ENGO respondents considered the State should be the principal environmental enforcer (Figure 2).

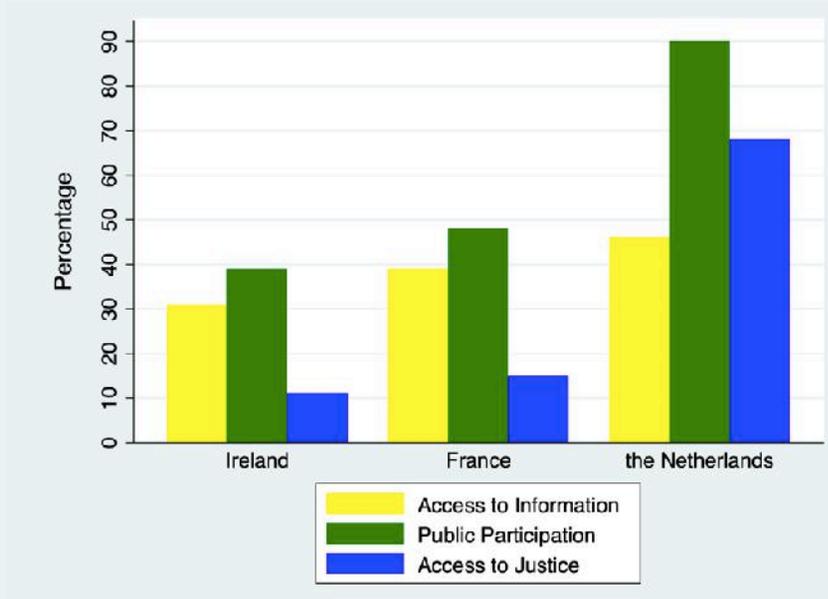


Figure 2: Respondents agreeing that "The State should play the main role in environmental enforcement."

While there is a general consensus within ENGOs that the Aarhus mechanisms are helpful, relatively few in Ireland and France have actually made use of those mechanisms.

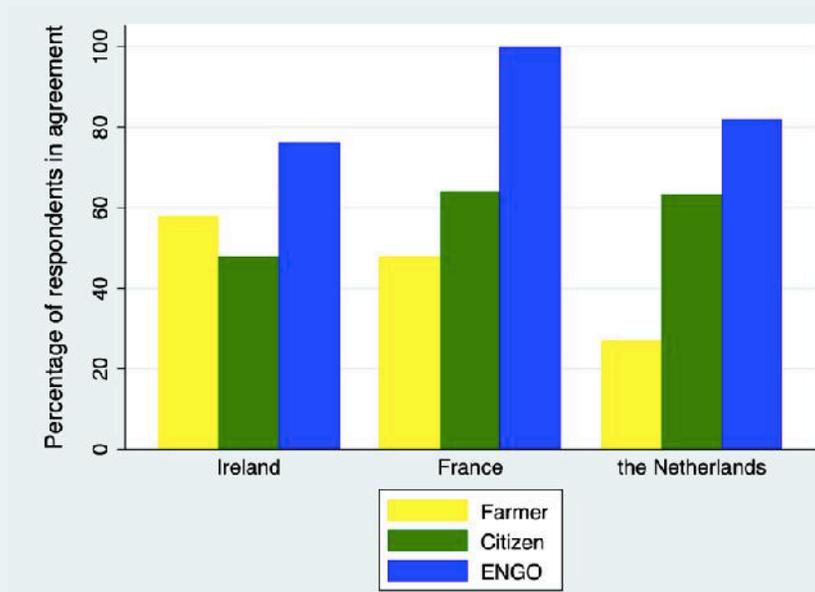


Figure 3: ENGOs' use of the Aarhus Mechanisms

## Irish ENGO perspectives

Most ENGOs considered that the State is not doing enough to enforce environmental laws, in part because there is a strong agricultural lobby in Ireland, led by the Irish Farmers' Association ('IFA'), which can make it politically unpalatable to take pro-environmental action that might interfere with the immediate needs of the agricultural sector.

Most ENGOs also cited underfunding of the State agency with responsibility for nature law, the NPWS, as being a barrier to proper State enforcement.

A pervasive theme from our Irish ENGO interviewees was, however, that the EU's Birds and Habitats Directives have played a vital role in preventing harm to the environment in Ireland.

Certain ENGOs complained that the State at times sought to "game" the Aarhus mechanisms, such as by incorporating public holiday periods into consultation periods, rendering the possibility of public participation more difficult.

Seeking access to justice was not a strategy of most Irish ENGOs, with just two ENGOs reporting that they had taken environmental court cases.

**Most ENGOs viewed legal proceedings as the "last resort."**

As concerns citizen enforcement, ENGOs considered this did not play a major role in Ireland, due to a "serious lack of awareness among the public that they have all these rights." A particular difficulty raised was the tight-knit nature of rural Irish communities.

**There was little appetite amongst Irish ENGOs for traditional enforcement action targeting farmers.** ENGOs felt that landowners played a vital role in protecting the environment and they need to be incentivised to do so, with proper explanations being provided to them for the reason behind environmental laws.

## French ENGO perspectives

While all ENGO interviewees strongly believed that nature protection is the responsibility of the State, most complained that the **State has had a progressively weaker role in nature enforcement in recent years.**

A minority of ENGOS were active in bringing proceedings appealing planning decisions and by challenging national laws for non-conformity with EU law; some had joined proceedings as a private party to claim damages before the French administrative and civil courts. However, smaller ENGOs did not generally use access to justice mechanisms, due in part to the costs involved, but also because they did not hold the necessary governmental approval (*agrément*).

On the role of citizens, ENGO respondents generally supported citizen engagement, but most considered private enforcement to be too difficult for ordinary citizens.

## Dutch ENGO perspectives

Similarly, most French ENGOs were sceptical about the idea that people (whether farmers or citizens) would voluntarily seek to go beyond the letter of the law: considering it is *"not a French habit or tradition to voluntarily go beyond the law"* due to the French *"rebellious"* nature.

To encourage people (farmers and citizens) to go further, ENGO interviewees considered that **education was key, to convince people of the usefulness and relevance of nature conservation concerns.**

While all ENGOs interviewed agreed that the State should play an important role in enforcement, a number of nature conservation ENGOs felt the **State is taking an increasingly laissez-faire approach to environmental enforcement, putting the onus of enforcement on private parties.**

*"The government follows a 'complaint' system, where you have to complain loud and often in order to get anything to happen."*

All but one of the ENGOs interviewed indicated they are active in environmental enforcement in one way or another - a role many have been reluctant to take up.

Many considered that it would not be right to lay the blame at the individuals not complying with the rules, but that the focus should be on the State that is not demonstrating the *"desire or will to enforce."*

One ENGO emphasised the lack of action by the European Commission, which has *"taken a very light-touch approach to environmental enforcement, focused on cutting red tape and lightening regulatory pressure."*

As concerns citizen involvements, one ENGO pointed to the risk that citizens might become alienated from society when taking up enforcement roles, taking the example of a local person who took on proceedings to stop a planning project endangering a protected beetle species, but was treated by the local community as a *"Don Quichotte"*, acting purely out of self-interest.

## CITIZENS' PERSPECTIVES ON PRIVATE ENFORCEMENT

Citizens are reasonably aware of the rights provided by the Aarhus mechanisms, with greater awareness in the Netherlands than in Ireland and France. There is most awareness of the access to information mechanism.

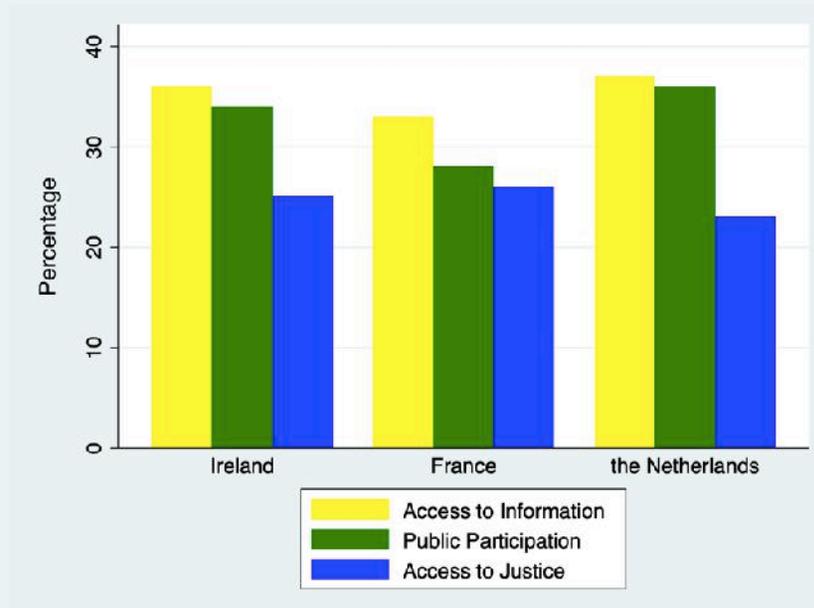


Figure 4: Citizens' Awareness of the Aarhus Mechanisms.

However, few citizens within our survey sample had made use of the access to information mechanisms, and virtually none had made use of the access to justice mechanism. The picture was different for public participation, where around one quarter of citizens surveyed had previously exercised their right to make submissions.

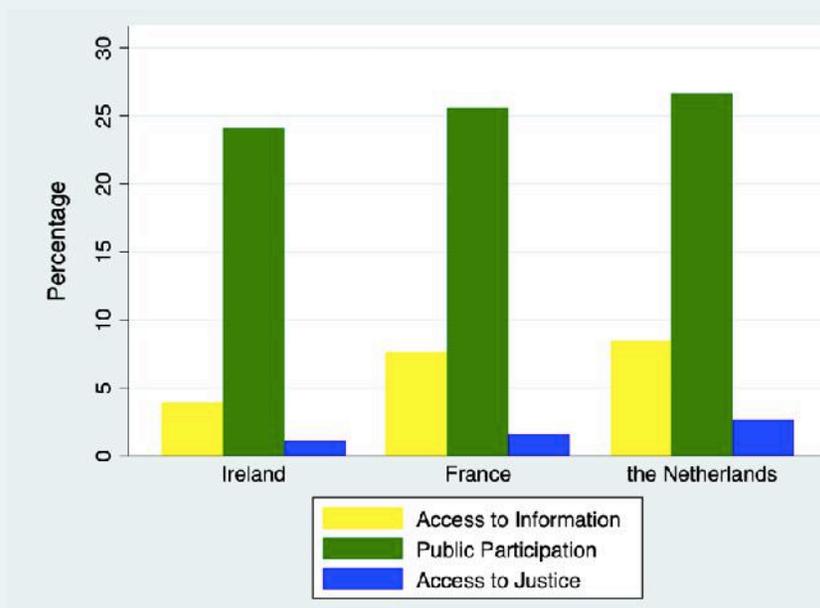


Figure 5: Citizens' Use of the Aarhus Mechanisms.

**Irish citizens' perspectives**

Most citizens perceived the State as having the main responsibility for enforcement.

The cost and time involved were seen as deterrents to using access to justice provisions. When asked about barriers to their involvement in environmental enforcement, most citizens cited a lack of information about ways to get involved; others considered that people had other priorities and did not have the time to engage in environmental action.

**French citizens' perspectives**

State enforcement was considered essential by all citizens, although most considered the nature rules are currently under-enforced.

Interviewees generally saw ENGOs as supporting the State's policies with limited financial means, by taking initiatives in favour of environmental protection, such as campaigns or actions to raise awareness. ENGOs' legal proceedings were not well-known by citizens.

**Dutch citizens' perspectives**

Citizen interviewees considered the State had a central role in enforcement.

Most citizens saw an important role for ENGOs, particularly in advising the government and farmers in how to protect nature.

As concerns citizen environmental enforcement, there was mixed views as to the potential and desirability of involvement. Litigation was deemed difficult as well as expensive.

Only three interviewees demonstrated an understanding of the Aarhus Convention and its mechanisms, although there was a common understanding among interviewees that Dutch citizens have the possibility to get involved in participation processes and have access to a judge.

## QUANTITATIVE FINDINGS

### B. *Mapping the evolution of nature governance laws 1992-2015, and their use in practice: The democratisation of European nature governance.*

Our results strongly confirm the democratic turn in the evolution of European nature governance rules over the past generation.

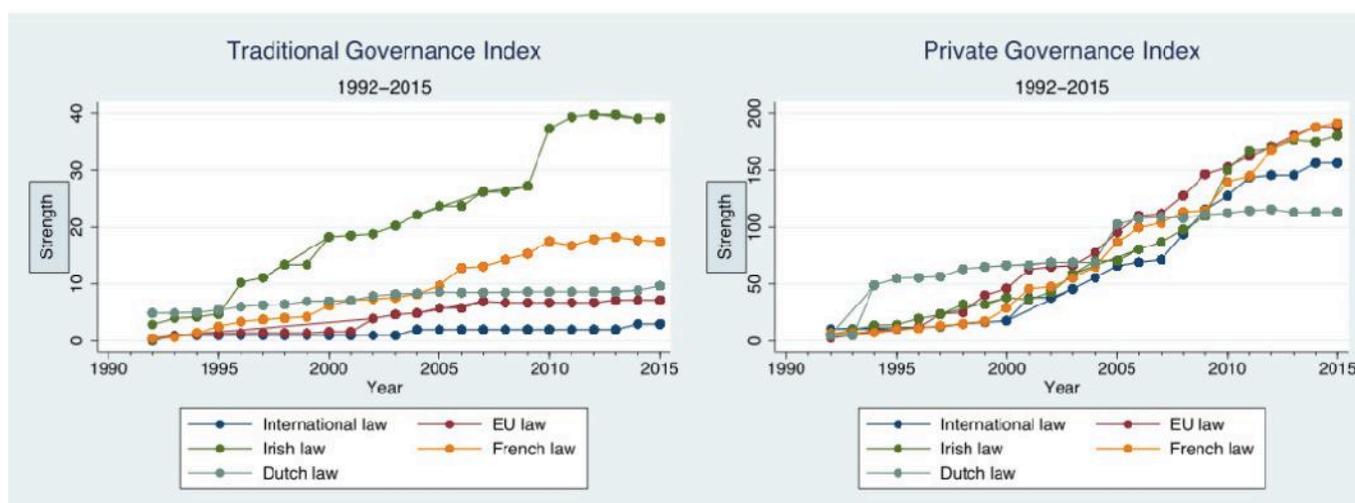


Figure 6: Trends in Traditional vs. Private Governance Compared.

As Figure 6 shows, the strength of traditional governance mechanisms (such as criminal penalties and civil fines) has remained relatively stable over the 23-year period. However, in the Netherlands certain legislation (in particular the Flora & Fauna Act 1999, and the Nature Protection Act 1998) further strengthened the applicable traditional State enforcement framework.

In the case of France, a gradual increase can be observed reflecting legislative strengthening through, e.g., the establishment of sanctions for damage to preserved environmental areas (Law n° 95-101 relating to the strengthening of environmental protection) and concerning national and regional natural parks and marine natural parks (Law n° 2013-619 implementing certain EU law requirements in the field of sustainable development), along with related case-law.

Conversely, Ireland stands out as a jurisdiction where the strength of traditional governance has increased markedly over this period. For Ireland, the next 23 years saw the passage of many important pieces of environmental legislation, including the Wildlife (Amendment) Act 2000 establishing national protected areas (National Heritage Areas), the Planning and Development Act 2000 which fundamentally reformed Irish planning and land use law, and the passage of a number of Ministerial Regulations transposing elements of the Birds and Habitats Directives.

**This relative stability of the studied traditional nature governance regimes from 1992-2015 stands in contrast to the marked increase in the strength of private / Aarhus governance mechanisms across Ireland, France and the Netherlands during this period.**

**As concerns EU law, the steady increase in strength reflects the EU's decision to incorporate the Aarhus principles into EU law** by means of the Access to Information Directive (Directive 2003/4/EC), the Public Participation Directive (2003/35/EC), the Decision concluding the Aarhus Convention on the part of the EU (Decision 2005/370/EC), and the Aarhus Regulation **applying the Aarhus principles to the EU's own institutions** (Regulation 1367/2006).

French and Irish law followed broadly parallel trajectories to EU law, reflecting the fact that these States were not generally first-movers in incorporating private nature governance norms within their governance laws, but rather did so after signature of the Convention.

The outlier trajectory is that of the Netherlands, where the strength of private nature governance rules increased and remained high even before signature of the Convention. This reflects the fact that the essence of the Aarhus principles of access to environmental information, public participation and access to justice were already to an extent present in Dutch law with, for instance, the entry into force of the Environmental Protection Act in 1993, and the General Administrative Law Act 1994 which *inter alia* codified ENGOs' right of access to the courts. In this way, our data reveal that private governance was, as a matter of law, already well-established in the Netherlands prior to Aarhus.

**Despite the efforts of the European Commission over some 20 years, Member States have resisted enshrining rights of access to environmental justice expressly in EU legislation,**<sup>17</sup> leaving the Commission confined to publishing non-binding guidance on the matter save in certain limited fields such as environmental impact assessment and industrial emissions.<sup>18</sup>

In 2020, the European Commission concluded that a **"series of systemic shortcomings" persist in the implementation of access to environmental justice in practice**, including difficulties faced by ENGOs in obtaining legal standing to bring legal challenges on EU environmental issues, and prohibitively high costs.<sup>19</sup>

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<sup>17</sup> S Kingston, V Heyvaert and A Čavoški (2017) *European Environmental Law*. Cambridge: Cambridge University Press.

<sup>18</sup> European Commission. (2017). *Communication by the Commission: Commission Notice on Access to Justice in Environmental Matters*, C(2017) 2616; European Commission (2020b) *Communication on Improving access to justice in environmental matters in the EU and its Member States*, COM(2020) 643.

<sup>19</sup> *ibid.*

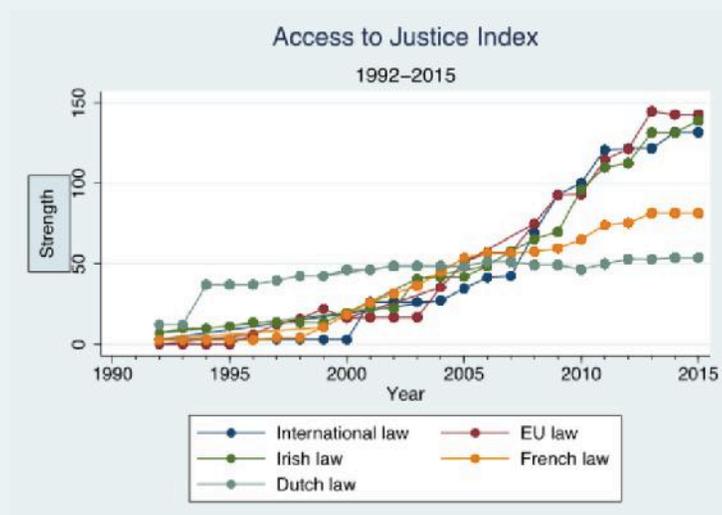
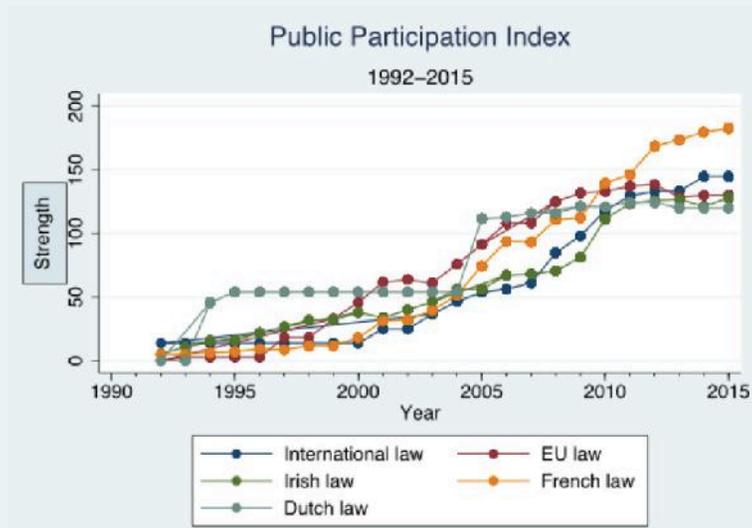
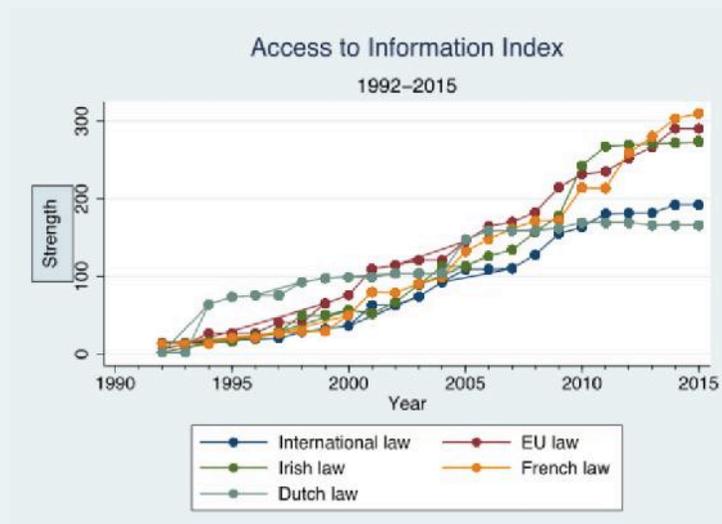


Figure 7: Trends in Access to Information, Public Participation and Access to Justice Compared.

Our results confirm that, in the European Commission's continued quest to strengthen access to environmental justice within Member States, express legislation remains the "*holy grail*". This is, indeed, consistent with the European Commission's recent express plea to the EU co-legislators (i.e., the Council and the European Parliament) to include express access to justice provisions in binding new or revised EU environmental laws.<sup>20</sup> Of note however is that the EU has itself largely rejected the Aarhus Convention Compliance Committee's findings that the EU's own legal system is non-compliant with the Convention's access to justice requirements (ACCC/2008/32/EU, Part 1 and Part 2).

## **The Effectiveness of the EU's Private Nature Governance Rules in Practice**

Our results tell a cautionary tale of Europe's private nature governance revolution. While our results confirm the widespread embrace of private nature governance laws on the books across our studied jurisdictions from 1992-2015, they also provide, to our knowledge, the first systematic empirical evidence that these enhanced rights for citizens are not being consistently used in practice. To take access to justice as an example, while we certainly found an increase in cases brought by private parties to enforce EU nature law before national courts (Figure 8), this increase was bumpy and, in the case of Ireland and France, figures still remained at relatively low levels (Figures 8A and 8B). Overall, the use of private nature governance mechanisms in practice has not kept pace with their development in law. Further, data on levels of use of the Aarhus mechanisms were often difficult to access, leading to a basic lack of transparency on the success of these new governance mechanisms, a situation itself incongruous with the aims of the Aarhus Convention. Figure 8 sets out the evolution in the number of proceedings brought by private parties (including ENGOs) before national courts where the Plaintiff sought to enforce EU nature law, between 1992 and 2015.

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<sup>20</sup> *ibid.*

Figure 8A  
**Ireland**

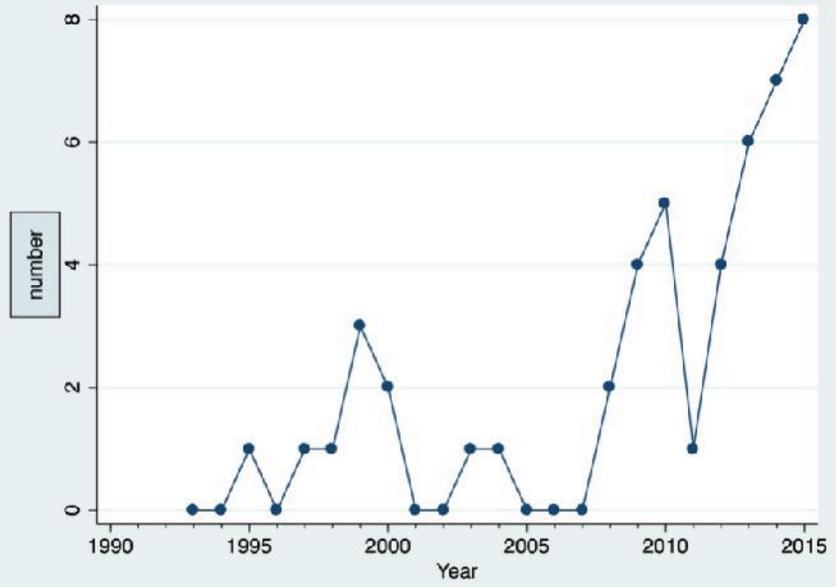


Figure 8B  
**France**

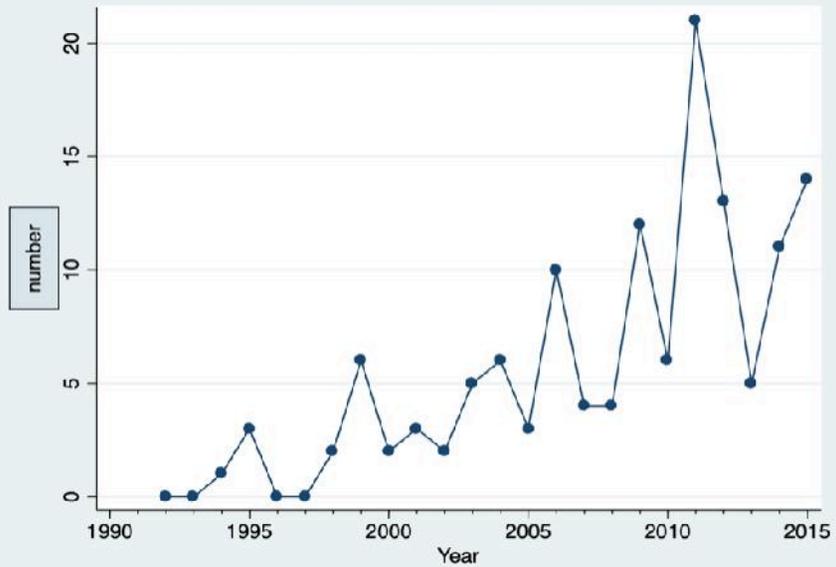
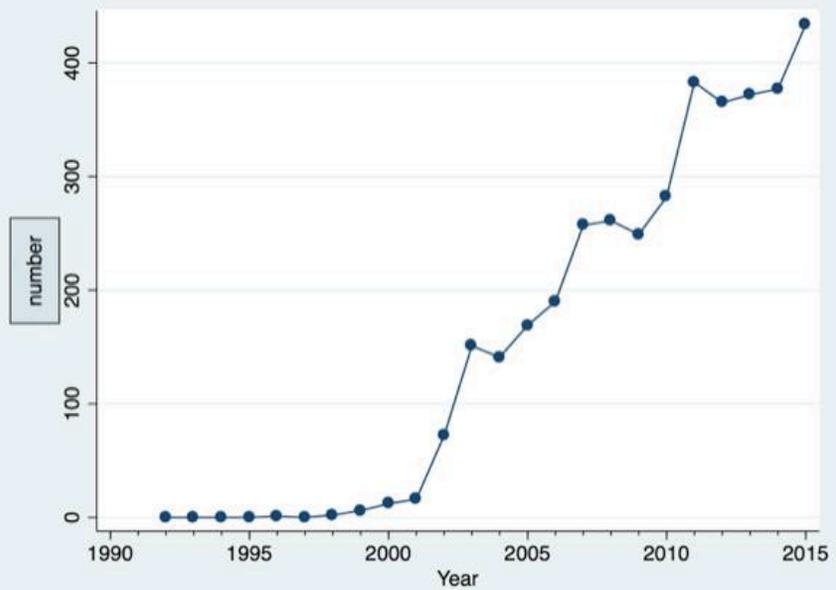


Figure 8C  
**The Netherlands**



As concerns enforcement by the European Commission, our data show a clear peak in the commencement of Article 258 TFEU proceedings against all three Member States between the years 1997 and 2003, from a low level prior to 1997, and reverting back to a low level from 2003 onwards (Figure 9). These data support the view that the Commission has moved towards a “management” approach to environmental compliance, even within the field of nature law, reducing its use of formal legal proceedings.

Our statistical regression results also reveal for the first time that, despite these inconsistencies in usage of the Aarhus mechanisms in practice, **passing private governance laws can in fact improve levels of State enforcement of EU nature law in practice.** Fascinatingly, we found that, while strengthening private governance laws significantly improved levels of State nature enforcement, strengthening traditional governance laws did not.

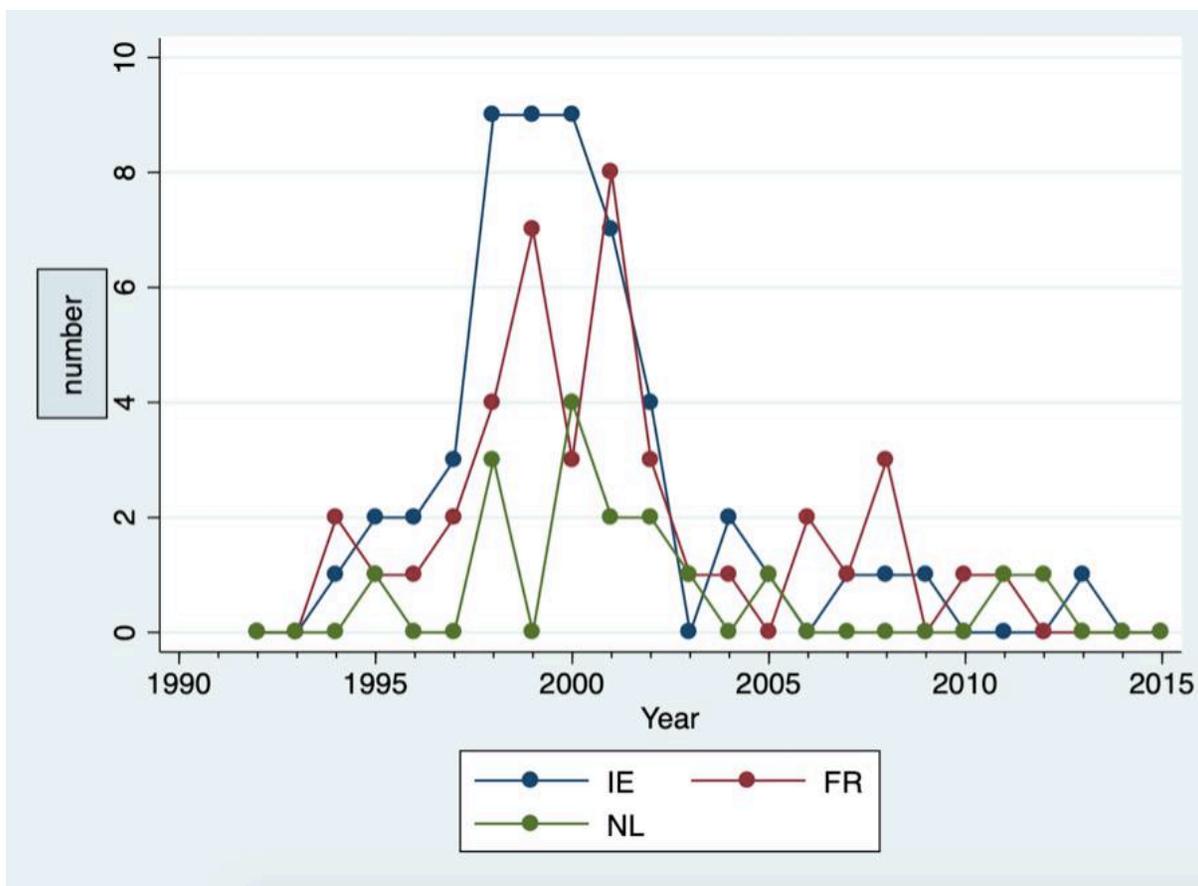


Figure 9. Number of Article 258 TFEU nature infringement actions commenced by the European Commission against Ireland, France and the Netherlands, 1992-2015. Data obtained from European Commission, DG Environment.

# EXPERIMENTAL BEHAVIOURAL ECONOMIC ANALYSIS

C. Our lab experiment confirmed that traditional and private environmental governance rules together achieve more effective nature conservation outcomes than traditional governance rules alone. This provides empirical support for the common assumption that strengthening mechanisms of 'environmental democracy', and the Aarhus mechanisms in particular, leads to improved environmental outcomes.

Our experimental results also show that there is far less need for environmental governance rules of any sort - whether traditional or private/Aarhus governance rules - if landowners hold strong intrinsic pro-environmental values. This suggests that enforcement resources might best be directed to those with weaker intrinsic environmental values, and complements qualitative research showing that reliance on traditional or private governance rules in cases of strong intrinsic pro-environmental motivations on the part of landowners can be counterproductive.

Our experimental results also show that perceptions of the effectiveness of traditional environmental enforcement does not deter citizen enforcers. These results therefore question the typical narrative on the part of public enforcers, such as the European Commission, that the Aarhus mechanisms are destined to fill the implementation gap left by public enforcement.



# CONCLUSION

Improving enforcement of the EU's nature laws is at the heart of the EU's 2030 Biodiversity Strategy, and is acknowledged by the European Commission as essential in dealing with Europe's biodiversity crisis (European Commission, 2020a). The Aarhus Convention, and its empowering of private governance by enabling civil society enforcement through law, has been a cornerstone of Europe's environmental enforcement strategy for the past generation.

Our results reveal that, contrary to what might be assumed, **Europe's private governance revolution has not been at the expense of traditional governance techniques, such as strengthening of criminal sanctions and civil/administrative fines. Rather, private governance has evolved alongside traditional mechanisms, especially at the national level.**

Our findings further show striking differences between States' approach to nature governance and the impact of EU law in this field, ranging from first-mover (the Netherlands), reactive (Ireland), or something in between (France). Ultimately however they strongly confirm that, even when Member States are themselves independently bound by the Convention as a matter of international law, **important divergences between national governance laws will remain, absent express harmonisation in EU law.**

In addition, even where legal rights of private enforcement are coded in law, an unsupportive regulatory culture can subvert private enforcement initiatives. The formal hierarchy of law is not enough. For private environmental enforcement to flourish in practice, this requires a supportive regulatory culture, fostered by the State. **Use of the Aarhus mechanisms must be straightforward, uncomplicated, and cheap.**

From the EU's perspective, if the Commission wishes to increase private enforcement activity, it must therefore go beyond monitoring formal implementation of the Aarhus requirements to ensure that the State fosters a regulatory culture that is supportive of and open to private enforcement.

Ultimately, despite all the EU's emphasis on the Convention, there **remains a strong belief (across all three jurisdictions, and all three stakeholder groups) in the central role of public enforcement by the State and/or the European Commission.**

Moreover, our findings show that, contrary to the typical narrative that private enforcement enables 'environmental democracy', in fact the Aarhus mechanisms are largely being used by a **sub-group of specialised ENGOs, not citizens in general.** Breaking that mould will, our evidence suggests, require more than the passage of law, or even State resources and clear publicisation of the rights at issue, but will **require a deeper shift in regulatory tradition and culture which we doubt can be achieved by the State alone.** Furthermore, if the policy aim is truly that of enhancing environmental democracy, **there are perhaps more directly effective tools than the Convention.** One such tool might be, for instance, a consultative and deliberative citizens' forum encompassing environmental governance, including nature governance, and which could embrace other stakeholders, including the State, ENGOs and farmers. This could draw from citizen deliberative models such as the Constitutional Convention and Citizens Assembly on Climate Change in Ireland.

# POLICY LESSONS

## 01 | **In making nature laws more effective, knowledge, communication, and clarity matter.**

Not just of the content of the law but also its environmental purpose. Across each jurisdiction, our data therefore suggest a need for a clear and independent source of information for landowners, citizens and ENGOs on the purpose and content of the EU nature rules and the Aarhus mechanisms.

## 02 | **Procedures, consultation and inclusivity also matter.**

We found evidence in each State that, in protected areas, locally-led conservation farming schemes that have regard to the specific nature of the protected habitats or species at issue, and involve farmers, can strongly encourage pro-environmental motivations of participating farmers.

## 03 | **Overreliance on private nature governance is dangerous. Member States, and the European Commission, should be cautious in relying on private nature enforcers as (part of) the solution to the EU's nature law implementation gap.**

Our quantitative results underscore the danger in overreliance on the Aarhus mechanisms to fill the gaps left by under-enforcement by State and/or EU authorities. Specifically, they highlight the fact that passing private nature governance laws is far from the end of the story for policymakers wishing to engage a potential citizen 'watchdog' environmental enforcement army to complement public enforcement. There are still major gaps in their effectiveness in practice, and significant divergences between Member States in the extent to which private citizens and ENGOs engage.

## 04 | **Strengthening Private Nature Governance Laws may have the added benefit of improving levels of State enforcement in practice.**

We found that, while strengthening private governance laws significantly improved levels of State nature enforcement, strengthening traditional governance laws did not. For policymakers seeking to increase enforcement of EU nature law on the ground, strengthening private governance rights may therefore be a more effective means of doing so than simply ratcheting up existing traditional governance mechanisms such as levels of maximum criminal penalties or civil fines.

## Join the conversation

Our findings point to practical ways in which nature governance laws might be made more effective. It is clear, however, that the conversation does not end here. For this purpose, we very much invite you to join the discussion on how nature laws can be made more effective, by getting in touch with us via the Effective Nature Laws website <https://effectivenaturelaws.ucd.ie/> or via email.

## Just published

Kingston, S., Alblas, E., Callaghan, M. and Foulon, J., Magnetic law: Designing environmental enforcement laws to encourage us to go further. *Regulation & Governance* (2021). <https://doi.org/10.1111/rego.12416> (Open Access)

Kingston, S., Wang, Z., Alblas, E. et al., The democratisation of European nature governance 1992–2015: introducing the comparative nature governance index. *Int Environ Agreements* (2021). <https://doi.org/10.1007/s10784-021-09552-5> (Open Access)

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