Magnetic law: Designing environmental enforcement laws to encourage us to go further

Suzanne Kingston, Edwin Alblas, Micheál Callaghan and Julie Foulon

Sutherland School of Law, University College Dublin, Dublin, Ireland

Abstract
The European Union 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. With the UNECE Aarhus Convention (1998), Europe launched an innovative legal experiment, democratizing environmental enforcement by conferring third party citizens and environmental non-governmental organizations (ENGOs) with legal rights of access to environmental information, public participation, and access to justice in environmental matters. Based on some 2000 surveys and over 150 interviews with stakeholders from three Member States – France, Ireland, and the Netherlands – we adopt a holistic, 360° perspective, capturing the views of regulated parties, NGOs, and the general public on this private governance experiment. Our data provide important new insights into the practical effectiveness of Europe’s laws enabling private environmental enforcement, its (intended and unintended) effects on farmers’ compliance decisions in the vital area of nature conservation, and how law might be used to stimulate pro-environmental predispositions.

Keywords: compliance, crowding-out, European governance, nature conservation law, private enforcement.

1. Introduction
The European Union (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. Encouraging private, “bottom-up” enforcement has formed a central plank of the EU’s efforts to deal with this serious problem (Kingston & Alblas 2019).

With the UNECE Aarhus Convention (1998), Europe launched an innovative legal experiment, democratizing environmental enforcement by conferring third party citizens and environmental non-governmental organizations (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 private actors and Member State enforcers should step in to fill the gap (Hofmann 2018), and emphasizing 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 (European Commission 2020a, 2020b). Further strengthening the Aarhus principles forms a central commitment of the European Green Deal, and has led, in 2020, to a legislative proposal and communication from the European Commission (2019, 2020b, 2020c). Other continents are now adopting the Aarhus Convention’s model, such as the Escazú Agreement in Latin America and the Caribbean (2018).

Surprisingly, however, to date, little empirical research exists on the (intended and unintended) effects of Europe’s new wave of private environmental governance rules in practice. This is a significant gap: against the background of unprecedented and continued levels of biodiversity loss in Europe (Intergovernmental Platform on Biodiversity and Ecosystems Services, 2019), there is an urgent need for us to understand whether enabling private environmental governance is actually achieving its intended policy outcomes and, if not, why not.
This article makes a novel empirical contribution to understanding the real impacts of these “new environmental governance” laws in the field of nature conservation. Based on some 2000 surveys and over 150 interviews with stakeholders from three selected Member States – France, Ireland, and the Netherlands – we adopt a holistic, 360° perspective, capturing the views of regulated parties (here, farmers and landholders), ENGOs, and the general public on this private governance experiment.

Building on diverse literatures, we show that the prevailing wisdom that stronger Aarhus/private enforcement mechanisms necessarily lead to better environmental outcomes is not always borne out by the evidence. Depending on local implementation and interaction with State enforcement, new environmental governance laws conferring private enforcement rights on third parties can at times, perversely, crowd out intrinsic environmental motivation, resulting in less compliance and subverting policy objectives. In other cases, new environmental governance laws can crowd in voluntary pro-environmental activity on the part of not only third parties, but also farmers. In this way, we find that environmental governance rules can, in the right conditions, display what we term magnetic properties, acting as a force attracting compliance and encouraging voluntary decisions to go further than the letter of the law requires. We conclude by applying our findings to suggest how regulators may maximize the magnetic potential of these new environmental governance rules, and use law as a positive force to help change environmental social norms.

2. The Aarhus Convention: Europe’s experiment with enabling private environmental governance through law

The Aarhus Convention was concluded in 1998 under the auspices of the UN’s Economic Commission for Europe (UNECE). It currently has 47 Parties, including all 27 Member States plus, unusually, the EU as a signatory in its own right. Hailed by then UN Secretary-General Ban-Ki Moon as the “most ambitious venture in the field of environmental democracy under the auspices of the United Nations” (UNECE, 2014), the Convention’s aim is to increase citizens’ involvement in achieving environmental protection, by guaranteeing the so-called “three pillars” of environmental governance rights, namely legal rights of access to information, public participation, and access to justice to the public at large (in the case of access to information) or the public “concerned” (in the case of public participation and access to justice).

A specific feature of the Aarhus Convention is the privileged status granted to qualifying ENGOs to participate in environmental governance and enforce environmental law. Thus, NGOs “promoting environmental protection and meeting any requirements under national law” enjoy the Convention’s public participation rights (Article 2(5)). ENGOs also enjoy privileged legal rights of access to environmental justice under the Convention, and are recognized as having the standing to bring proceedings as of right (Article 9(2)). Furthermore, there is an obligation on Parties to ensure that legal proceedings within the scope of the Aarhus Convention are not “prohibitively expensive” (Article 9(4)). These innovative legal mechanisms aim at surmounting the classic obstacles to private enforcement typically encountered in many legal systems, whereby environmentally motivated plaintiffs often do not have standing and/or the resources to bring litigation.

The EU’s implementation of the Aarhus Convention has required significant changes to traditional governance principles applicable in EU law. The EU Treaties have, from the outset, provided for public enforcement mechanisms that are far stronger than those typically seen in international treaties, including the Commission’s power to bring infringement proceedings and seek fines and penalty payments. Pursuant to the principle of national procedural autonomy, it is a matter for Member States to organize the procedural rules before their courts (including legal standing, time limits for bringing proceedings, and legal costs), as long as the remedies available for breach of EU law are effective and equivalent to those available for breaches of national law (van Schijndel, 1995). The implementation of the Aarhus Convention in EU law has turned this principle of national procedural autonomy on its head by requiring Member States, as a matter of EU law, to provide for legal rights of access to information, public participation and access to justice. Nevertheless, while the EU has applied all three pillars of the Aarhus Convention to its own institutions via the so-called “Aarhus Regulation” (Regulation 1367/2006), its express incorporation of the Aarhus Convention vis-à-vis its Member States has been only partial. The right of access to environmental information applies generally (Directive 2003/4), but the rights of public participation and access to justice have been expressly incorporated only in certain fields (Directive 2003/35).

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Despite the efforts of the European Commission, Member States have strongly resisted enshrining rights of access to environmental justice expressly in EU legislation (Kingston et al. 2016, ch. 5), leaving the Commission confined to publishing non-binding guidance on the matter (European Commission 2017, 2020b).

The EU has not expressly incorporated Aarhus rights into its flagship nature laws, the Habitats Directive (92/43/EEC) and the Birds Directive (2009/147/EC), which require Member States to implement strict protection of EU protected sites and species. The Court of Justice of the EU has, however, stepped into this gap, emphasizing the link between access to justice in environmental matters and “the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role” (Edwards, 2013).

As noted, strengthening the Aarhus Convention’s implementation forms a central commitment in the European Green Deal, and the European Commission has in 2020 (i) proposed legislation to amend the Aarhus Regulation and (ii) issued a communication on improving access to justice within Member States (European Commission 2019, p. 23, 2020b, 2020c).

3. Theorizing the effect of law on environmental compliance decisions

While a significant body of literature has explored the reasons why people choose to comply, or not to comply, with environmental law, much of this has focused on corporate or industrial actors (e.g. Naysnerski & Tietenberg 1992). The reasons why individuals such as farmers comply with the law remain underexplored, although their decisionmaking is crucial to the effectiveness of nature conservation law. Little empirical literature examines the effect of private enforcement laws on these individuals’ compliance decisions. Three strands of literature may be identified of particular relevance to understanding law’s effect on individuals’ compliance decisions.

First, within the responsive regulation and compliance literature, Ayres and Braithwaite’s work on responsive regulation (1992) suggested that regulatory enforcement should be designed to respond to the moves of regulatees, as well as to industry context and the environment. Parker has argued that responsive regulatory enforcement can in itself send out a “moral message” to regulatees (Parker 2006).

On the regulatory potential of social actors, Sinclair et al. (1998) argued that non-State actors can assist in improving compliance levels through “smart regulation,” which aims to “create the necessary preconditions for second or third parties to assume a greater share of the regulatory burden rather than engaging in direct intervention”. Gunningham, Kagan, and Thornton’s work on the “social licence to operate” (2004) suggested that where a corporation perceives itself to operate under a social license, normative motivations rather than instrumental or deterrence-based motivations are key.

A further body of work has explored the role of non-State, social actors in the regulation of pollution control, with early work here focusing on mapping the phenomenon of citizen participation (Weinberg & Gould 1993), understanding the reasons why citizens choose (or not) to participate in local environmental struggles against industry-caused pollution (Gaventa 1980), and documenting, for instance, the “bucket brigades” Community policing movement recording pollution from local industry in the United States (O’Rourke & Macey 2003). More recently, Van Rooij has shown the critical importance of local regulatory conditions and cultures in the level of citizen enforcement, such as the “bare foot inspectors” involved in the society-based implementation of law in China (van Rooij 2012). Further work has examined the effect on public polluters and corporations of legal frameworks enabling citizen lawsuits in the United States (Naysnerski & Tietenberg 1992), and the relationship between public and private environmental enforcement in the United States (Langpap & Shimshack 2010). Beyond enforcement, empirical work in the United States has suggested that the presence of active non-profits may increase the supply of environmental public goods (Grant & Langpap 2019).

Second, within the behavioral psychology literature, scholarship on the influence of law on motivations and behavior has distinguished between extrinsic motivations for behavior (acting to avoid or attain a separable outcome, such as avoiding a fine), intrinsic motivations (self-sustained motivations from “hidden gains of reward”, such as altruism) and image motivations (motivations from others’ perceptions, and the desire to be respected by others) (Ariely et al. 2009). These motivations may interact with each other to produce unexpected behavioral outcomes (Nielsen & Parker, 2012). Perhaps the best-known example is the “crowding out” phenomenon whereby extrinsic incentives may cause individuals previously behaving in the desired pro-social behavior to stop
doing so where intrinsic motivations are reduced. For instance, individuals may resent the loss of autonomy induced by sanctioning incentives, or may not gain as much pleasure from an action when incentives “over-justify” the activity, or the framing effect of external intervention may shift people’s perceptions of an action from a moral plane to an economic one (Feldman & Perez 2012). Friedman (2016) has argued that private enforcers can often be perceived as “vigilantes,” and has identified a defiance effect: if the social norms in a particular community do not support the law, then this can lead to positive wishes to defy the law, supported by the community.

Third, the theory of the “expressive function of law,” argues that law may, if properly designed, not just reflect but positively mold societal norms and values (Sunstein 1996). Applying a behavioral ethics approach, Feldman has argued that typical legal enforcement approaches overlook the regulatory potential of “good people”: unethical behaviors are often not the product of explicit choices to do wrong, but rather are largely the product of mindless choices: law must be clearer and enable reflection and accountability (Feldman 2018).

4. Hypotheses

Bringing these diverse strands together, a consistent conclusion is that empirical work is vital in understanding the linkages between law, compliance, and private enforcement, and which legal architectures are most effective (Friedman 2016; Cunningham & Holley 2016). The common assumption that the Aarhus Convention’s bottom-up approach leads to better environmental outcomes, and “has the potential for bringing about positive procedural and substantive change sooner than would be the case through traditional legal venues” (Dellinger 2011) must, therefore, be tested.

Taking the example of nature conservation, as a field of environmental policy classically conceived as protecting a public good rather than a private interest, we predict that, counterintuitively, and contrary to the prevailing assumptions in discourse and policymaking concerning the Aarhus Convention, the effect of private environmental governance laws is not always positive. Specifically, we hypothesize that:

1 First, as concerns potential social enforcers, laws enabling private environmental enforcement may not necessarily increase such enforcement in practice. Drawing on the above compliance and behavioral psychology literature, we predict that the same private governance laws may have very different incentivizing effects on organizations (ENGOs) and the general public in encouraging voluntary environmental good citizenship: what encourages ENGOs may discourage the general public. Further, we predict that the same governance law may work in one State but fail and even cause a defiance effect in another State, discouraging compliance and voluntary pro-environmental behavior, where regulatory frameworks and cultures differ.

2 Second, as concerns regulatees, laws enabling private environmental enforcement may positively encourage more compliance from regulatees (here, farmers/landowners), including crowding in voluntary efforts to go beyond what the letter of the law requires and, in line with theories of the expressive function of law, magnetizing and molding social norms. We predict that, again, the magnetic properties of law will vary depending on the identity of the social enforcer (which ENGO, or which citizen) and the regulatory framework and culture of the State at issue. We further predict that private environmental governance laws may display magnetic properties, attracting and incentivizing voluntary pro-environmental behavior and helping to create pro-environmental social norms (Sunstein 1996; Feldman 2018), but they may also do the opposite.

5. Methodology

We conducted some 2000 surveys across the three selected jurisdictions in 2018–2019, across three key stakeholder groups in private enforcement of EU nature law: farmers/landowners, ENGOs, and the general public (citizens). Informed by the initial results of these survey data, we subsequently conducted 165 in-depth semi-structured interviews across these three stakeholder groups and State enforcers, enabling us to drill down to gain a fuller understanding of stakeholders’ views. Broken down by group:
In the case of farmers/landowners, some 400 surveys were carried out, along with interviews and focus groups capturing 80 farmers. Farmers were reached at national and local farmers’ association meetings and events, with care taken to ensure a sufficient spread of intensive and extensive (high nature value) farmers;

In the case of ENGOs, the target population necessarily varied per Member State, due to the lower number of ENGOs active in Ireland compared to France and the Netherlands. Overall, some 80 surveys were conducted together with in-depth interviews of 27 ENGOs;

In the case of the general public, a larger survey was conducted to ensure national representativeness, with a target population of all citizens over 18 living in Ireland, France, and the Netherlands. A Qualtrics online panel was employed, using quota sampling to generate nationally representative samples of Irish, French, and Dutch citizens. Over 1700 surveys were carried out, followed by in-depth interviews with some 60 citizens.

The 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. A detailed description of the survey and interview frameworks, including data underlying choice of jurisdiction, is provided in the online appendices (Appendix S1).

While defining and measuring regulatory cultures is notoriously contested, we begin by identifying what Friedman (1985, p. 29) terms “lawyer’s law” (“of interest to legal practitioners and theorists”), legal acts (the processes of administrative governance), and legal behavior within each State. We then report our survey and interview data showing experiences of non-professional, legal laymen (farmers and citizens, and some ENGOs) to understand the relationship between the Convention’s effectiveness and regulatory cultures (Grødeland & Miller 2015). We include cross-references to the detailed key to the interviews found in the online appendices (Appendix S1).

6. Results: 360 ° views on private enforcement of the EU’s nature rules

6.1. Situating private environmental enforcement: One Convention, differing national implementations

Examining the applicable “lawyers’ law” first, we found that the manner in which Ireland, France, and the Netherlands have implemented the Convention varied considerably. While the Netherlands had a strong pre-existing tradition of private environmental governance rights similar to the Convention, Ireland did not, and generally changed its laws only when required to do so as a matter of EU law. France, on the other hand, had strong pre-existing constitutional protections of these rights, but these have not consistently translated into practice.

More specifically, in Ireland’s case, it was a laggard in formally ratifying the Aarhus Convention: it was the last EU Member State to do so, in 2012. By then, it had already passed access to information legislation transposeing the Convention (in 2007, as a result of the intervening EU Directive) and a patchwork of legislation providing for access to information and public participation rights, reflecting the notoriously fragmented nature of environmental and planning legislation in Ireland. The public and ENGOs can seek access to environmental information from public bodies, and can make submissions or observations 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 (Planning and Development Act 2000, s. 37). This sets Ireland apart from France and the Netherlands, where no independent administrative planning appeals body exists but rather independent recourse is taken directly before the administrative courts.

As concerns access to justice, 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 as of right, and do not need to show a sufficient interest (Planning and Development Act, s. 50A(3)). 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 (Planning and Development Act, s. 50B; Environment (Miscellaneous Provisions) Act 2011, s. 3), whereby each party pays their own costs, thus significantly reducing 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.
In the case of France, the rights of access to information and public participation in environmental decisionmaking enjoy constitutional status (Charte de l’environnement, Article 7) and have been implemented in the French Environmental Code (Code de l’environnement, L.124-1; Article L. 110-1 II.4°-5°). While the right of access to environmental information is provided for in law, its implementation 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 (Ministère de la transition écologique et solidaire, 2020). 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 (European Commission 2020d).

Public participation procedures have required fewer changes as a result of the Convention (Drobenko 1999). As concerns access to justice, legal standing is afforded in French law 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, including that they have the principal object of environmental protection, have existed for at least three years, have a sufficient number of members, and a non-profit aim (Code de l’environnement, Article 141-2). 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 (aide juridictionnelle) is available to citizens or ENGOs to cover legal costs if a claimant does not have sufficient resources.

As concerns The Netherlands, the Freedom of Information Act (Wet Openbaarheid Bestuur), which was amended in 2005 to implement the Convention, lays down a right of access to information. The Environmental Management Act (Wet Milieubeheer) further requires public agencies to actively disseminate environmental information (Article 19(c)). As concerns public participation, making submissions is free of charge; an appeal can then be made before an administrative judge (Government of the Netherlands 2017). Despite the long public participation tradition in the Netherlands, the Convention broadened the type of plans where the right of public participation applies (Wet uitvoering Verdrag van Aarhus).

By contrast, no significant changes in Dutch law were made in the 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 (Backes 2012), 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 far less than in common law systems such as Ireland, and means-tested legal aid is available for private citizens and ENGOs (Government of the Netherlands 2017).

6.2. Delving deeper: Farmers’ perspectives on private enforcement

Dealing first with the core sentiment of farmers’ autonomy over their own land, our survey data revealed that some 43 percent of Irish farmers and 40 percent of French farmers considered that others should not get involved at all in environmental decisions concerning their property (Fig. 1). This figure was significantly lower in the Netherlands (25 percent). 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.

Drilling down by means of interview data, within Ireland, 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. A majority of interviewees who had land in protected areas felt strongly that the process of designating land as being within an EU protected area had been unfair (“It is a land grab … stealing, in fact, from us” [IFFG1]; “They took control without consultation, and in my view that is a land grab” [IFFG2]), with others reporting low awareness of the
implications of having their land designated as protected, and the restrictions on activities that this implies (“a lot of people don’t even know it’s designated” [IFFG1]; “Farmers don’t know what requires consent and what doesn’t” [IFFG5]). This led to bitterness and a view that those who are creating the rules do not truly understand their meaning and impact for high nature value farming areas like protected areas: the rules have been made by “some fellow with a suit” who have “never put on a pair of wellingtons [boots] in their life, and that’s the reality” [IFFG2]. 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 (“We would have planted broad leaf trees that there wasn’t any great profit in, but it seemed like the right thing to do” [IF3]). These were however displaced where farmers felt the rules restricting activities on EU protected areas did not make sense, unfairly favored intensive farmers active in non-protected areas, or had been unfairly imposed upon them (“If there is a sheep sick on the side of the hill there, I cannot go up without the permission of the NPWS to go and save that animal” [IFFG1]).

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. The outcome was that, “Farmers are disillusioned and all the rules for [agri-environmental subsidies] would put you off doing your own things for the environment” [IF2]. 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. As a NPWS ranger acknowledged, “I can understand their confusion and pain when two different government bodies are telling you different things” [IWR].

A common example given of a success story was the Burren LIFE project, a conservation farming program in the protected Burren area of the West of Ireland, which originally developed out of EU LIFE farming. In that case, the program was developed with local input, tailored to the specific rare limestone pavement habitat at issue, and provides subsidies based on environmental results overseen by a locally resident conservation farming expert. As one farmer observed, “I think the basic thing is that the people who are drawing up these programs know what they are talking about, as opposed to the civil servants who have never been out on the land” [IFFG3]. As an NPWS ranger reported, for farmers, this locally designed, results-led approach “is restoring a bit of pride in their farm … Even between their farms, the farmers are comparing the habitats” [IWR].

The importance of consultation, local knowledge, and the involvement of local farmers in rule-making and enforcement was a recurrent theme: “if farmers are consulted with, they will do their part for water quality and environment, but they are just being bullied and it’s going to become a huge problem unless there is a change
of attitude” [IFFG2]. This was also the experience of the Department of Agriculture, where the interviewee acknowledged that directly engaging with farmers was important, as farmers “might not know the qualifying interest and the purpose” of the designated site.

This antipathy to being “bullied” by those with little direct expertise in farming was similarly evident in farmers’ approaches to third-party enforcement. Here, while farmers often recognized the “important role” that ENGOs and private parties could play in bringing issues to the public’s attention [IF8; IFFG2; IFFG3], most reported a suspicion of those from outside the locality seeking to get involved in protected areas (“all that comes with that is trouble” [IF9]). Citing prior experience of a high-profile successful legal challenge brought by an ENGO to the proposed Mullaghmore visitor center in the West of Ireland, the polarization between farmers and some ENGOs was evident (“We realised 20 years ago that it was them and us, and it was what we called the woolly jumpers”) [IF4]. Numerous farmers expressed their resentment of people getting involved in enforcement where they are not connected with or living in the area, and who were not felt as possessing the necessary “local knowledge.” As was expressed: “one individual can ruin everyone” [IF10] and a project “won’t affect them, they won’t even know where it is, but [the involvement] can have a major impact” [IF7]. Certain ENGOs were seen as “serial objectors” in this regard [IF1], and as “creaming off” [IF2] conservation jobs that should have gone to locals.

Within France, most farmers we interviewed considered that the 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”) [FF16]. 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 [FF3]. Farmers active in protected areas reported difficulties in knowing what the rules were, complaining of a lack of personal communication and overreliance on the internet as a source of information for farmers [FF24], and considering nature law breaches to be due often to the complexity of the current laws [FF20]. Certain farmers reported that over-prescriptive and formalistic rules meant that farmers have “lost their free will” [FF3] to improve their farming practices in an environmentally appropriate manner.

A particular feature of interest in the French legal framework is the use of (i) steering committees and (ii) 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 [FF4]. 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: “The Natura 2000 contract is a compromise signed with farmers” [FF4].

As concerns enforcement, interviewees repeatedly reported a lack of active enforcement on the part of State agencies, leaving it to ENGO “activists” to carry out enforcement (“The French administration doesn’t have the means, they don’t have civil servants to control the situation. So the laws are made very well, but there is no enforcement” [FF15]).

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 (those who “understand the land and the area” [FF6; FF16]). These farmers indicated their 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 [FF6]. Other farmers reported feeling targeted and vilified by ENGOs’ activists going to “extremes.” As concerns citizen enforcement, the majority of interviewees considered that citizens generally do not know the realities of farming, and the involvement of “city people” was inappropriate [FF3]. Certain farmers reported feeling vilified in public opinion as responsible for all environmental problems; there was also frustration that the individuals who choose to participate in public consultation procedures are often only those opposed to projects [FF19].

Most farmers in The Netherlands also emphasized 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. These rules need to be both monitored and enforced so that there is a clear “level playing field,” respondents emphasized [NF18; NF19]. As with Irish and French farmers, Dutch farmers acknowledged their desire to be able to feedback into the regulatory regime on the nature rules, what works, and what does not [NF8].

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In keeping with the survey data reflected in Figure 1 above, a particular feature of our interviews with Dutch farmers was recognition of 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 [NF10; NF11; NF18]. One farmer, currently in the process of transitioning his intensive farm to an organic one, mentioned that: “Where ENGOs and farmers used to be each other’s enemies, I have chosen to enter the dialogue. […] I ask them for advice, I consult them when making plans, and I find it has a real added value” [NF18]. Others, however, felt that ENGOs do not know enough about the reality of running a farm to “tell farmers what to do” [NF2], or how to run their business [NF4; NF6; NF8]. Certain farmers shared negative experiences of ENGO-led enforcement action. As one farmer stated: “I am pro nature, but anti ENGOs. They are not cooperative and start cases against us as farmers, and I am done with them. It’s our future and livelihood that’s at stake, they need to start being reasonable” [FN8]. Another respondent added here that “ENGOs often exaggerate things and rarely know what they are talking about. They are not the ones doing the work on the field or paying the costs for environmental work – we are” [FN9]. Farmers reported that such extreme ENGO behavior reduced their own willingness to engage in environmental work on their land [NF1; NF4]. Ultimately, Dutch 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” [NF11]: “if there is possibility for communication and consensus-building, then you can create the right conditions for cooperation between farmers, ENGOs and citizens” [NF9].

As concerns citizen enforcement, while there was acknowledgment of the need for consensus (“the Netherlands is a small country, and the only way you can achieve something is by building consensus” [NF9; NF10]), most considered that citizens’ involvement was only appropriate if linked to the locality (“if you are a neighbour, it should be your right to participate in decision making. But if you are not from the area, and you are making complaints, you are crossing a line” [NF3]). While the large majority of respondents did not have direct experience of citizen involvement in enforcement, certain interviewees considered that this could give rise to friction, as citizens’ opinions could be “easily swayed and rarely based on actual evidence” [NF1].

6.3. ENGO perspectives on private enforcement
In each of our jurisdictions, 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 percent of French ENGO respondents considered the State should be the principal environmental enforcer (Fig. 2).

Our survey data also shows that, 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 (Fig. 3).

Moving to interview data, we found that within Ireland, 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. At the same time, ENGOs recognized the wide diversity within the farming community and that intensive farmers, represented by the IFA, represented only part of that community. The portrayal of ENGOs versus farmers was recognized as a significant problem as making “the debate very binary, i.e. nature vs agriculture” [IE4].

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 (“Everyday I am thankful that we still have the Birds and Habitats Directives intact”) [IE5].

We found that ENGOs used different strategies for ensuring that the State’s environmental law obligations are upheld. Most preferred to rely on “soft” mechanisms such as campaigning, activist mobilization, and lobbying the State for change [IE2], for which purpose a number of ENGOs have also joined as members of the Irish Environmental Law Implementation Group (“ELIG”), a high-level forum for ENGOs to meet with State officials to discuss issues relating to implementation [IE3; IE8]. We found a low level of use of Aarhus mechanisms by Irish ENGOs. The most common reason given for this was lack of resources and perceived lack of expertise [IE5; IE8]. Of the minority that made use of the Aarhus mechanisms, certain ENGOs indicated they used access to information requests as the “only way we can get evidence of what’s going on” [IE5] that can be used in complaints to the European Commission [IE5]. Other ENGOs that had used Access to Information requests queried the effectiveness of such requests, in light of the time involved to compose and submit them, when compared to making a complaint to the European Commission, which is free of charge and could serve as a more effective catalyst for legal and policy change (“a single letter can bring about significant changes in Irish policy” [IE6]). 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 [IE6].

Seeking access to justice was not a strategy of most Irish ENGOs, with just two ENGOs reporting that they had taken environmental court cases [IE3; IE6]. However those two ENGOs have been very active in litigation and, for them, Aarhus has had an “enormous impact on litigation” and has been “fantastic” [IE3], giving ENGOs standing because “trees can’t talk and rivers can’t … that’s what we do, we’re giving them a voice.” [IE6] While the numbers of ENGOs engaging in litigation in Ireland is low in absolute terms, we found that these two ENGOs had in effect become the specialist ENGO litigators expert in how the Convention’s mechanisms apply in Ireland. They have frequently brought environmental court cases in Ireland, including several which had gone to the CJEU on preliminary reference (for instance, one of these ENGOs brought at least 12 legal proceedings before the Irish High Court in 2020).

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” [IE9]. A particular difficulty raised was the tight-knit nature of rural Irish communities:
Part of the problem in Ireland is that everybody knows each other. If you are a ranger and you are trying to work in a rural area, everybody knows you and your kids are going to the local school … You are going to chastise the local farmer for burning his land, you are going to be ostracised. Your kids are going to school with his kids. It’s tricky. [IE4; IE5]

One ENGO noted that the Aarhus participation and access to justice provisions can be counterproductive, enabling “selfishly motivated” [IE3] objections by citizens and citizen groups to renewable energy and public transport projects, noting that “you will have individual residents using the Birds and Habitats Directives to shoot down development they don’t like” on a “not in my backyard” (NIMBY) basis [IE3].

In contrast to their work to hold the State to account for failures of enforcement of environmental law, there was little appetite among Irish ENGOs for traditional enforcement action targeting farmers. ENGOs felt that landowners played a vital role in protecting the environment and they needed to be incentivised to do so, with proper explanations being provided to them for the reason behind environmental laws. Most ENGOs viewed legal proceedings as the “last resort” [IE8] as “if you look at success stories, it is landowners and communities working with state agencies and scientists” [IE7], as opposed to taking legal cases.

Within France, 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 [FE1; FE2; FE4; FE5; FE6]. A minority of ENGOS were active in bringing proceedings appealing planning decisions and by challenging national laws for non-conformity with EU law [FE2; FE4; FE6]; some had joined proceedings as a private party to claim damages before the French administrative and civil courts [FE5]. 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). Other ENGOs reported helping regional authorities in other ways, by enforcing and complying with the EU nature rules through the provision of legal/technical expertise and by alerting the State/regional authorities when there is a breach of environmental rules [FE1; FE2; FE6].

On the role of citizens, ENGO respondents generally supported citizen engagement [FE3; FE4], but most considered private enforcement to be too difficult for ordinary citizens [FE1, FE4; FE5]. 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” [FE1; FE2; FE7] due to the French “rebellious” nature [FE2; FE7]. To encourage them to go further, ENGO interviewees considered that education was key, to convince people of the usefulness and relevance of nature conservation concerns [FE1; FE4].

For ENGOs in The Netherlands, 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 [NE1; NE2; NE9]. As one ENGO put it: “the government follows a ‘complaint’ system, where you have to complain loud and often in order to get anything to happen” [NE4]. 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. As one ENGO, highly active in the taking of judicial proceedings against both public and private parties, put it: “securing compliance with EU nature laws is fully the responsibility of the State. The fact that we exist is a sign that something is wrong. If the government would do its job, we would not have to exist.” [NE5].

We found that the choice whether to engage in enforcement actions is linked closely with the ENGO’s institutional capacity and capabilities. One ENGO, focused on the collection of biodiversity data, explained that the more technical tasks of monitoring population levels are more suited to the skills and expertise of their employees, but noted that if they were institutionally suited to take actions, they could start one every day, considering the many cases of non-compliance they encounter [NE3]. Many considered however that it would not be right to lay the blame on 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” [NE1; NE2; NE4; NE9], as “it is understandable that, as long as the government does not make a single effort to make sure the rules are complied with, farmers will not actually make an effort to comply either” [NE4]. One ENGO emphasized the lack of action by the European Commission (“what we need is a more active enforcement role taken by the Commission, the entity
ultimately responsible for ensuring compliance with the rules, but has taken a very light-touch approach to environmental enforcement, focused on cutting red tape and lightening regulatory pressure” [NE9]).

Most Dutch ENGOs recognized the importance of citizen involvement in environmental protection, but considered private enforcement too difficult for ordinary citizens, with the procedural and substantive rules governing enforcement being “extremely complex” [NE1], such that “we simply cannot expect it from them” [NE5]. Another 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 [NE1]. Conversely, various ENGOs explained how they are increasingly trying to support citizens in citizens’ enforcement efforts, for instance by helping citizens build societal support for legal cases, by providing legal advice, and at times even bringing cases for citizens [NE5].

6.4. Citizens’ perspectives on private enforcement

Our survey data show that 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 (Fig. 4).

By and large, this awareness did not translate into use of those mechanisms in practice: 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 (Fig. 5).

Drilling down further by means of interview data, in Ireland, most citizens perceived the State as having the main responsibility for enforcement. While a minority of interviewees were involved with ENGOs [IC1; IC7], others noted the need to get more citizens involved in environmental issues as current “pressure groups” only have “small numbers of people, and the general population doesn’t get involved or is afraid to get involved” [IC4]. The cost and time involved were seen as deterrents to using access to justice provisions (the legal system “is very expensive … you would really want to be making sure you are going to win and that puts a lot of people off” [IC11]). 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 (“People don’t want to know: they just want to get on with their lives, their routine, unless it affects them” [IC1]). A further deterrent cited was the perceived negative social connotations associated with becoming involved in an environmental matter [IC4; IC11; IC9], such as being seen as a “crank … trying to stop progress” [IC4], and that “Irish people don’t want to complain as they’re afraid they might offend their neighbour” [IC9].

Within France, State enforcement was considered essential by all citizens, although most considered the nature rules are currently under-enforced [FC3; FC6; FC7; FC8; FC9; FC22; FC23; FC24]. Most considered that
farmers have a strong positive role to play in protecting the environment [FC3; FC14; FC24], but a minority mentioning negative issues such as overuse of pesticides [FC13; FC14; FC17]. Interviewees generally saw ENGOs as supporting the State’s policies with limited financial means, by taking initiatives in favor of environmental protection, such as campaigns or actions to raise awareness. ENGOs’ legal proceedings were not well-known by citizens. Almost all interviewees considered that citizens’ role is limited to complying with the laws in force [FC5; FC13]. Most interviewees doubted that citizens would use the Aarhus mechanisms, even if they knew about them (“people have their own problems, and they just do not want to be bothered”) [FC5; FC14]. Access to justice is perceived as a mechanism reserved for corporations and ENGOs (“it’s stupid, but I didn’t think that as a citizen I could do it”) [FC8].

In The Netherlands, most citizen interviewees considered the State had a central role in enforcement (“nature conservation on a voluntary basis does not work, there should be enforcement by the government” [NC4]; “the government should play a much larger role in nature protection than is currently the case” [NC7]). While certain citizens stressed the benefits of having ENGOs involved in decisionmaking processes, working together with the government and landowners “towards a common goal” [NC3], others felt that influence of ENGOs should be minimized, mentioning that money donated to ENGOs often “does not end up in the right places” [NC8]. Overall, however, most citizens did see an important role for ENGOs, particularly in advising the government and farmers on how to protect nature.

As concerns citizen environmental enforcement, there were mixed views as to the potential and desirability of involvement. Litigation was deemed difficult as well as expensive [NC2]. Only three interviewees demonstrated an understanding of the Aarhus Convention and its mechanisms [NC3; NC5; NC12], 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. Barriers to access to justice cited included the need to demonstrate a “sufficient interest” before having the right to participate as a barrier [NC1; NC2; NC13; NC15], time limits on the making of objections and submissions, and difficulties in accessing information on planning permissions [NC11]. Overall, however, the understanding of the possibilities and rights under the Aarhus Convention was minimal. While some citizens considered that greater information should be provided by the State and local municipalities [NC11], as well as ENGOs [NC9; NC10], others were more sceptical of the possibilities provided under the Convention, (“only people who have knowledge of the matters at stake should get involved” [NC1]; “some people just go to court for the sake of going to court” [NC2]).

7. Analysis

7.1. The Convention’s effect on potential private enforcers

As to our first hypothesis, we found that, as we predicted, laws enabling private environmental enforcement did not necessarily increase such enforcement in practice. The Convention’s effect on potential private enforcers is
conditional, and depends on a range of factors magnifying, or restricting, levels of private enforcement on the ground (Table 1).

We found only partial evidence supporting common policy and theoretical assumptions that private environmental enforcement will “fill the gap” left by perceived under-enforcement of EU law on the part of the State. We found most evidence of this gap-filling function among ENGOs in Ireland and the Netherlands, where certain ENGOs viewed the Aarhus mechanisms as a crucial means of overcoming the State’s failure to prioritize and/or sufficiently resource nature enforcement, enabling them to rely directly on their EU rights. These ENGOs had effectively become experts in the use of the Aarhus mechanisms. Within this sub-community, we found a high degree of knowledge of the interaction between EU and domestic enforcement mechanisms: while the mechanism of complaints to the European Commission remains part of the ENGO toolbox as a potential game-changer from a “single letter” (IE), there was acknowledgment that this could not be relied upon, and frustration at the Commission’s recent “light touch” (NL) approach.

While most Dutch ENGOs had enforcement experience, this was not so in Ireland, where the small size of the ENGO community along with their limited resources had in effect led to a sub-specialization within those ENGOs of (i) those expert in use of the Aarhus mechanisms, which used them extensively and (ii) those that did not, but focused rather on traditional ENGO activities like nature conservation work and lobbying. By contrast, we found a more widespread usage of all Aarhus mechanisms among Dutch ENGOs, in the context of a long-established culture of transparency and accessing environmental information (generally free of charge), relatively low legal costs, and a general sense of willingness to challenge the State (“complain loud and often”).

Within the Aarhus ENGO specialists, we found that belief that the State was not doing enough for nature conservation (IE, NL), and that the Aarhus mechanisms could achieve real changes in practice (IE, NL), were magnetic factors encouraging ENGO action, even where ENGOs considered themselves underfunded (IE, FR, NL).

### Table 1

| Law’s effects on potential private environmental enforcers | Magnetizing/encouraging factors | Repelling/discouraging factors |
|----------------------------------------------------------|---------------------------------|-------------------------------|
| Factors affecting ENGO enforcement                       |                                 |                               |
| Belief that State is not doing enough (IE, NL)            | Lack of ENGO resources and expertise (IE, FR, NL) |
| Need to counteract strong agricultural lobby (IE)         | Unwillingness to act against farmers (IE, NL) |
| Need to counteract underfunding of State nature conservation agency (IE) | Belief in State’s primary role as enforcer (FR) |
| Belief in the transformative potential of EU nature conservation law (IE) | Exclusionary effect of requirement to have agrément (FR) |
| Belief in the effectiveness of complaints from the ENGO sector (NL) | ENGO resources used to support State enforcement (FR) |
| Light-touch role of the European Commission (NL)          |                                 |                               |
| Factors affecting citizen enforcement                     |                                 |                               |
| Would get involved if personally affected (IE, NL)        | Lack of awareness of the mechanisms (IE, FR, NL) |
| ENGO support of citizen action (NL)                       | Belief in farmers’ autonomy over own land (IE, FR, NL) |
|                                                           | Cost and time (IE, NL)           |
|                                                           | Social ostracization (IE, NL)    |
|                                                           | Complexity (FR, NL)             |
|                                                           | The State should enforce; citizens’ role is to comply not to enforce (FR) |
|                                                           | Environmental activism is for ENGOs (IE, NL) |
|                                                           | Unwilling to restrict economic progress (NL) |

ENGO, environmental non-governmental organization.
For these ENGOs, our data show therefore that changes in the law can make a decisive difference to levels of private enforcement. A good example is the major amendments in the Irish laws on access to justice since 2010, making it easier and cheaper to bring legal proceedings (although these were provoked by EU law’s implementation of the Aarhus Convention). We found this has created a culture of environmental legal challenges that never previously existed in Irish law, meaning many recent important CJEU environmental judgments originated in the Irish courts from privately led litigation (Kingston et al. 2016). Other, more subtle, cultural changes have supported that shift in legal culture, such as the decision of the Irish Supreme Court to hear cases for the first time outside Dublin, rendering justice, quite literally, physically closer to the citizen. In turn, litigation can also in itself act as an important vehicle for social mobilization and the development of environmental morale, as the recent successful challenge to the Irish Government’s Mitigation Plan, itself brought by an ENGO, illustrates (Friends of the Irish Environment v Government of Ireland & Ors [2020] IESC 49).

Conversely, in France, both our survey and interview data showed a more deeply rooted sentiment of the central role of the State throughout the potential private enforcement community (ENGOs and citizens). We found this strong regulatory culture has persisted despite the presence of extensive “lawyers’ law” providing for enforcement rights, including (uniquely within our surveyed States) at constitutional level, in France.

Use of the Aarhus mechanisms was strikingly low in citizens across all three jurisdictions. While the most common reason citizens gave for this was their lack of awareness of the mechanisms (IE, FR, and NL), our evidence suggests that, even if awareness were improved, this may not increase citizen enforcement levels, due to citizens’ concerns of the cost and time entailed (IE, NL), the social ostracization to which this may lead (IE, NL), the complexity of the rules (FR, NL), and the belief that ENGOs are the proper locus for such activism (IE, NL).

Our findings therefore show that, even where legal rights of private enforcement are provided for de jure on the statute book, an unsupportive regulatory culture can therefore fatally chill 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. The use of the Aarhus mechanisms must be straightforward, uncomplicated, and cheap. Access to information in France is a good example, where our data show (and as confirmed by the pending European Commission infringement procedure) it can be very difficult in practice to obtain environmental information from State bodies, despite formal implementation of the right of access to environmental information.

Similarly, as concerns public participation and access to justice, the practical detail of how the rights work is decisive for their effectiveness (for instance, public consultation periods running over holiday periods, or decisions taken but not properly publicized rendering them difficult to challenge). From the EU’s perspective, if the Commission wishes to increase private enforcement activity, it must therefore go beyond monitoring formal de jure implementation of the Aarhus requirements as it has been emphasizing in its most recent Communication on the matter (European Commission 2020b), 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.

We also found partial evidence that private enforcement may go beyond mere “gap filling,” to perform functions that State enforcement could not easily perform, and reach parts of society that the State cannot reach. Our evidence suggests that ENGOs can provide advice and biodiversity expertise to farmers, where there is a lack of reliable and accessible information from the State (NL, IE). Our findings also show that, while ENGOs were sometimes perceived as “outsiders” by farmers, those that have gained acceptance as experts may bring a fresh voice to tight-knit rural communities, surpassing the risks of social ostracization that we found may exist for locals who take private enforcement action and even for employees of State enforcement agencies (IE).

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 specialized ENGOs, not citizens in general.

Breaking that mold will, our evidence suggests, require more than the passage of law, or even State resources and clear publicization 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. Thus, we heard from French ENGO interviewees that it was “not a French habit or tradition to voluntarily go beyond the law”; from Irish ENGOs that citizens in rural close-
knit communities would not wish to rock the boat and accuse their neighbors of wrongdoing; and from Dutch farmers about the importance of proceeding by consensus-building in Dutch society. Similarly, Irish farmers’ sentiments that the EU nature laws represented a “land-grab” is consistent with work showing the strong cultural belief in the sacred nature of land ownership in rural Ireland, arising from the history of colonial dispossession (Laffan & O’Mahony 2008).

Accordingly, 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, or amend existing structures such as the French Comité national pour la biodiversité or the Irish Environmental Law Implementation Group (which does not currently include citizen representation). Environmental democracy might also be improved by ensuring that mechanisms used for transposing EU environmental law include parliamentary deliberation and engagement at the national level, avoiding reliance on delegated legislation taken by the executive alone.

7.2. The Convention’s effects on farmers

Concerning our second hypothesis, as to law’s effect on regulatees (farmers), Table 2 summarizes our findings as to law’s potential magnetizing and repelling effects on farmers’ intrinsic pro-environmental motivations.

As to repelling/crowding-out effects, our findings show that, where farmers perceived themselves as being “bullied” by private enforcers, including ENGOs, this deterred them from pro-environmental actions (IE, FR, NL) and, especially in the case of litigation, encouraged a “them and us” attitude which was unhelpful for environmental outcomes, and had a lasting effect that could continue for decades (IE). While properly managed ENGO involvement brought a welcome fresh and expert perspective (IE, NL), in other cases ENGOs were viewed as “serial objectors” (reminiscent of Friedman’s “vigilantes”) with no true understanding of the environmental issues in the locality (IE, FR, NL). Resistance was sharpened where the ENGO benefited financially from its

Table 2  Law’s effects magnetizing/repelling farmers’ voluntary pro-conservation activity

| Magnetizing/crowding-in factors                                                                 |
|---------------------------------------------------------------------------------------------|
| Belief in importance of nature in protected areas and farmers’ role as guardian of the land |
| (IE, FR, NL)                                                                               |
| Involvement of local farmers in creating the specific rules to be applied and enforced       |
| (IE, FR, NL)                                                                               |
| Direct engagement with farmers in publicizing the rules and the reasoning behind them         |
| (IE, FR, NL)                                                                               |
| Engagement with those ENGOs who have conservation expertise (IE, NL); communication           |
| and consensus-building (NL)                                                                  |

| Repelling/crowding-out factors                                                              |
|---------------------------------------------------------------------------------------------|
| Perceived procedural unfairness in Natura 2000 designations (IE)                             |
| Perceived lack of publicization of substantive Natura 2000 rules (IE, FR, NL)               |
| Perception that rules are imposed/policed by outsider State/ENGO city-dwellers who do not  |
| understand farming (IE, FR, NL)                                                            |
| Perception that the rules do not make environmental sense (IE, FR)                          |
| Inconsistencies between laws implementing Natura 2000 and agri-environmental subsidy        |
| schemes, and belief that agricultural schemes favor intensive farmers (IE)                  |
| Disconnect between State’s environmental and agricultural bodies (IE)                       |
| Involvement of ENGOs/citizens who have no connection with the local area (IE, FR, NL)       |
| Perception of certain ENGOs as serial objectors (IE) who vilify farmers (FR) and/or         |
| exaggerate (NL)                                                                            |
| Perception that ENGO/citizen may be using enforcement for their own selfish/NIMBY end      |
| (IE, FR)                                                                                   |

ENGOs, environmental non-governmental organizations; NIMBY, not in my backyard.
involvement at locals’ perceived expense (IE), or adopted perceived “extreme” or “exaggerated” measures that did not give credit for farmers’ expertise (FR).

We found that in the absence of mutual dialogue there was significant distrust among some farmer communities of certain ENGOs (“all that comes with that is trouble”) but especially of enforcement activity by citizens from outside the local area (“city people”) who “don’t know what they are talking about” (IE, FR). Our findings therefore support the retention of legal standing rules requiring proof of a sufficient interest for individuals in challenging a measure, and suggest that an actio popularis may in fact be counterproductive. Similarly, certain ENGOs emphasized that citizens’ use of the Aarhus mechanisms for “selfishly motivated,” NIMBY reasons was counterproductive and could in fact damage ENGOs’ efforts (NL). In some cases, however, by taking action with or on behalf of individual citizens, ENGOs can shield environmentally motivated citizens from the social “ostracization” that can arise from individual enforcement efforts (avoiding the “Don Quichotte” label) (NL).

Our data strongly support Friedman’s “defiance effect”: in cases where farmers did not buy into and/or understand the laws being imposed and enforced against them, we found positive wishes to defy the law (IE, FR), in some cases supported by the community. An example is the stand-off in enforcing EU nature law on turf-cutting in protected areas in Ireland, where rejection of the law led to social unrest and criminal proceedings against some turf-cutters, largely solved eventually by the creation of a multi-stakeholder consultative forum, the Peatlands Council (Laffan & O’Mahony 2008).

Clarity and consistency of the State’s message also matter. We found crowding-out effects where the State bodies with which farmers have most contact (such as agricultural Ministries) are unaware of – or positively support measures contradicting – nature conservation requirements (IE). This underlines the need to fully integrate environmental considerations into the ongoing CAP reform under the European Green Deal.

Our data suggest, therefore, not only that effective private enforcement depends on regulatees’ social acceptance of the underlying norm, but that, managed insensitively, private enforcement can polarize communities, entrench views and reduce voluntary pro-environmental activity. These potential crowding-out effects have not been sufficiently acknowledged in the policy and theoretical debate on the Convention to date. In the light of our findings, it cannot always be assumed that more private enforcement always leads to better environmental outcomes.

Conversely, our findings suggest two conditions for increasing law’s magnetic effects encouraging farmers’ additional pro-environmental behavior.

The first is knowledge, communication and clarity, not just of the content of the law but also its (environmental) purpose (IE, FR, NL). Awareness of the nature conservation rules is low among farmers, and the mode of communication matters: farmers may not look at websites (“you need human contact, you need to see people”) (FR). As discussed above, lack of knowledge also remains the single biggest restricting factor for private environmental enforcement across all three States for citizens and also for smaller ENGOs. Across each jurisdiction, our data therefore suggest a need for a clear and independent source of information for farmers, citizens, and ENGOs on the purpose and content of the EU nature rules and the Aarhus mechanisms.

Second, procedures, consultation, and inclusivity 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 crowd in pro-environmental motivations of participating farmers. An example is the successful results-based Burren Life scheme (IE), but respondents from all jurisdictions emphasized the added value of dialogue, understanding, and the exchange of expert knowledge between ENGOs and farmers. However, this embrace of inclusion was not universal. Where a prior conflict has occurred with an ENGO in the locality, farmers’ distrust may persist for years (IE). Our evidence also suggests that, in order for ENGOs to gain farmers’ trust, they must “prove themselves” to farmers by demonstrating real conservation expertise (IE, FR, NL).

8. Conclusion

Over 20 years after the signature of the Aarhus Convention, Europe’s great experiment with enabling private environmental governance through law, it is time to take stock of its effects.
Current European policy narratives push for stronger private enforcement rules on the often unquestioned assumption that this has positive effects. This may be understandable for cash-strapped State enforcers in need of a solution to rapidly deteriorating environmental conditions. Our results suggest however that caution may be required. Depending on regulatory conditions, further strengthening the law may be ineffective or even counterproductive.

Our evidence suggests that, as an essential complement to any such strengthening, regulators should seek to maximize the magnifying factors for voluntary environmental behavior identified above, and minimize the repelling factors, insofar as possible. Some of these factors may be slow-burners and take years to change (e.g. the traditional cultural view of the role of the State in enforcement). Others however lie largely within the gift of the State and/or European Commission (e.g. the importance of fostering a supportive regulatory culture, maintaining easily comprehensible legal rules, providing sufficient ENGO funding, and minimizing costs). In reality, where State bodies are often the target of private enforcement action, an obvious tension arises and it may often be left to the European Commission to drive such changes. Absent pressure from the Commission, there may be limits to what States will do to “magnetize” their laws and encourage private enforcement.

Our data also highlight the untapped potential of farmers as a vital regulatory resource whose intrinsic pro-environmental motivations can be crowded in by the thoughtful design of nature conservation rules. The most strongly magnetic factors here are simple and intuitive: involving farmers in creating specific conservation rules, ensuring that agri-environmental subsidy schemes are consistent and make environmental sense, and explaining the reasoning behind those rules. We found many instances, however, where these intuitive principles were not followed. We also found that, while ENGOs can assist farmers in understanding and applying the rules, this must be handled with care. A perception of “outsiders” getting involved with little knowledge of farming can strongly repel pro-environmental motivations. Contradictory messages from different arms of the State (in particular agricultural vs. environmental ministries) are similarly repellent.

Finally, our results also highlight the need for clarity of purpose in strengthening private environmental enforcement laws. Insofar as the purpose is to strengthen environmental democracy, as is often assumed, the Convention is a blunt instrument: it is largely a sub-set of ENGOs, rather than citizens, which currently use its mechanisms. Accordingly, if improved environmental democracy is the goal, the Convention’s mechanisms should be complemented by other approaches better able to achieve this goal, such as citizens’ fora and parliamentary debate of transposing legislation.

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Data availability statement

The data that support the findings of this study are available from the corresponding author upon reasonable request.

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Supporting information

Additional Supporting Information may be found in the online version of this article at the publisher’s web-site:

Appendix S1: Supporting information