

Greenpeace's Use of Lawfare in the EU

Caroline Wiidau* & Emma Gintberg-Dees**

Environmental policy is a political area in which the role of NGOs is key to ensuring compliance due to the existence of diffuse interests that pertain to everyone and no one at the same time, and because the EU Commission has limited capacity to influence member states into compliance. However, there is little research on how NGOs use different instruments to try to get member states to comply with EU legislation. This paper examines whether there is a difference in the degree to which Greenpeace uses lawfare to try to influence EU member states to improve their environmental policy depending on whether it operates in a compliant or non-compliant state, and if Greenpeace resorts to certain types of lawfare depending on the level of compliance. This was researched through a comparative case study of Greenpeace's offices in a prototypical compliant and non-compliant EU member state. These findings were triangulated through an interview with a project leader in Greenpeace. The paper found evidence that Greenpeace used more lawfare in some EU member states compared to others when trying to influence them to improve their environmental policy. It also found that Greenpeace turned to societal lawfare rather than legislative and court-centered in some EU member states. However, it is not clear whether this is because of compliance or other factors. Finally, the paper found that NGOs have an important role to play in ensuring compliance and they therefore need to have access to justice as intended for them in the Aarhus Convention.

1. Introduction

The role of NGOs to get EU member states to comply with EU regulation through different types of action is especially pertinent at times when the EU Commission has a limited capacity and cannot start infringement procedures against all non-

* Cand.jur. (Master of Laws). Head of Section, Ministry of Foreign Affairs of Denmark [carolinewiidau@gmail.com].

** Cand.scient.pol. (MSc in Political Science). Head of Section, Danish Ministry of Finance [emmagint@hotmail.com].

compliant member states. The EU Commission must turn to NGOs for support in trying to influence member states into compliance.¹ However, there is little research on how NGOs in different EU member states use different instruments to try to get member states to comply with EU legislation.²

The different instruments that NGOs use to try to influence EU member states can be described through the concept of lawfare. Lawfare is increasingly used to describe how opposition groups, such as NGOs, try to achieve political and social change through the use of law, courts and protests. Lawfare by actors in civil society is often referred to as lawfare from below.³ To explain Greenpeace's actions a lawfare typology is used. This paper uses a typology from the article "Conceptualizing Lawfare: A Typology & Theoretical Framework" by Siri Gloppen.⁴ Lawfare may be sorted in three different categories; 1) legislative/regulative such as lobbying political parties or government bodies lawfare, 2) court-centered lawfare, and 3) societal lawfare such as demonstrations, art, media campaigns, or civil disobedience.⁵

If there are differences between member states in NGOs' use of lawfare, it could have profound effects on member state implementation of EU policy. Consequently, it is relevant to explore in more detail the extent to which NGOs use different types of lawfare depending on which member state they operate in.

This paper will focus on the environmental NGO Greenpeace, because environmental policy is a political area in which the role of NGOs is key to ensuring compliance due to the existence of diffuse interests that pertain to everyone and no one at the same time. Therefore, it is especially relevant to research

¹ Falkner, Gerda (2018). A causal loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgments. *Journal of European Integration*, Vol. 40(6), pp. 769–784, at p. 769.

² Vanhala, Lisa (2018). Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy. *Comparative Political Studies*, Vol. 51(3), pp. 380–412, at p. 382.

³ Gloppen, Siri (2017). *Conceptualizing Lawfare: A Typology & Theoretical Framework* (draft). Centre on Law Social Transformation, at pp. 4–6.

⁴ Gloppen (2017).

⁵ Gloppen (2017) pp. 7–13.

NGO action here.⁶ Furthermore, it is an area covered by the Aarhus Convention⁷, which should contribute to reducing the differences between member states since it determines minimum requirements for public access to information, public participation, and access to justice in environmental matters. Moreover, Greenpeace is an international organization with offices in multiple countries, which makes it possible to compare its choice of activism in a compliant versus a non-compliant member state. The paper researches Greenpeace's use of lawfare through two hypotheses.

Earlier research has found that NGOs focus most of their criticism on states that usually comply with their international obligations.⁸ This has led to the following hypothesis:

Hypothesis 1: Greenpeace engages in more lawfare actions to try to influence EU member states to improve environmental protection in compliant member states than in non-compliant member states.

Other studies have found that the correlation between type of political system and type of NGO action stems from the fact that, when NGOs or social movements have limited means of influence inside of the political system, dissatisfaction may build until it generates forms of protest activity outside of the political system such as protest, demonstrations, and civil disobedience.⁹ This leads to the second hypothesis:

Hypothesis 2: When operating in non-compliant member states, Greenpeace resorts to societal lawfare rather than

⁶ Eliantonio, Mariolina (2018). The role of NGOs in environmental implementation conflicts: 'stuck in the middle' between infringement proceedings and preliminary rulings?, *Journal of European Integration*, Vol. 40(6), pp. 753–767, at pp. 753–754.

⁷ Convention on access to information, public participation in decision-making and access to justice in environmental matters. Done at Aarhus, Denmark, on 25 June 1998. OJ 2005, L 214, pp. 4–20. United Nations Treaty Series, Vol. 2161, pp. 447–472.

⁸ Dothan, Shai (2016). A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States. *Duke Journal of Comparative and International Law*, Vol. 27(2), pp. 141–189, at pp. 173, 179.

⁹ Dalton, Russell, Alix Van Sickle & Steven Weldon (2010). The Individual–Institutional Nexus of Protest Behaviour. *British Journal of Political Science*, Vol. 40(1), pp. 51–73; Dalton, Russell J., Steve Reccia, & Robert Rohrschneider (2003). The environmental movement and the modes of political action. *Comparative Political Studies*, Vol. 36(7), pp. 743–771; Kitschelt, H. (1986). Political opportunity structures and political protest, *British Journal of Political Science*, Vol. 16(1), pp. 57–95.

legislative or court-centered lawfare compared to in compliant member states.

To answer this, the paper carries out a comparative case study of Greenpeace's office in the Netherlands (acting in a prototypical compliant EU member state) and Greenpeace's office in Bulgaria (acting in a typical non-compliant EU member state). Firstly, the two EU member states will be compared with regards to the degree in which they use lawfare through a quantitative analysis of the number of actions used by Greenpeace. Secondly, the differences in the types of lawfare that Greenpeace uses will be determined through an in-depth analysis of the different Greenpeace actions. An interview with a project leader in Greenpeace was also carried out as a triangulation of the findings. A limitation to the research design is that it is difficult to determine which explanatory variables are the reason for the outcome and, therefore, to determine causation, which will be discussed later in the paper.¹⁰

The paper is structured as follows: Firstly, the legal framework that NGOs face regarding environmental policy is described. Then, the two hypotheses are tested through a comparative case study. The findings from the case studies are triangulated through an elite interview with a Greenpeace campaign manager. The analysis' findings are then discussed. Finally, a discussion of the role of NGOs in ensuring compliance and the problems regarding a lack of access to justice is provided.

2. Legal Framework

EU environmental law and the Aarhus Convention form the legal framework under which environmental NGOs, such as Greenpeace, operate when they try to use different types of lawfare to affect policy change.

EU environmental law has only grown over time and is one of the most harmonized policy areas in the EU.¹¹ The effectiveness of EU environmental law depends on how the member states implement the legislation. A great number of infringement cases in this sector, together with the Commission's Fitness Checks, evaluations of various environmental directives and regulations, show that a

¹⁰ Hirschl, Ran (2005). The Question of Case Selection in Comparative Constitutional Law. *The American Journal of Comparative Law*, Vol. 53(1), pp. 125–155, at p. 134.

¹¹ EUR-Lex (2021). Summaries of environment and climate change legislation. Located at https://eur-lex.europa.eu/summary/chapter/environment.html?root_default=SUM_1_CODED%3D20%2CSUM_2_CODED%3D2001&locale=en.

number of member states lag behind when it comes to a correct implementation of EU environmental law.¹²

Due to the importance of environmental protection and the insufficient implementation, environmental law is a policy area in which NGOs tend to try to improve protection in different ways. This might be sought through public participation or by invoking EU environmental provisions in courts, where one must be aware of how procedural law varies between member states, in particular with regards to standing requirements for NGOs, legal costs, and access to legal aid.¹³

The Aarhus Convention tries to deal with some of these differences. The Aarhus Convention consists of three pillars: The first regards access to environmental information, the second regards public participation in decision-making in environmental matters, and the third regards access to justice in environmental matters and is implemented at EU level in the Aarhus Regulation (EC) 1367/2006.¹⁴ This is applicable to all EU institutions. At the member state level, the Convention is implemented through Directive 2003/4/EC on Public Access to Environmental Information and Directive 2003/35/EC on Public Participation and Access to Justice.¹⁵

Access to justice in environmental matters is not implemented in EU member states as clearly as the above-mentioned pillars. How to invoke a provision on EU environmental law at national courts largely depends on national law. Member states need to ensure effective legal protection in areas covered by EU law, cf.

¹² European Environmental Bureau (2019) EU Commission to get tougher on air quality laggards – Fitness Check concludes. Located 28.05.2021 at <https://eeb.org/eu-commission-to-get-tougher-on-air-quality-laggards-fitness-check-concl>.

¹³ Jans, Jan H. & Hans H.B Vedder (2012). *European Environmental Law: After Lisbon*. Europa Law Publishing, 4th edition, pp. 229–230.

¹⁴ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. OJ 2006, L 264, pp. 13–19.

¹⁵ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. OJ 2003, L 41, pp. 26–32; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. OJ 2003, L 156, pp. 17–25.

Article 19(1) TEU¹⁶, but the exact requirements are for the member states to decide, cf. the principle of procedural autonomy. The Aarhus Convention Article 9(3) determines the right to go to court with cases relating to the environment, but this Article has still not been implemented in EU legislation. In paragraph 52 of its judgment in case C-240/09, *Lesoochranárske zoskupenie*¹⁷, the ECJ decided that Article 9(3) does not have direct effect but that national courts should interpret national law in consonance with the objectives laid down in Article 9(3). The ECJ also stated that member states shall ensure that environmental NGOs are able to challenge a decision that may be contrary to EU environmental law.¹⁸ Therefore, the Aarhus Convention and its pillar on access to justice is still relevant when NGOs want to improve environmental protection in member states, even though it is not implemented correctly in several member states.

3. Measuring Compliance and Lawfare

The measurement of EU compliance will be based on compliance in terms of EU law. Compliance is defined as “behavior that is consistent with (international) norms and rules”.¹⁹ We use the number of infringement procedures that have been initiated by the EU Commission against an EU member state as a measurement for compliance.²⁰ We have chosen the number of infringement procedures against a member state as a measurement of compliance because it is one of the few ways that has systematically measured whether member states comply with EU legislation. There may be a bias in these results since not all non-compliance is met with an infringement procedure, and the Commission chooses in which countries to commence a procedure. However, it is arguably the best way, on average, to assess a member state's level of general compliance with EU legislation.²¹

¹⁶ Consolidated Version of the Treaty on European Union. OJ 2012, C 326, pp. 13–45.

¹⁷ EU:C:2011:125, [2011] ECR I-1255.

¹⁸ *Lesoochranárske zoskupenie* (2011) para. 52.

¹⁹ Börzel, Tanja A. (2021). *Why Noncompliance? The Politics of Law in the European Union*. Ithaca: Cornell University Press, p. 13.

²⁰ Börzel (2021) pp. 18–20; EU Commission (2020a). Commission Staff Working Document. Part III: Member States Accompanying the document Monitoring the application of European Union law 2019 Annual Report. Located 13.05.2021 at https://ec.europa.eu/info/sites/default/files/file_import/report-2019-commission-staff-w-en.pdf.

²¹ Börzel (2021) p. 18.

This paper's measurement of compliance is measured through an average of overall, new and environmental infringement cases filed against a member state. It leads to the compliance scores presented in table 1.²² The member states scoring in the top 25 percent received the compliance level 1, the next 25 percent 2, the 25 percent thereafter 3, and the worst 25 percent received the compliance score 4, which would indicate that they are non-compliant.

²² EU Commission (2020a); EU Commission (2020b). Statistics on environmental infringements. Located 13.05.2021 at <https://ec.europa.eu/environment/legal/law/statistics.htm>.

Table 1: Compliance score of EU member states

Member state	Compliance score
Lithuania (LT)	1
Netherlands (NL)	1
Finland (FI)	1
Luxembourg (LU)	1
Denmark (DK)	2
Latvia (LV)	1
Germany (DE)	2
Estonia (EE)	1
Sweden (SE)	2
Croatia (HR)	3
Slovenia (SI)	2
Austria (AT)	3
Italy (IT)	3
Malta (MT)	1
United Kingdom (UK)	4
Czech Republic (CZ)	2
Spain (ES)	3
France (FR)	4
Belgium (BE)	3
Hungary (HU)	2
Portugal (PT)	4
Poland (PL)	4
Ireland (IE)	4
Romania (RO)	3
Bulgaria (BG)	4
Greece (EL)	4
Cyprus (CY)	3

To measure the quantity and type of lawfare used to influence EU member states to improve environmental policy, the paper turns to the typology of lawfare. The table below lists the types of actions that will be measured as the different kinds of lawfare used by Greenpeace to improve environmental policy.

Table 2: Types of lawfare from below by actors in civil society

Legislative/regulative	Court-centered	Societal
Advocacy or lobbying of political parties and government bodies. Input to law and policy development.	Strategic litigation, including at international courts and quasi-judicial bodies, such as strategic provocation of arrests or charges.	Rights or law focused advocacy, documentation, demonstrations, art, sensitisation training, media campaigns. Illegal civil resistance strategies such as civil disobedience.

4. Research Design and Data

The hypotheses of the paper are tested through a comparative case study of two EU member states, a non-compliant and a compliant. The first hypothesis is tested through a short descriptive quantitative analysis and the second hypothesis is tested through an in-depth qualitative analysis. The hypotheses are triangulated through an interview.

When comparing two EU member states, one draws upon a limited number of observations to test the validity of one's argument in order to generalize about the rest of the EU. It would have been optimal if a most similar systems design could be applied for the comparative analysis, so that we could hold a number of other explanatory variables constant except compliance. However, it is difficult to find similar EU member states that only vary in compliance and a most similar systems design is therefore difficult to apply as a research design.²³ Therefore, prototypical countries are chosen to test the hypotheses. Prototypical cases feature as many key characteristics as possible akin to those found in as many cases as possible. Prototypical cases can, therefore, serve as a representative example of other cases, and the arguments tested here are likely to apply and be generalizable to other, somewhat similar cases.²⁴

Within each of the chosen countries, the same transnational NGO, Greenpeace, is analyzed through its national offices. A reason this research design is chosen lies in the ability to compare lawfare tactics used in different national branches of the same transnational organization. Variables such as Greenpeace's ideology and organizational structure may to some extent be held constant across

²³ Hirschl (2005) p. 133.

²⁴ Hirschl (2005) p. 142.

the different member states, so that these explanations as to why different types of lawfare is used can be excluded.²⁵ By only focusing on one organization, a thorough analysis of the lawfare used is made possible.

In regards to data in identifying and analyzing the different types of lawfare in the two different member states, data is drawn from Greenpeace's own records, court documents, and the EU Commission's country reports. The hypothesis is tested further by an interview with a campaign director and former international project leader in Greenpeace. The interview serves as a methodological triangulation to increase confidence in the inferences drawn from our case study by seeing whether the same results may also be drawn from other data such as interviews. It also guards to some extent against the dangers of selection bias in our cases.²⁶ It should be noted that the interviewee expresses Greenpeace's point of view and may be biased. Yet, the questions asked are mostly descriptive or of a less politicized nature. Therefore, there is no reason to believe that the answers are biased in any way relevant for the paper's finding or that will affect the objectivity of the findings.

To analyze and test the hypotheses, we engage in a case comparison between a prototypical compliant and non-compliant member state and their use of lawfare. The Netherlands is chosen as a typical compliant member state because it was given the highest score in our measurement and it has a Greenpeace office. Bulgaria is chosen as a typical non-compliant member state because it has received the lowest compliance score and there is also a Greenpeace office in Bulgaria.

5. Analysis

5.1. *Analysis of Number of Cases*

In the following section the two hypotheses will be tested through analyses of cases from Greenpeace the Netherlands and Greenpeace Bulgaria. Firstly, some facts about the two offices are described.

The Dutch Greenpeace office is one of the largest Greenpeace offices with 99 employees.²⁷ The Dutch office was established in 1979 as one of the first

²⁵ Vanhala (2018) p. 390.

²⁶ Pavone, Tommaso (2019). From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa. *Law & Society Review*, Vol. 53(3), pp. 851–888, at p. 856.

²⁷ Greenpeace (2020a). Annual report 2020, Greenpeace the Netherlands. Located 15.05.2021 at <https://www.greenpeace.org/nl/greenpeace/45744/jaarverslag-greenpeace-nederland-2020/>, p. 9.

Greenpeace offices since the organization's founding in 1971.²⁸ In 2020, Greenpeace the Netherlands (hereinafter Greenpeace NL) received 22 million euros in economic support from personal supporters; so, it is an office with large financial resources to draw upon.²⁹

Greenpeace Bulgaria (hereinafter Greenpeace BG) is a small Greenpeace office with five employees.³⁰ The Bulgarian office was registered in 2011,³¹ so it does not date as far back as the office in the Netherlands but constitutes an example of how Greenpeace has established itself in the Eastern Europe countries over the past two decades.

To be able to answer hypothesis 1, about whether Greenpeace uses more lawfare in compliant member states than non-compliant member states, a short descriptive analysis of the quantity of lawfare performed is done.

The table below illustrates the quantity of the lawfare actions carried out in the two countries. The data is from the 1st of December 2020 until the 26th of May 2021. Some of the lawfare actions span over a longer time period, but to be included in the chart, some type of action such as initiating a signature collection or receiving a judgment in a case must have happened within the timeframe set. The data is found by going through press releases and announcements on the local Greenpeace websites.³²

Table 3: Amount of lawfare actions by Greenpeace

	NL	BG
Amount of lawfare	22	13

²⁸ Greenpeace (2021a). Greenpeace the Netherlands article about the history of the Dutch office. Located 13.05.2021 at <https://www.greenpeace.org/nl/over-ons/geschiedenis/>.

²⁹ Greenpeace (2020a) p. 45.

³⁰ Greenpeace (2021b). Greenpeace Bulgaria list of employees. Located 16.05.2021 at <https://www.greenpeace.org/bulgaria/kontakti/>.

³¹ Greenpeace (2021c). Greenpeace Bulgaria article mentioning celebration of 10-year birthday. Located 26.05.2021 at <https://www.greenpeace.org/bulgaria/istorii/6144/pochistvane-vodoemi-izberi-vodata/>.

³² Greenpeace (2021d). Greenpeace Bulgaria front page with latest news. Located 26.05.2021 at <https://www.greenpeace.org/bulgaria/>; Greenpeace (2021e). Greenpeace the Netherlands front page with latest news. Located 26.05.2021 at <https://www.greenpeace.org/nl/>.

The table shows a clear picture that the Dutch office is more active than the Bulgarian. Greenpeace NL has been initiating 22 different actions the past six months. Greenpeace in the Netherlands also shares news of their actions more frequently. This is not the case with the Bulgarian office, which has only initiated 13 actions in the same period and posts news on their website less often.

Therefore, the analysis shows that Greenpeace is leading more lawfare in the Netherlands compared to Bulgaria. Because they are chosen as prototypical cases of compliant and non-compliant EU member states, the findings could indicate a potential for generalization to other compliant and non-compliant member states. The findings support hypothesis 1. However, further member states should be analyzed to become more confident of the potential for generalization since for example the size of the offices in the two countries could have an effect on the results.

5.2. *Analysis of the Differences in the Type of Lawfare Used*

5.2.1. Greenpeace's Use of Lawfare in the Netherlands

Based on a review of the recent cases, it can be concluded that Greenpeace NL practices different types of legislative lawfare in compliant states. In a case about the North Sea Agreement, Greenpeace was invited to submit their opinion which was then taken into account.³³ This indicates that the Netherlands makes use of public participation and shows interest in the views of stakeholders. The influence may also be due to the size and experience of Greenpeace, since it is well established in the Netherlands and therefore ostensibly possesses a voice worth listening to. This was also the case in a recent event where Greenpeace NL together with other green organizations increased the public pressure on the government for a deposit system on bottles. Greenpeace had been advocating this for a long time but finally succeeded in gathering the necessary pressure by working together with other organizations, so that the government adopted a law on bottle deposits.³⁴ At the moment, the Dutch Greenpeace office is initiating six signature collections on greening politics, single-use plastic packaging, green recovery, protection of rainforest, sustainable energy, and the climate crisis. The signature collections will

³³ Greenpeace (2021f). Greenpeace the Netherlands article on the North Sea Agreement. Located 12.05.2021 at <https://www.greenpeace.org/nl/natuur/44679/noordzee-akkoord-is-rond/>.

³⁴ Greenpeace (2021g). Greenpeace the Netherlands article on the lobbying of a deposit system. Located 15.05.2021 at <https://www.greenpeace.org/nl/klimaatverandering/45073/het-klimaat-moet-weer-op-1-staan/>.

be handed over to the Cabinet when the number of signatures set by Greenpeace is reached.³⁵ The country report on the Netherlands' implementation of EU environmental legislation from 2019 also confirms that national and local authorities work together with NGOs on areas such as incorporating nature into infrastructure.³⁶ Public participation constitutes one of the pillars of Dutch environmental law. Including stakeholders in policy development is something the Netherlands puts a lot of effort into. This also shows in the Eurobarometer numbers, which demonstrate that 97 percent of the Dutch population believe that an individual can play a role in protecting the environment.³⁷ Due to the fact that influence is achievable through legislative lawfare, NGOs might be more motivated to put a lot of effort into participating in the development of policy and law in a country like the Netherlands.

In regards to court-centered lawfare, through a search on CURIA and Greenpeace's website it does seem that the Dutch Greenpeace office uses the courts to change environmental protection for the better and get its opinion heard. In a recent case, Greenpeace has filed a complaint to the Dutch Advertising Code Committee, accusing Shell of greenwashing.³⁸ Another example is, that Greenpeace the Netherlands in May 2021 sent a summons warning about a lawsuit against the Prime Minister and the Minister for Agriculture, Nature and Food Quality if they do not set higher goals for reducing nitrogen emissions.³⁹ An older case from the European Court of Justice also illustrates Greenpeace's use of court-

³⁵ Greenpeace (2021h). Greenpeace overview of existing signature collections. Located 14.05.2021 at

<https://www.greenpeace.org/nl/acties/>.

³⁶ EU Commission (2019a). Commission Staff Working Document - The EU Environmental Implementation Review 2019 Country Report - THE NETHERLANDS, p. 14.

³⁷ EU Commission (2019a) pp. 36–37.

³⁸ Greenpeace (2021i). Greenpeace the Netherlands article on case filed to the Advertising Code Committee.

Located 13.05.2021

at <https://www.greenpeace.org/nl/klimaatverandering/45788/shell-misleidt-met-rij-co2>.

³⁹ Greenpeace (2021j). Greenpeace the Netherlands article on threatening with lawsuit due to breach of the Habitats Directive. Located 22.05.2021 at <https://www.greenpeace.org/nl/natuur/46238/kabinet-schendt-europese-natuurregeling-greenpeace-dreigt-met-juridische-stappen/>.

centred lawfare.⁴⁰ The case is ten years old, but it still demonstrates that NGOs in the Netherlands enjoy legal standing in some environmental areas and that the Dutch courts under the right circumstances are willing to bring a case to the ECJ if they find the legislation unclear. However, with only two recent cases and an older case at the ECJ, it is obvious that court-centered lawfare does not constitute their main tool of activism. One of the reasons it may not be used more is that the NGOs need to have their interests directly affected by a decision to be allowed to commence a case, cf. the General Administrative Law Act,⁴¹ Article 1:2(1). If Greenpeace wants to challenge a matter, the issue must be expressly mentioned in its article of association and evidenced by its activities.⁴² Furthermore, it is stated in the country report on implementation of EU environmental law that the Dutch government does an inadequate job of informing the general public about access to justice in environmental matters - both regarding Dutch and EU law.⁴³

When it comes to societal lawfare, Greenpeace NL facilitates many protests and debates. Examples are Dutch Greenpeace activists boarding Shell oil rigs in 2019,⁴⁴ protests against the UK government, which considered giving Shell permission to dump the platforms,⁴⁵ demonstration against the reopening of a coal power plant⁴⁶ and a concert in front of the Dutch Parliament, where the politicians could choose between different protest songs relating to protecting one's rights and the earth. In addition to this, Greenpeace initiated calls from individuals in which political parties were called with the message “*(name) is waiting for a better climate policy. Do something about it,*” followed by a chosen protest song. 8000 people joined the

⁴⁰ Joined Cases C-165/09 to C-167/09, *Stichting Natuur en Milieu and Others*, EU:C:2011:348, [2011] ECR I-4599.

⁴¹ Algemene Wet Bestuursrecht.

⁴² EU Commission (2019a) p. 37.

⁴³ EU Commission (2019a) p. 37.

⁴⁴ Greenpeace International (2019). Article on activists boarding Shell oil rigs. Located 14.05.2021 at <https://www.greenpeace.org/international/press-release/24826/greenpeace-activists-board-shell-oil-rigs-in>.

⁴⁵ Greenpeace International (2019); Greenpeace (2021k). Greenpeace the Netherlands article on actions for the North Sea. Located 18.05.2021 at <https://www.greenpeace.org/nl/greenpeace/44689/in-actie-voor-de-noordzee/>.

⁴⁶ Greenpeace (2021l). Greenpeace the Netherlands article on demonstration against reopening of coal power plant. Located 17.05.2021 at <https://www.greenpeace.org/nl/klimaatverandering/45756/heropening-kolencentrale-rotterdam-onbegrijpelijk-en-ongepast/>.

campaign.⁴⁷ The examples mentioned above only constitute a few of the many cases. Greenpeace has a history of civil obedience actions, many of which have involved the Dutch office. Besides the recent boarding of the Shell platform, most of these actions took place years ago. It no longer seems to be Greenpeace NL's primary tool to gain influence. This might be explained by the fact that Greenpeace has a reputation in the Netherlands, which makes it possible to have their say without civil disobedience actions. However, protests and campaigns are still a big part of the activism in the Dutch Greenpeace office. According to the Commission's country report, NGOs working to promote sustainability are drawing a lot of attention in the Dutch media.⁴⁸ This may support the outcome of societal lawfare in the Netherlands and motivate Greenpeace to do more of this type of activism, since it is possible to reach a large audience. Furthermore, Greenpeace NL seems to have great success with its societal lawfare. The support that some of Greenpeace NL's actions receive from the political establishment might be another reason the Dutch office is so active in leading societal lawfare.

5.2.2. Greenpeace's Use of Lawfare in Bulgaria

Greenpeace BG has used legislative lawfare a limited number of times. A recent example is a report with proposals for a green recovery after the COVID-19 crisis.⁴⁹ Other examples of legislative lawfare constitute an open letter on support for renewable energy⁵⁰ and various signature collections.⁵¹ One of the reasons Greenpeace BG is not engaged in a lot of legislative lawfare might be Bulgaria's

⁴⁷ Greenpeace (2021m). Greenpeace the Netherlands article on concert with protest songs. Located 13.05.2021 at <https://www.greenpeace.org/nl/klimaatverandering/45948/toekomstmuziek-voor-de-tweede-kam>; Greenpeace (2021n). Greenpeace the Netherlands article on calling political parties with protest songs. Located 14.05.2021 at <https://www.greenpeace.org/nl/klimaatverandering/45040/duizenden-protestnummers-ve>.

⁴⁸ EU Commission (2019a) p. 42.

⁴⁹ Greenpeace (2021o). Greenpeace Bulgaria article on a green recovery. Located 12.05.2021 at <https://www.greenpeace.org/bulgaria/press/6174/zavrushtane-budeshte-plan-vuzstanoviavane-ustoichivost/>.

⁵⁰ Greenpeace (2021p). Greenpeace Bulgaria article on open letter to the government about transition to renewable energy. Located 17.05.2021 at <https://www.greenpeace.org/bulgaria/press/5332/obshtini-otvoreno-pismo-pravitelstvo-podkrepa-energiyni-obshtnosti/>.

⁵¹ Greenpeace (2021q). Greenpeace Bulgaria signature collection. Located 16.05.2021 at <https://www.greenpeace.org/bulgaria/act/krai-na-vuglishtata/>.

deficient implementation of the Aarhus Convention. Bulgaria has sought to implement the Convention through the Bulgarian Environmental Protection Act. Although the Council of Ministers has created a portal for public participation in the preparation of legislation, 2017 Eurobarometer figures show that only 73 percent of Bulgarian respondents believe that an individual can play a role in protecting the environment, which is considerably lower than the EU average of 87 percent.⁵² The Bulgarian government seems reluctant to pay much attention to Greenpeace and their recommendations on the recovery plan, for example. If the lobbying of political parties and the government has little influence on the preparation of legislation, as the Eurobarometer figures indicate, that might explain why Greenpeace BG is not putting a lot of effort into legislative lawfare initiatives.

In regard to court-centered lawfare, there is only one recent mention of a court-related measure initiated by Greenpeace BG on the Greenpeace website, where Greenpeace BG filed a case at the national courts, claiming that a coal-fired power station should have conducted an environmental impact assessment if it should keep burning waste and biomass together with coal. The decision is not yet final, as it is being processed at the second instance.⁵³ One reason Greenpeace BG may not be using a lot of court-centered lawfare is that Bulgaria still has a very restrictive approach to legal standing. It is based on direct interest, which is extremely difficult for NGOs to fulfill. Bulgarian courts, therefore, regularly deny standing to environmental NGOs to contest, for example, Bulgarian plans on air quality. Furthermore, Bulgaria recently increased the fees for NGOs to challenge decisions on environmental impact assessments, which may also create a barrier to access to justice and might constitute a breach of the Aarhus Convention.⁵⁴ Lastly, Bulgaria lacks publicly-available information on access to justice in environmental matters, so it is difficult to find practical information on how to file a case. Therefore, one of the priority actions mentioned in the Environmental Implementation Review 2019 country report for Bulgaria is that Bulgaria needs to: “*Ensure that there is legal standing for environmental NGOs to bring legal challenges on air pollution and nature*”.⁵⁵ Due to the poor access to justice,

⁵² EU Commission (2019b). Commission Staff Working Document - The EU Environmental Implementation Review 2019 Country Report - BULGARIA, p. 30.

⁵³ Greenpeace (2021r). Greenpeace Bulgaria case filed due to missing EIA. Located 26.05.2021 at <https://www.greenpeace.org/bulgaria/press/5264/sud-reshenie-otsenka-vuzdeistvie-zdrave-okolna-sreda-izgarya>.

⁵⁴ EU Commission (2019b) p. 31.

⁵⁵ EU Commission (2019b) p. 31.

environmental NGOs tend to express their concerns on possible breaches of environmental law to the European Commission. This might contribute to the large numbers of infringement proceedings against Bulgaria on environmental matters. The alleged violations are primarily poor application and enforcement of environmental legislation and not lack of implementation in national law.⁵⁶ In addition to incorrect implementation of the Aarhus Convention, which can be blamed on the Bulgarian government, limited economic and personal resources in the Bulgarian Greenpeace office might also limit the amount of court-centered lawfare.

When it comes to societal lawfare, the Bulgarian office has initiated many activities categorized as societal lawfare lately. Examples are a satiric video criticizing the political parties for not discussing water policies at all in connection with the election or during the formation of a new government,⁵⁷ a demonstration in front of the Bulgarian Parliament regarding a green recovery,⁵⁸ a Christmas present to the mayor in the capital city of Sofia, containing a snow globe containing polluted air from the city⁵⁹ and a wooden Christmas tree that was covered in glue-on particles from air pollution coming especially from the coal industry, gifted to the Ministry of Energy.⁶⁰ Also, a protest campaign concerning a reformation of the energy system in Bulgaria⁶¹ and a concert powered by solar

⁵⁶ EU Commission (2019b) p. 33.

⁵⁷ Greenpeace (2021s). Greenpeace Bulgaria article on a satiric video with non-existing water debate. Located 18.05.2021 at <https://www.greenpeace.org/bulgaria/press/6227/debatut-za-vodata-koito-ne-se-sustoy>.

⁵⁸ Greenpeace (2021t). Greenpeace Bulgaria article about a demonstration for a green recovery. Located

16.05.2021 at <https://www.greenpeace.org/bulgaria/press/6174/zavrushtane-budeshte-plan-vuzstanoviavane>

⁵⁹ Greenpeace (2020b). Greenpeace Bulgaria article about snow globe with polluted air inside. Located 15.05.2021 at <https://www.greenpeace.org/bulgaria/press/5150/fandakova-prie-prespapieto-vazduh-vei/>.

⁶⁰ Greenpeace (2020c). Greenpeace Bulgaria article about christmas tree with glued on particles. Located 13.05.2021 at <https://www.greenpeace.org/bulgaria/press/5128/koleda-v-galabovo-demonstratsiya-minister>.

⁶¹ Greenpeace (2020d). Greenpeace Bulgaria article about citizens calling the ministry of energy. Located 16.05.2021 at <https://www.greenpeace.org/bulgaria/press/5032/prizovi-ministerstvo-na-energetikatum->

energy⁶² demonstrate use of societal lawfare. Societal lawfare sometimes seems to be the only opportunity for Greenpeace BG to make its opinion heard. The societal measures taken by Greenpeace succeeded in gaining attention around specific problems, including the coal industry and bad air quality. Demonstrations, satiric videos, gift presentations, and online debates all help inform politicians that there is a desire for a better protection of the environment and climate in the society.

5.2.3. Summary of Hypothesis 2

The predominance of societal lawfare is specific to Bulgaria, which implies that Greenpeace tends to primarily use societal types of activism over other types in non-compliance member states, compared to in the Netherlands representing a compliant member state, where a more even distribution of the three types of lawfare is seen. Since the countries are chosen as prototypical cases, the findings allow for a generalization to other compliant and non-compliant EU member states. The findings confirm hypothesis 2.

5.3. *Triangulation of Findings Through Elite Interview*

An elite interview was conducted to try to triangulate the findings. Regarding the quantity of lawfare used in different EU member states, conflicting information to support hypothesis 1 is given. The interview confirms that national offices in member states classified as compliant, such as the Netherlands and Germany, are more resourceful, engage in many different types of lawfare and are more able to influence the member states in which they operate compared to what smaller offices can do in their member states. However, the interview suggests that it is not certain that it is due to the countries being compliant or not. It is instead suggested that other factors could influence the degree of lawfare used in different EU member states such as how many resources the office has. There could instead be historical roots and local reasons why Greenpeace has larger offices in some compliant EU member states and focuses its actions on compliant countries such as the Netherlands or Germany. Nevertheless, economic resources may be transferred between countries. Greenpeace can therefore allocate resources to the offices that they wish should perform more lawfare.

⁶² Greenpeace (2020e). Greenpeace Bulgaria article about online debate and solar powered concert. Located 15.05.2021 at <https://www.greenpeace.org/bulgaria/press/4871/solaren-kontsert-diskussi-vuzobnovyae>.

The interview also confirms that Greenpeace uses different types of lawfare all over Europe, which supports the earlier findings. It is mentioned that, in Eastern European EU member states, where many are categorized as non-compliant, some types of lawfare are not used as much:

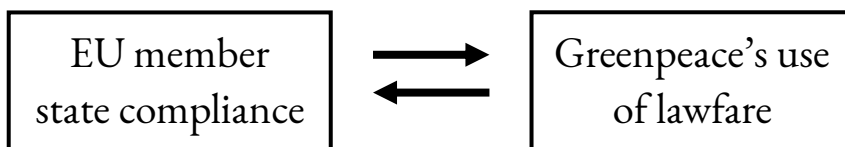
Some places we need to be more careful – primarily in Eastern European countries. There has been a change in how much some governments accept civil disobedience and how much we can get away with. In Hungary, it is not going well – also in Poland. There are larger restrictions, I regard, as to how spectacular the civil disobedience can be, and we must compensate in other ways.

This can be interpreted as limiting hypothesis 2 since societal lawfare is more difficult to perform in non-compliant member states. There also seems to be a link between the lack of civil disobedience that Greenpeace uses in some EU member states less to their low level of compliance but to democratic backsliding by these member states. It is not indicated whether societal lawfare is preferred to other types of lawfare in non-compliant member states compared to compliant member states.

6. Discussion

Reverse causation, omitted variable bias or other explanatory variables may have affected the validity of our findings in the analysis.⁶³ Firstly, it is possible that our findings are a result of reverse causation. EU member state compliance is defined as infringement proceedings brought against the member state. Greenpeace's lawfare can affect improvements in environmental policy in member states so that the member state complies with EU legislation and avoids infringement procedures being filed against the state. Therefore, in member states where Greenpeace is more active with its use of lawfare, EU member states' compliance may be affected in a positive way, which would also explain the paper's findings.

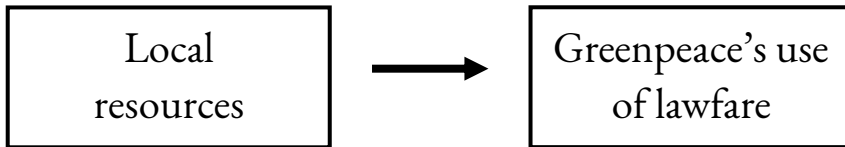
Figure 1: Possible reverse causation



⁶³ Hariri, Jacob G. (2012). Kausal inferens i statskundskaben. *Politica*, Vol. 44(2), pp. 184-201, at p. 184; Gerber, Alan S. & Donald P. Green (2012). *Field Experiments: Design, Analyses and Interpretation*. New York: W.W. Norton Company, Inc., pp. 37–39.

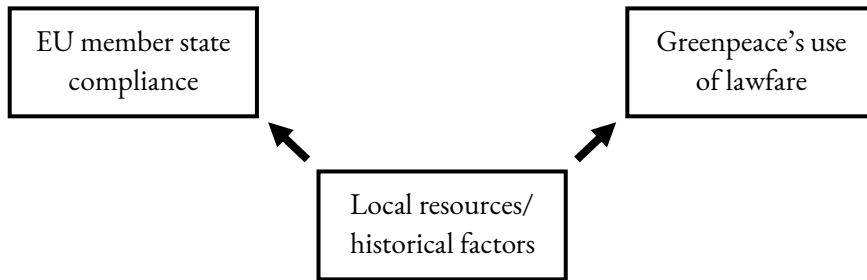
Secondly, it has also been suggested that other factors might have affected Greenpeace's use of lawfare. The analysis indicates that there are different local resources such as organizational income and number of employees in Greenpeace offices, depending on the member states in which they are located, which might affect the degree of lawfare and also what kind of lawfare is used. Some types of lawfare are costly to perform, such as court-centred due to fees and lawyers, while societal lawfare is often less expensive and does not require the same personal skills. Therefore, local resources both with regards to economic, but also personal resources, might influence the amount of lawfare performed and possibly limit which types of lawfare is doable.

Figure 2: Possible alternative causal model



Thirdly, the interview indicates that there could be patterns in which countries that have more resources or not that could affect compliance among member states and Greenpeace's use of lawfare. Historical factors may influence Greenpeace's resources in different EU member states. For example, Greenpeace was established in Western EU member states long before the Eastern European countries. As mentioned, well-established offices often have more economic support, which again might influence the degree and type of lawfare used. Historical factors might also explain member states' compliance level. Central and Eastern European member states may have challenges with compliance because of the triple challenges of transitioning toward democracy, a market economy, and a (new) nation.⁶⁴ Therefore, finding a lower degree of lawfare in non-compliant countries and finding that societal lawfare is the preferred type of lawfare used in non-compliant states compared to compliant, might be spurious and caused by local historical factors.

⁶⁴ Börzel (2021) pp. 64–65.

Figure 3: Possible omitted variable

The interview suggests that resources might be moved between offices. It is therefore difficult to determine whether Greenpeace's offices have more resources in compliant countries because Greenpeace has chosen to allocate resources there due to better possibilities at influencing the political agenda or whether the actual location itself is the reason for more resources.

The interview also suggests that societal lawfare in which Greenpeace primarily engages in some EU member states has less to do with their compliance than it does with democratic backsliding in some member states. Papers on social movements indicate that being an open democracy rather than a close political system may have an effect on which type of lawfare is used by NGOs.⁶⁵ This could primarily affect our findings regarding hypothesis 2. If one looks at democracy measures such as Freedom House estimations of civil liberties, the Netherlands has a higher score on civil liberties than Bulgaria, and this is the case of many compliant member states vs. non-compliant member states.⁶⁶ Compliance and democracy could correlate, and this would make it difficult to determine whether it is compliance, democratic institutions or both that cause Greenpeace's use of certain lawfare types. An analysis of democracy's effect of Greenpeace's use of certain types of lawfare should, therefore, be explored further.

There is therefore reason to believe that both reverse causation, omitted variables or other explanatory variables such as local resources and democracy may have affected the findings of this paper. Consequently, additional research is deemed needed to assess the causal mechanism of compliances' effect on the degree of Greenpeace's lawfare and the type and lawfare used. Further interviews with a focus on the causal chain and especially on the possibility of other explanatory variables should be made.

⁶⁵ Dalton et al. (2010) pp. 51–53.

⁶⁶ Freedom House (2021). Countries and Territories. Located 21.05.2021 at <https://freedomhouse.org/countries/nations-transit/scores>.

Furthermore, prototypical case studies have limitations in their generalizability as addressed in section 4. A larger number of similar cases could bring further clarity the findings of the study. It is also worth noting that the analysis is conducted on the basis of actions happening within a period of six months and only by looking at two member states. To improve the credibility of the findings, data from further back could have been included and the analysis could have involved more non-compliant and compliant member states. The analysis of hypotheses could be weighted in regards to office size, local resources etc., to see if this would affect our finding.

7. The Importance of NGOs' Use of Lawfare to Influence EU Member States

Our finding that Greenpeace differs in its use of lawfare is interesting even if it is not known why. However, it is even more so if their role in improving environmental policy is important. National NGOs are often the first to explore breaches of environmental law, since they have the necessary knowledge about local conditions, which the EU Commission and other member states do not possess. Therefore, it can be argued that NGOs should play a major role in improving compliance and ensuring better protection of the environment.

In addition to softer methods such as demonstrations, lobbying, etc., NGOs are able to turn to legally harsher tools to seek compliance by informing the Commission about a breach of EU law in the hope that the Commission will start an infringement procedure, cf. Article 258 TFEU.⁶⁷ NGOs may also commence a case at their national courts. Through the preliminary question procedure, they might be able to have their case brought to the ECJ. This requires the national court to believe it is necessary to get the ECJ's opinion and be willing to bring the case to Luxembourg. The main problem, however, is fulfilling the requirements for legal standing in the national court – and, as mentioned, this is more difficult in some countries (BG) than others (NL).

This problem of varying access to courts was supposed to be solved with the Aarhus Convention, which on paper gives NGOs a unique possibility for influence through wide access to justice in environmental matters, cf. Article 9(3). As stated in section 2 this article has yet to be implemented in EU legislation. The Commission requests the member states to promote wide access to justice while, at the same time, allowing for divergent and very restrictive rules on legal

⁶⁷ OJ 2012, C 326, pp. 47–390.

standing.⁶⁸ As a consequence, NGOs cannot fully exploit their position to mobilize national courts in the fight to improve EU environmental law - and this weakens their role in influencing member states to improve environmental policy.

It is counterintuitive that the Commission, which is so dependent on NGOs to detect the breaches of environmental law, does not ensure them access to justice and provide them the means to help improve environmental policy. To solve this problem, the Commission needs to adopt legislative measures to implement article 9(3) of the Aarhus Convention properly.⁶⁹ The Commission tried to do so in 2003; but, even after a decade, an agreement could not be reached.⁷⁰

Until this happens, the role of NGOs is limited and must rely to a large extent on questionable actions such as protests or Commission infringement procedures when they try to improve environmental protection. This is especially problematic in some member states such as Bulgaria. With a proper implementation of the Aarhus Convention, NGOs in all EU member states will be better positioned to engage in litigation in national courts and preliminary rulings. A proper implementation of the Convention will also ease the use of legislative lawfare through wider public participation, which will likely improve the overall implementation of environmental legislation in the EU.

8. Conclusion

Previous literature and theories state that countries' compliance has an effect on the degree of NGO action and that certain political structures, that relate to the level of compliance, determine whether NGOs are more likely to act outside of the political system. This paper contributes to the field of research on NGO impact on environmental policy change by linking the research on lawfare with research on how the environmental NGO Greenpeace try to influence EU member states. At the same time, it tests whether the results found in literature that NGOs try to influence compliant states more are transferable to NGOs operating in other institutions with different norms and frameworks such as the EU and its member states.

This paper's purpose was to examine whether there is a difference in the degree to which Greenpeace uses lawfare to try to influence EU member states to improve

⁶⁸ Mariolina (2018) p. 754.

⁶⁹ Darpö, Jan (2012). *Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union*, p. 23.

⁷⁰ EU Commission (2017). *Communication from the Commission. Commission Notice on Access to Justice in Environmental Matters. C(2017) 2616 final*, para. 10.

their environmental policy depending on whether it operates in a compliant or non-compliant EU member state, and whether Greenpeace resorts to certain types of lawfare in non-compliant member states compared to in compliant member states.

To examine this, the paper tested two hypotheses: Firstly, whether Greenpeace engages in more lawfare actions to try to influence member states to improve environmental protection in compliant member states than in non-compliant member states and, secondly, whether Greenpeace will turn to societal lawfare rather than legislative or court-centered lawfare when operating in non-compliant EU member states compared to compliant EU member states. The hypotheses were tested through a comparative case study of Greenpeace's office in the Netherlands (as a prototypical compliant EU member state) and Greenpeace's office in Bulgaria (as a typical non-compliant EU member state). These findings were triangulated through an interview with a project leader in Greenpeace.

The comparative case study suggests that lawfare is used more frequently in compliant states than non-compliant states when trying to influence EU member states to improve EU environmental policy. The interview seems to indicate the same, but these findings are less certain and the interview hints at other explanatory variables than compliance. Furthermore, study supported the statement that Greenpeace operating in non-compliant states resorted to societal lawfare more than legislative or court-centered than when it was operating in compliant EU member states. The interview does not relate to hypothesis 2 but indicates that the choice of lawfare might be dependent on democratic systems instead of the member states' level of compliance.

There is reason to believe that reverse causation, omitted variables or other explanatory variables might have affected the findings of the analysis. Further research is deemed needed to assess the causal mechanism to answer whether the differences in the degree of lawfare Greenpeace uses are determined by operating in a compliant state or non-compliant state or whether it is because of local resources or historical reasons. These causal uncertainties and the limited number of prototypical cases influence the generalizability of Bulgaria and the Netherlands to other member states, since it is difficult to determine whether the same conditions with regards to resources are applicable to all non-compliant and compliant member states.

At the same time, further research is needed to determine if Greenpeace resorts to societal lawfare rather than other types of lawfare in some member states compared to others because of the member states compliance level or level of democratic institutions. At the same time, more data could be gathered to heighten the credibility of our findings.

Lastly, based on our findings, NGOs have an important role to play in ensuring compliance regarding environmental law, since they are often the first to discover breaches of environmental law. Therefore, it is critical for NGOs to have access to justice intended for them in the Aarhus Convention. They should not have to rely mostly on actions such as protests and campaigns or infringement procedures, where the last measure is inadequate due to lack of sufficient resources at the Commission.