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Wir müssen reden! – We Need to Have a Serious Talk!

The Interaction between the Infringement Proceedings and the Preliminary Reference Procedure in Ensuring Compliance with EU Environmental Standards: A Case Study of Trianel, Altrip and Commission v Germany

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Abstract

The preliminary ruling procedure and the infringement proceedings are generally considered to constitute complementary means for the enforcement of European Union law. This paper critically assesses the actual complementarity of the two procedures from the perspective of the communication of and approach to a problem before the Court of Justice. Furthermore, it considers to which extent this complementarity has improved or created new complications with respect to compliance with EU environmental standards. These two questions will be answered on the basis of a case study concerning three different rulings rendered by the Court of Justice in which one particular problem of (in-) compatibility of national rules with environmental Union law was at stake, namely the German *Schutznormtheorie*.

Keywords

Infringement proceedings – preliminary ruling procedure – complementarity – enforcement of EU environmental law – *Schutznormtheorie*

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1 Introduction

In the Union, there are two different mechanisms to "seriously talk" about national infringements of supranational law. In particular, infringements of EU environmental law by Member States may be sanctioned through the centralised system provided by Article 258 TFEU but also through national courts which can refer preliminary questions to the Court of Justice in accordance with Article 267 TFEU.

Both provisions are contained in EU primary law since the Treaty of Rome.[1] In the intentions of the first Treaty drafters[2] and later the European Court of Justice,[3] these enforcement avenues were meant to be complementary: since the Commission has only limited access to the application of EU law in the national legal systems, and only possesses limited investigation competences and resources, the preliminary ruling procedure could contribute, not only to a uniform interpretation of Union law, but, more generally, to ensure the compliance with EU law. The doctrines of supremacy and direct effect, coupled with the preliminary ruling procedure, established the national courts as partners of the Commission in pursuing violations of EU law.

At the same time, the direct and indirect enforcement avenues cannot be considered equivalent: the infringement procedure is a strictly intergovernmental, quasi-diplomatic kind procedure, entailing bilateral and confidential talks between the Commission and the concerned Member State and eventually culminating in a declaratory ruling by the Court of Justice as to whether the Member State failed to fulfil its obligations under EU law. The indirect route is instead initiated necessarily by a natural or legal person at the national level

1 Articles 169 and 177 of the Treaty establishing the European Economic Community.

2 M. Gaudet, *The Legal Systems of the European Community*, FJME (Lausanne), Fonds Michel Gaudet, p. 12 ff.

3 See for example the reasoning of the Court of Justice in *Van Gend en Loos*: "In addition the argument based on articles 169 and 170 of the Treaty put forward by the three governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations." Judgment of the Court of 5 February 1963. Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1

who alleges that EU law is being violated by the national authorities: the Court of Justice will, in such case, be involved only upon request of the national court and only in an intermediary step to provide an interpretation of EU law, with the final, constitutive ruling, being taken by the national courts.

This contribution will focus on the complementarity of the two procedures from the perspective of the communication of and approach to a problem before the Court of Justice, whereby the preliminary ruling procedure is considered to be a mechanism giving answers to specific questions in specific cases, as opposed to the infringement procedure, which is aimed to take a broad approach against serious infringements of Union law. In particular, this paper will ask 1) to what extent the two types of proceedings are complementary in practice and 2) to which extent this complementarity has improved or created new complications with respect to compliance with EU environmental standards.

These two questions will be answered on the basis of a case study concerning three different rulings rendered by the Court of Justice in which one particular problem of (in-) compatibility of national rules with environmental Union law was at stake. Specifically, this paper will focus on the German 'doctrine of protective provisions' which has been an issue in the cases of *Trianel*[4] and *Altrip,*[5] in which national courts posed questions for preliminary ruling under article 267 TFEU, and the case of *Commission v Germany,*[6] which was brought as an infringement procedure under article 258 TFEU.

To begin with, this paper will provide for an introduction to the legal problem underlying the three cases, which is the German 'doctrine of protective provisions' (*Schutznormtheorie*), according to which access to administrative courts is dependent on the infringement of a subjective right (2). Next, the facts of the cases of *Trianel*, *Altrip* and *Commission v Germany* will be roughly outlined and the questions for preliminary ruling, the plea of the Commission in the infringement procedure and the conclusion of the Court will be set out (3). After this, it will be assessed how the findings by the Court were received by the German legislator, national courts and legal scholars in order to highlight that the answers of the Court of Justice did not provide clarity as to what would be required to comply with the rulings (4). Moreover, it will be asked to what extent questions about the German doctrine and its compatibility with Union law remain (5). On the basis of this analysis, the communication of and approach to the underlying dogmatic problem by the Court of Justice shall be

4 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289.

5 C-72/12, *Gemeinde Altrip et al. v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712.

6 C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683.

analysed and it will be asked in how far the procedures were complementary or could have been complementary, and where there have been shortcomings (6). In the end some general conclusions will be drawn and some recommendations for the improvement of the (communication in the) procedures will be given (7).

2 The Focus of the German Litigation System: The Protection of Individual Rights

In Germany, the administrative court system aims first and foremost at the protection of individual rights (*Individualrechtsschutz*). This system has its constitutional foundation in article 19 (4) Basic Law which states that: "If someone's rights are violated by public authority, he has recourse to the courts."[7] This approach is crystallized in several provisions of the German Administrative Court Procedure Act (*Verwaltungsgerichtsordnung*, VwGO). According to § 42 (2) VwGO

> If not otherwise provided statutorily, the legal action is only admissible if the claimant asserts that his rights have been infringed upon by the administrative act or the refusal or omission thereof.[8]

This rule governs standing before administrative courts. It emphasises that claimants can (in certain procedures) only access administrative courts if they can allege the possible infringement of a subjective right. As a complementary rule, § 113 (1) VwGO stipulates that the administrative judge annuls an administrative decision if it is illegal and (only) if it infringes the claimant's rights. Hence, this approach entails two elements: first, claimants have to allege that there is a rule which protects the rights of individuals and secondly, they need to be holder of this right in order to be successful with their claim. The question arises what such a "right" is. According to the so-called "doctrine of protective provisions" (*Schutznormtheorie*), an individual can rely on provisions which *at least also* aim at the protection of the individual.[9] Whether or not a rule *at least also* protects the right of an individual can be clear from the wording

7 Translation taken from: S. Hardt, N. Kornet, *Selected National, European and International Provisions from Public and Private Law*, Groningen 2015 (Maastricht Collection).

8 Translation provided by the Maastricht Collection.

9 K. Redeker & H.J. von Oertzen, *Verwaltungsgerichtsordnung* (Stuttgart 2014) § 42 at 52.

of the provision itself, but it often entails a complex interpretational exercise.[10] German courts have adopted a rather restrictive approach, which is particularly the case in environmental matters.[11] According to the interpretation of the national courts, a rule, which solely protects nature, does not aim at the protection of individual rights.[12] Hence, for a long time – the VwGO being the applicable statute to court proceedings also in environmental matters – claimants were hardly able to access courts or to be successfully in their claims regarding actions for annulment if they only wanted to challenge the infringement of a rule which aims at the protection of the environment.[13]

A similar limitation concerned the rules of administrative procedure. According to the traditional jurisprudence of German courts, rules of administrative procedure usually do not provide for individual rights.[14] The theoretical foundation for this interpretation is that procedural rules only *serve* the adoption of an administrative decision, which as such can be the subject of a legal dispute in front of the courts.[15] Hence, most procedural rules (only containing so-called 'relative procedural rights') cannot be challenged separately before the administrative courts if they are allegedly infringed by the administration.[16] In environmental matters, the national courts held that, for example, the procedural rules stemming from the implementation of the environmental impact assessment (EIA) Directive[17] are not aimed at the protection of individuals and they therefore denied standing in cases related this directive.[18]

This approach has been criticised for a long time for its restrictiveness.[19] Therefore, some states adopted special provisions for litigation in nature

10 R. Wahl, Schütz, § 42 (2), in: F. Schoch, J.P. Schneider & W. Bier, *Verwaltungsgerichtsordnung Kommentar* (München 2015) at 45; Sodan, § 42, in Sodan & Ziekow, *Verwaltungsgerichtsordnung* (Baden-Baden 2014) at 391.

11 F. Hufen, *Verwaltungsprozessrecht* (München 2013) § 14 at 77; W. Erbguth & S. Schlacke, *Umweltrecht* (Baden-Baden 2014) § 6 at 12 ff.

12 For example: BVerwG, NVwZ 2007, 1074; OVG Lüneburg, NJW 1996, 3225.

13 OVG Schleswig-Holstein, 17.5.2001 – 1 K 1/01, juris; see also: OVG Saarlouis, Judgment of 23.09.1997 – 8 M 11/93 – juris.

14 BVerwG, Judgment of 20.10.1972, BVerwGE 41, 58, 63; BVerwG, Judgment of 13.12.2007, 4 C 9/06, NVwZ 2008, 563 (566).

15 See for example: BVerwG, Judgment of 20. 12. 2011 – 9 A 30/10, NVwZ 2012, 573 at 19.

16 Compare § 44 a VwGO; see also: BVerwG, 16.11.1998, 6 B 110/98, juris at 10.

17 Initially: Directive 85/337/EEC; Today: Directive 2014/52/EU. This instrument provides for several steps which have to be followed when an authority assesses the admission or modification of a certain project with potential impacts on the environment.

18 See for example VGH München, Judgment of 26.1.1993 – 8 A 92.40143, NVwZ 1993, 906.

19 For an overview on the debate: Koch, *Die Verbandsklage im Umweltrecht*, NVwZ 2007, 369.

protection matters, but the possibility to challenge decisions remained narrow.[20] Also when the federal legislator adopted a special federal provision in 2002, which allows environmental organisations to access courts in some specific nature protection matters,[21] standing in Germany remained restrictive. In addition to the rules applicable to some specific nature protection claims, specific rules were created under the influence of international law. Germany and the European Union are parties to the international Aarhus Convention (AC) and the two legal systems are therefore obliged to implement article 9 AC on access to justice. Specifically, article 9 (2) AC requires that the public concerned have access to courts in relation to decisions, acts or omissions taken in administrative procedures subject to the public participation requirements established by the Convention itself. In this context, the contracting states are free to make access dependent either on the existence of a 'sufficient interest' or on the 'impairment of a right' of the claimant. The European Union implemented this article through two Directives. Article 10 a EIA Directive (today: article 11)[22] and article 15a IPPC Directive (today: article 25)[23] provide for rules on access to justice in some specific environmental matters falling under the scope of these pieces of legislation. For the purpose of implementing the European requirements on access to justice in the German legal system, a special statute was created in 2006, providing for specific rules derogating from the general approach adopted under the VwGO: the *Umweltrechtsbehelfsgesetz* (UmwRG).[24] The rules of this special statute have been subject to many legal disputes and, as will be seen throughout this paper, the statute had to be reformed due to the intervention of the Court of Justice. The initial version of the contentious provision on standing of the UmwRG (2006) provided that

> a domestic or foreign association [...] may, without being required to maintain an impairment of its own rights, bring an action in accordance with the VwGO to challenge such a decision or a failure to adopt such a decision, provided that the association asserts that the decision contravenes

20 See for example: BVerwG, 29.04.1993, 7 A 3/92, BVerwGE 92, 263-266 ; BVerwG, 6.11.1997, 4 A 16/97, NVwZ1998, 398-399; VG Oldenburg, Decision of 26.10.1999- 1 B 3319/99, NuR 2000, 398-405.

21 Today, the applicable provision is § 64 BNatSchG.

22 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21.

23 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17–119.

24 UmwRG, BGBl. I p- 2816.

> legislative provisions which seek to protect the environment, which confer individual rights and which may be relevant to the decision.[25]

The provision stated that environmental organisations could access courts without claiming the impairment of an *own* subjective right; however they could only rely on provisions which *intend* to protect subjective rights. Hence, this provision was still based on the doctrine on protective provisions (*Schutznormakzessorietät*), which rendered it difficult for environmental NGOs to access courts.[26]

In the following section, it will be explained how the German approach making access to administrative justice dependent on the infringement of a subjective right became the subject matter of dispute in front of the Court of Justice.

3 One Problem, Three Cases: The Questions and Answers in *Trianel*, *Altrip* and *Commission v Germany*

The restrictive German approach on access to justice was an issue before the Court of Justice in the three cases of *Trianel*, *Altrip* and *Commission v Germany*.

In *Trianel*, the problem was that, due to the restrictive approach adopted by the UmwRG, an environmental organisation would have been denied standing in the national court. The case concerned a claim brought by an environmental organisation against the authorisation for the construction and operation of a coal-fired power station. The environmental organisation alleged that certain rules on emission and nature protection law were breached. However, according to § 2 (1) UmwRG, the organisation would not have standing in the national court. This was because the provisions which allegedly had been breached, did not intend to protect the rights of individuals but the rights of the general public and the project at stake did not fall under the narrow scope of the statute on nature protection. Therefore, the referring court asked:

25 § 2 (1) UmwRG (2006) translation as provided by the Court of Justice in C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 18.

26 See the considerations on this restrictiveness and the possible incompatibility with Union law: OVG Lüneburg, Decision of 7.7.2008, 1 ME 131/08, juris; OVG Lüneburg, Decision of 10.3.2010, 12 ME 176/09, juris, at 8 f.; see however as an example for the possibility to receive standing: VGH Kassel, 16.09.2009, 6 C1005/08. T, juris (which was not sucessful on the merits); on the compatibiliy with Union law: A. Schmidt & P. Kremer, *Das Umwelt-Rechtsbehelfsgesetz und der „weite Zugang zu Gerichten"* ZUR 2007, 57 (60 ff.); on the restrictiveness of the approach: H.J. Koch, *Die Verbandsklage im Umweltrecht*, NVwZ 2007, 369 (278).

(1) **Does Article 10a of Directive 85/337 ... require it to be possible**, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, **to argue** that there has been an **infringement of any environmental provision** relevant to the approval of a project, **including provisions** which are intended to **serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?**

(2) Unless Question 1 is answered unreservedly in the affirmative: Does Article 10a of Directive 85/337 ... require it to be possible [....] to base their argument on the infringement of environmental provisions relating to the approval of a project **which are derived directly from Community law or which transpose Community environmental legislation into domestic law,** including provisions intended to serve the interests of the general public alone, rather than those which, at least in part, protect the legal interests of individuals?

(a) If Question 2 calls, in principle, for an affirmative response: Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

(b) If Question 2(a) is answered in the affirmative: What are the relevant substantive conditions (for example, direct effect, protection objective or aim of the legislation)?

The national court distinguishes three questions: first, it would like to know *generally*, whether the provision of EIA directive, transposing article 9 (2) AC, requires that environmental organisations be able to access courts when claiming that rules of environmental law are breached, including rules which only protect the general public. In the second question, the national court would like to know, in case that no *general* answer can be given, whether standing must be granted in cases where Union law is at stake even if the rules of Union law only protect the rights of the public. Third, the referring court specifically asked about the possibility of environmental organisations to access courts under the Directive. The Court of Justice joined the first two questions in one answer. It held that although the Aarhus Convention provides the contracting states with the possibility to make access dependent on the infringement of a right, it would be "contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness"[27] if

27 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 46.

environmental organisations were unable to access courts when they allege the violation of a rule of EU environmental law which is solely aimed at protecting the public interest. Therefore, the German rule was deemed incompatible with Union law. Moreover, as regards the possibility of environmental organisations to access national courts, the Court of Justice found that environmental organisations could directly rely on the Directive in order to enforce the Union rules at stake.[28]

In *Altrip*, the legal problem was that the claimants, the municipality Altrip, a civil law partnership (*GbR*) and an individual, were unable to challenge a flaw in the environmental impact assessment procedure. The relevant national provisions as interpreted by the courts at the time[29] limited the possibility to challenge flaws to two types of EIA infringements, namely the lack of an environmental screening and of an environmental impact assessment. Therefore, the Federal Administrative Court wanted to know whether this limitation was contrary to Union law. Moreover, in its third question, the national court asked:

> In cases in which, in accordance with subparagraph (b) of the first paragraph of Article 10a of [Directive 85/337], **the administrative procedural law** of a Member State **lays down in principle** that **access to a judicial review procedure** for members of the public concerned is **conditional upon maintaining the impairment of a right**, is Article 10a of [Directive 85/337] to be interpreted as meaning
>
> (a) that a challenge before a court to the procedural legality of decisions to which the provisions of that directive which relate to public participation are applicable **can be successful and lead to the decision's being annulled only if**, in the circumstances of the case, there is a definite possibility that the contested decision would have been different without the procedural irregularity and if, **at the same time, that procedural irregularity affected a substantive legal position of the applicant's**, or
>
> (b) that, in judicial proceedings challenging the procedural legality of decisions to which the provisions of that directive relating to public participation are applicable, it must be possible for procedural irregularities to lead to annulment **on a greater scale?**

28 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 59.

29 § 4 UmwRG (2006).

In this question, two 'problems' are addressed at the same time. To begin with, the national court asks a question about the so-called 'condition of causality', according to which a decision can only be annulled if a procedural flaw would have led to a different administrative decision. Hence, if there is no 'causal link' between the flaw and the final decision, the latter will not be annulled.[30] Next, the annulment can only be requested, if that procedural irregularity infringes a rule protecting a subjective right of the applicant.

The Advocate General clearly distinguished between the question about the condition of causality and the question about the impairment of rights. Starting with the latter issue, he noted that the stages of the admissibility of a claim and that of the assessment of the merits of the claim have to be distinguished. He stated:

> With regard to the right to bring an action, it is true that the second and third sentences of the third paragraph of Article 10 a put environmental protection organisations in a privileged position inasmuch as it provides that they have rights which may be impaired. As regards substance, however, there is nothing to indicate that members of the public concerned are in a worse position than environmental protection organisations. As the aforementioned provisions of the Aarhus Convention show, the citizen himself becomes the implementing authority for environmental protection, a task which, as the applicants point out, environmental protection organisations are able to take on only to a limited extent because of insufficient financial resources.[31]

For this reason, the Advocate General considered the national rule on the impairment of a right to be incompatible with Union law.[32]

Contrary to this nuanced reasoning, the one provided by the Court of Justice is not very clear. The court merges and blurs the two elements of the preliminary question. The judges understand the two problems described as an issue of the burden of proof and conclude that there is no incompatibility with Union law, as long as the burden to prove the 'condition of causality' is not on the claimant.[33] In the words of the Court:

30 See for example: VGH BW, 28.3.1996, 5 S 1301/95, juris at 80.

31 Opinion of AG Cruz Villalón in C-72/12, *Altrip,* ECLI:EU:C:2013:422, para. 98.

32 Opinion of AG Cruz Villalón in C-72/12, *Altrip,* ECLI:EU:C:2013:422, para. 99.

33 C-72/12, *Gemeinde Altrip et al. v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, paras. 39; 52 f.

> Therefore, the new requirements thus arising under Article 10a of that directive mean that impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court of body, that the contested decision would not have been different without the procedural defect invoked by that applicant.[34]

In conclusion, the question about the (in-) compatibility of the requirement of an applicant's infringement of a 'subjective right' remained without an answer.[35] This means that it is not clear under which conditions individuals and municipalities, so claimants which are not environmental organisations,[36] can successfully claim an infringement of the EIA Directive,[37] i.e. under which conditions, the infringement of a European procedural rule must lead to the annulment of a decision.

Contrary to these two questions referred for preliminary ruling in the two specific cases, the Commission took a broad approach in *Commission v Germany* and challenged the general national procedural provision requiring the impairment of a right to obtain the annulment of an administrative measure, i.e., § 113 VwGO. In this case, the Commission asked the Court to declare that, by restricting:

> – annulment of administrative decisions covered by Directive 2011/92/EU [...] and by Directive 2010/75/EU [...] to only those cases **where an infringement of an individual public-law right has been established** [§ 113(1) ACPA]

34 C-72/12, *Gemeinde Altrip et al. v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, para. 53.

35 J. Greim, *Das Urteil des EuGH in der Rechtssache Altrip*, NuR 2014, 81 (83); R. Klinger, *Umweltverträglichkeitsprüfung und Rechtsschutz*, ZuR 2014, 535 (539).

36 After the ruling in *Trianel*, the German legislator reformed the *UmwRG*. According to the new version of § 2 *UmwRG*, environmental organisations do not need to allege the infringement of a right for their claim being admissible (§ 2 (1) UmwRG) and they do not need to have a right infringed at the stage of the assessment of the merits of the claim (§ 2 (5) UmwRG).

37 T. Bunge, *Der Rechtsschutz in Umweltangelegenheiten in Deutschland – Stand und offene Fragen*, ZUR 2015, 531 (537).

> – annulment of decisions on the basis of procedural errors in the absence of an environmental impact assessment or pre-assessment [§ 4(1) UmwRG] and to cases in which the applicant proves that the procedural error was causative as regards the result of the decision **and the applicant's legal position is affected** [§ 46 VwVfG read in conjunction with § 113(1) VwGO]
>
> [...] the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Directive 2011/92/EU and Article 25 of Directive 2010/75.

Before turning to the findings of the Court of Justice, it is again necessary to take a brief look at the conclusions of the Advocate General, as the Court adopted a different opinion in the central question under analysis.

The Advocate General was of the opinion that the general German rule, according to which an administrative decision may only be annulled if it infringed a subjective right of the claimant, breached Union law.[38] He argued that under the rules on access to justice stemming from the Aarhus Convention, it is possible to restrict the admissibility of a claim, but that it is not possible to restrict the court's ruling on the merits.[39]

Contrary to this Opinion of the Advocate General, the Court of Justice rejected the first plea of the Commission. With a very short reasoning, the Court simply found that the European rules on access to justice allow the Member States to make access dependent on the impairment of a right so that § 113 (1) VwGO is not incompatible with the rules of the EIA and IPPC Directives.

Also with regard to the second plea, the ruling by the Court is very short. The Court first repeats the finding of *Altrip* as regards the requirement of a causal link between the procedural defect and the substance of the decision,[40] and then, without any transition, more or less out of the blue, finds that

> it is not in dispute that, pursuant to [§ 113 (1) VwGO], read in conjunction with [§ 46 VwVfG], where an environmental impact assessment act is affected by a procedural defect, the decision adopted at the end of such a procedure cannot be annulled by the national court hearing the action unless that procedural defect infringes an individual public-law right of the applicant.[41]

38 Opinion of AG Wathelet in C-137/14, *Commission v Germany* ECLI:EU:C:2015:344, para. 62.

39 Opinion of AG Wathelet in C-137/14, *Commission v Germany* ECLI:EU:C:2015:344, para. 52 ff.

40 C-137/14, *Commission v Germany* ECLI:EU:C:2015:683, para. 59 f.

41 C-137/14, *Commission v Germany* ECLI:EU:C:2015:683, para. 63.

In the German version of the ruling, the phrase "it is not disputed" is translated as "steht fest" (it is determined). This section raises some problems of understanding. How can the Court find – without any further assessment – that this question is "not in dispute"? The Commission had clearly explained that it wanted to challenge the fact that there is this restriction when courts rule on the merits of the case.[42] The judges simply refer to their paltry arguments brought forward with regard to the first plea and conclude that there is no infringement of Union law. Hence, the conclusion is – as everyone knew before the ruling – that the rules implementing article 9 (2) AC provide the Member States with discretion to make access to justice dependent on the infringement of a right. As a consequence, the general German rules limiting annulment to situations in which the contested measure infringed the applicant's subjective rights was held to be in compliance with EU law.

In conclusion, comparing the outcome of the three cases concerning the same underlying legal problem, the Court of Justice provided for a specific answer for a very specific sub-problem of the German approach in the case of *Trianel,* but it did not provide for any answer in the case of *Altrip*. From the infringement procedure, it follows that the application of the protective norm theory at the stage of assessing the merits of a claim (i.e. the same legal problem which was submitted by the German court in *Altrip*) is not incompatible with the EIA and IPPC Directives. In the following it will be assessed how these rulings were received in the German legal order.

4 The Reception of the Answers in the National Legal Order: Reactions on *Trianel*, *Altrip* and *Commission v. Germany*

The three rulings under consideration triggered different reactions in the courts, by the legislator and scholarship. These reactions shall be outlined in this section, before turning in the next section to the questions left open by the rulings.

The case of *Trianel* concerned one single rule applicable to a very specific problem, namely standing for environmental organisations in disputes brought under the scope of a statute providing for sector-specific rules on access to courts in environmental cases (UmwRG). The direction signs provided by the Court were clear: the national litigation rule in question violated Union law, and, because the relevant provision of Union law is sufficiently precise

42 C-137/14, *Commission v Germany* ECLI:EU:C:2015:683, para. 42.

and unconditional,[43] the Directive had to be applied directly in the national court.[44] Moreover, the Court of Justice expressly provided that

> …in order to give the referring court the most useful answer possible, it should be pointed out that a plea raised against a contested decision which alleges infringement of the rules of national law flowing from Article 6 of the Habitats Directive must be capable of being relied on by an environmental protection organisation.[45]

In the final judgment on the case, the national court held that the German rule insufficiently transposed article 10 a EIA Directive and that any (substantive) rule transposing environmental Union law must be challengeable by environmental organisations.[46] Since the environmental organisation in the case at stake alleged an infringement of rules of the Habitats Directive, they could be granted standing in the national court.[47]

The direction signs provided by the Court of Justice were also clear from the perspective of the German legislator. In the aftermath of the reference for preliminary ruling, the German provision on standing in the *UmwRG* was reformed: the part of the provision requiring that the allegation of an environmental organisation had to concern an infringement of a rule protecting the rights of individuals was deleted for the stage of assessing the admissibility of the claim (§ 2 (1) UmwRG) and for the stage of assessing the merits of the claim (§ 2 (5) UmwRG).[48]

However, the domestic rule in question only concerns the standing of environmental organisations when courts assess the admissibility of a claim. This means that it is not applicable to other claimants not being a (recognised) environmental organisation. In this same context, it is also not clear how the statute has to be interpreted as far as the rules on the assessment of the merits of a case are concerned. Therefore, various uncertainties remained, which shall be further discussed in the next section.

In conclusion, the reception of the answer by the Court in the case of *Trianel* was rather unproblematic in practice, as it was clear how the specific

43 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 57.

44 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 59.

45 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 49.

46 OVG Münster, Judgment of 1.12.2011 – 8 D 58/08.AK, juris at 99 ff.

47 OVG Münster, Judgment of 1.12.2011 – 8 D 58/08.AK, juris at 90.

48 Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften (21.1.2013) BGBl I 2013, 95; Compare also section 2 of this paper.

cases comparable to the situation in *Trianel* had to be deal with. It led to a piecemeal transformation in the national legal system, in that environmental organisation were no longer barred from challenging the infringement of environmental rules stemming from Union law.

In the case of *Altrip*, the Court did not answer the preliminary question as regards the issue of the impairment of a subjective right under public law. The reaction of the Federal Administrative Court in this regard is not surprising: claimants (other than environmental organisations) who are granted standing under § 42 (2) VwGO, i.e. who can allege the possible infringement of their own subjective right, can request the annulment of a decision if there is a serious flaw in the EIA procedure.[49] Therefore, it is not impossible that an administrative decision is annulled if the EIA procedure was seriously flawed. However, claimants which are not a recognised environmental organisation cannot *solely* rely on the infringement of a ('relative') procedural rule under the EIA Directive in order to successfully challenge an administrative decision, i.e. their claims would not be admissible in court. It should be noted that this ruling of the Federal Administrative Court was delivered one week after that the Court of Justice delivered the ruling in the infringement procedure against Germany on § 113 (1) VwGO. The national court simply stated that this ruling in the infringement procedure did not require a different solution in the case at stake.[50] In the end, the Federal Administrative Court did not take a final decision but referred the question back to the lower court to finally rule on the case, so it remains to be seen how the lower court will finally decide on the case of *Altrip*.

In the aftermath of the Court of Justice's ruling in *Altrip*, national scholars criticised the remaining uncertainties as regards the remaining problems with the doctrine of protective provisions.[51] Quite often, procedural rules of the EIA are infringed which obviously do not protect the rights of individual, but only nature as such.[52] For these cases, further guidance by the Court of Justice would have been necessary. Furthermore, the legislator decided to redraft the provisions of the UmwRG but these changes mainly related to the categories

49 BVerwG, Judgment of 22.10.2015, NVwZ 2016, 308 (310).

50 BVerwG, Judgment of 22.10.2015, NVwZ 2016, 308 (310).

51 T. Bunge, *Rechtsfolgen von Verfahrensfehlern bei der Umweltverträglichkeitsprüfung*, NuR 2014, 305 (311); J. Greim, *Das Urteil des EuGH in der Rechtssache Altrip- Meilenstein oder Mosaikstein auf dem Weg zum gebotenen Individualrechtsschutz bei UVP – Fehlern*, NuR 2014, 81 (83); J. Ziekow, *Verfahrensfehler im Umweltrecht*, NuR 2014, 229 (233 f.); see also: C. Meitz, *Auch nach EuGH „Altrip" keine UVP-Interessentenklage im deutschen Recht, Anmerkung zum Urteil VGH Mannheim 11.4.2014*, 5 S 534/13, ZuR 2014, 496 (499 f.)

52 R. Klinger, *Umweltverträglichkeitsprüfung und Rechtsschutz*, ZuR 2014, 535 (538).

of procedural mistakes that can be challenged in court.[53] Hence, in conclusion, the ruling in *Altrip* could and did not trigger any substantial reactions in the courts or by the legislator as far as the doctrine on protective provisions is concerned.

The finding of the Court of Justice in the infringement procedure against Germany was that § 113 (1) VwGO does not violate the rules of the EIA and IPPC Directives. Hence, the feared 'revolution'[54] did not take place and a friction with the traditional doctrine on protective provisions was prevented.[55] The courts are expressly allowed to continue with their practice not to annul an administrative decision in cases in which the decision is illegal under EIA or IPPC legislation but in which the individual rights of the claimants are not infringed. So, no further changes in the German legislation are expected in the near future.

5 Open Questions: Is there a Need to Talk again 'Seriously' about the German Problem?

The question arises to what extent the three cases decided by the Court of Justice provided for more clarity in the national legal system and to what extent uncertainties remain.

To begin with, it is clear that environmental organisations must be granted standing in environmental cases involving the alleged infringement of Union law. Their claims must be admissible in court. It should however be noted that there are two limitations of access to justice for environmental organisations which were not yet discussed by the Court of Justice. First, § 2 (5) UmwRG provides that a claim will only be successful on the merits, if the infringement concerns interests (*Belange*) which the environmental organisation aims to support according its statutes. With this rule, the possibility of an *actio popularis* is excluded. Whether or not this rule will become the subject of further legal disputes depends on the (restrictiveness of) interpretation by the courts. Second, there is another issue which raises some questions of compatibility with Union law, namely the requirement that environmental organisations need to be officially recognised according to the criteria listed in § 3 UmwRG

53 Draft bill: BT Drs.18/5927 (7.9.2015).

54 M. Ludwigs, *Bausteine des Verwaltungsrechts auf dem Prüfstand des EuGH, Die Revolution ist ausgeblieben*, NJW 2015, 3484.

55 M. Kment & C. Lorenz, *Eckpfeiler des deutschen Verwaltungsrechts auf europäischem Prüfstand*, EurUP 2016, 47 (50).

before being able to access courts.[56] Without going into detail, it should be noted that the *WWF* and *Greenpeace* would not fulfil the criteria, and it is striking that there is only one recognised foreign environmental organisation in Germany,[57] although there are certainly quite some projects with potential environmental effects on neighbouring states.

Moreover, the rulings delivered by the Court of Justice do not give any satisfactory guidance how the allegations of claimants which are not environmental organisations should be dealt with (i.e. individuals, companies and municipalities). So far, different positions are adopted on this subject matter. The Federal Administrative Court has the opinion that these claimants can only request the annulment of administrative decisions in cases of flaws in the EIA procedure if their subjective rights are infringed, and that the rules of the UmwRG do not provide for subjective rights.[58] Some lower courts agree with this position.[59] However, there are also other courts, which adopt the opposite position and hold that individuals – forming part of the 'public concerned' – must be able to request the annulment of decisions breaching EIA legislation.[60]

Moreover, it is not clear what a 'subjective right' is [61] and who exactly the 'public concerned' is. Although the Aarhus Convention and the Union legislation allow the Member States to adopt a right-based approach, this does not say anything about the content of this approach as such. Although article 11 (3) EIA Directive and 25 (3) IPPC Directive state that member States have to determine what "constitutes an impairment of a right", this does not exclude the jurisdiction of the Court of Justice on this matter. The reason is that the Member States still have to ensure a "wide access to justice" in accordance with this provision and this is a term which can be interpreted by the Court of Justice. Moreover, the European judges could rule that these directives must be interpreted as containing (subjective) rights,[62] which certain claimants must be able to

56 § 2 (2), 3 UmwRG.

57 See the list provided by the Umweltbundesamt (2013), https://www.umweltbundesamt.de/sites/default/files/medien/375/dokumente/122013anerkannte_umwelt-_und_naturschutzvereinigungen.pdf (last visited 29.05.2016).

58 BVerwG, Judgment of 20.12.2011, NVwZ 2012, 573, at 19 ff; see also: VG Neustadt, 23.5.2012 – 4 L 321/12.NW, juris.

59 OVG Mannheim, Judgment of 11.4.2014, 5 S 534/13, at 41 ff.

60 OVG Münster, Judgment of 25.2.2015, 8 A 959/10, at 54; see also: VG Aachen, Decision of 28 November 2014, AZ.: 3 L 224/13, juris; VG Aachen, Decision of 20.1.2016, 3 K 2445/12, juris.

61 See also: K. Keller & C. Rövekamp, *Anmerkung zum Urteil des EuGH vom 15.10.2015 – C 137/14, Verstoß gegen Verpflichtungen zur Umweltverträglichkeitsprüfung bei bestimmten öffentlichen und privaten Projekten*, NVwZ 2015, 1665.

62 Compare C-237/07, *Dieter Janecek v Freistaat Bayern* ECLI:EU:C:2008:447, para. 37 f.

enforce before national courts. It seems paradoxical that the EIA procedure, expressly aiming at the protection of human health,[63] does not, according to German jurisprudence, confer rights on individuals. The conflicting interpretations will probably come under scrutiny of the courts in the near future.

Furthermore, the question remains how the doctrine of protective provisions has to be applied in cases that do not concern the EIA or IPPC Directive. In other terms, how does the German doctrinal approach fit under article 9 (3) AC, which contains a general provision on access to justice in environmental matters? Only recently, the German government proposed a modification of the UmwRG in order to transpose this article into its national legal order.[64] The European Union failed to implement this article so far. However, the Court of Justice held in the judgment of the *Slovak Brown Bear* that there should be a possibility to challenge decisions in the domestic courts under this provision.[65] In the German order, it has been very unclear, how this judgment of the Court of Justice should be interpreted,[66] and it is likely that more litigation will follow.

In addition to that, the reasoning provided by the Court of Justice in order to sustain the answers in the cases under consideration is not very nuanced, which reinforces the problem that there is no clarity. Whereas in the case of *Trianel* the court stressed the necessity of the effectiveness of Union law,[67] this argument was no longer as important in *Altrip*[68] and it was not addressed in *Commission v Germany*. However, the need of an effective application and enforcement of Union law is probably the most important argument that can be raised in the realm of environmental litigation. Since the effective enforcement of environmental (Union) law is dependent on an active civil society, which is willing to litigate, the Court of Justice should have considered in depth the question about the conditions under which the 'public concerned' should be allowed to bring claims in order to ensure the *effet utile* of Union law. In conclusion, however, it is not clear how the German doctrine complies with the necessity of an effective application and enforcement of Union law.

Considering the fact that even after three judgments delivered by the Court of Justice on one single legal issue so many questions remain unresolved, the next section shall assess the problems arising with regard to the communication

63 Recital at 14; see also art. 3 (a) Directive 2011/92/EC.

64 BT Drs. 18/9526.

65 C-240/09, *Lesoochranarske zoskupenie VLK*, ECLI:EU:C:2011:125, para 52.

66 BVerwGE 147, 312 at 38 ff; R. Klinger, *Das Rechtsschutzgebot des Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung in deutsches Recht*, EurUP 2014, 177.

67 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 46.

68 C-72/12, *Gemeinde Altrip et al. v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, para. 45.

of and the approach to the legal problem and ask to what extent uncertainties are still existing because of a flawed communication. In this context, it will be asked to what extent the procedures were complementary or could have been complementary, and what the shortcomings in communication between the different institutional actors were.

6 Questioning the Questions and Pleas: Some Observations on Communication Skills and Complementarity

Procedures for preliminary ruling are very specific in nature: national courts require answers from the Court of Justice in order to solve specific situations. We argue, therefore, that this procedure is not apt to solve far-reaching fundamental dogmatic problems of the national legal system in the first place. Instead, these procedures are aimed at providing specific solutions in individual cases and they may ultimately lead to piece-meal transformations in the national legal systems. In the infringement procedure, the Court is not restricted to the assessment of a provision in the context of a specific case scenario, but it can adopt a broad approach, which is better suited to tackle far-reaching dogmatic problems. In this respect, the two procedures are complementary, at least in theory.

In this section, the questions referred and the answers provided (*Trianel*, *Altrip*), and the pleas raised and the decision given (*Commission v Germany*) by the Court of Justice will be compared and it will be asked to what extent the two procedures have been complementary in practice, and to what extent the interplay has improved or created new complications as regards the application of Union law.

In the case of *Trianel*, the questions posed by the referring court were straightforward. To recall, the court first wished to know *generally*, whether the EIA Directive requires that environmental organisations be able to access courts when claiming that rules of environmental law are breached, including rules which only protect the general public and not the rights of individuals. In the second question, the national court specified the question for the case that the Court could not provide for a *general* answer, asking whether standing must be granted in cases where Union law is at stake even if these rules of Union law only protect the public interest and not the rights of individuals. Furthermore, two sub-questions were raised asking the court for guidance on the substantive conditions which a provision of Union law has to fulfil, so that an environmental organisation is able to rely on it before a national court. As explained in the previous sections, the ruling of the Court was sufficiently clear and provided for the necessary direction signs for the national court to decide

the case and also for the national legislator to remedy the breach of Union law. However, the authors allow themselves to critically ask whether it was a wise decision to join the two specific questions and sub-questions in one answer. The reason for this criticism is grounded in the concern that, because of merging the questions, some aspects raised in the question were only answered insufficiently, which, if answered more in depth, might eventually have saved further litigation.

To begin with, by merging the questions, the Court does not clearly distinguish between the enforcement of environmental rules which are of European origin and of rules under national law. It merely finds that the rules on access to justice under the Directive "necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect".[69] This is basically an answer to the first part of the second question, but it does not provide for any further guidance on 'purely national' situations. Of course, one might wonder why this question was raised at all, considering the scope of jurisdictional powers of the Court of Justice. The question is of course whether the Court of Justice has the competence to rule on these 'purely internal situations'. In the final judgment given by the national court, it was briefly said that it was no longer necessary to elaborate on the question of national rules as in the case under consideration there was an alleged infringement of European provisions in any event. Nevertheless, it would have been helpful to receive from the Court of Justice a clearer statement as to its lack of competence to decide on 'purely internal situations', In the end, in the national courts, it was held that such a distinction between 'national' and 'European cases' could not be made[70] and also the German legislator decided not to distinguish between national and European situations.[71]

Next, and more importantly, the Court of Justice omitted to discuss in detail the two sub-questions raised, which the referring court wished to have answered in case that the first part of question 2 was answered affirmatively. In very brief terms, the Court stated that 'the "impairment of a right" cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation'.[72] This is a very opaque statement and not very helpful. First, the question is who is meant with "other physical or legal persons"? Does it mean

69 C-115/09, *BUND v Bezirksregierung Arnsberg* ECLI:EU:C:2011:289, para. 48.

70 OVG NRW, Judgment of 12.6.2012, 8 D 38/08.AK, juris para. 185 ('Datteln').

71 BR Drs. 469/12 (10.8.2012) p. 36 f.

72 C-115/09, *BUND v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 47.

everyone else except for the environmental organisation? If this is the case, the examples given for the distinction between these groups are not understandable. Why can "only other" persons be a more or less close neighbour of an installation, but not an environmental organisation? In fact, there are environmental organisations which (try to) acquire ownership of adjacent land to installations just to be able to access courts as property owners. Also the second example 'of suffering… the effects of the installation's operation' is difficult to grasp. The Court expressly refers to the possibility that legal persons can be affected, so why not environmental organisations pursuing activities in the area concerned? The phrase on the condition raises some doubts whether the details of the problem that the German doctrine of protective provisions creates were understood correctly. The two sub-questions which in the end remained unanswered did not aim at receiving an answer as to *the effect* of this doctrine, i.e. that a specific group of claimants is unable to receive standing, but it wished to receive some guidance on the *theoretical basis* necessary in order to determine whether or not an environmental organisation can rely on a rule before an administrative court at all, i.e. how the court can establish that a 'right' is at stake which is allegedly infringed. The referring court gave concrete examples in its question, namely 'the protection objective or aim of the legislation'. As discussed previously in this paper, the question of how to interpret what the 'impairment of a right' is, is not yet answered by the Court and is likely to raise further litigation. Hence, it might have been a better option for the Court to answer the questions referred one by one, which might have forced the Court to elaborate in sufficient depth on all the elements contained in the question.

Also in the case of *Altrip*, a problem was that not all elements of the questions referred were considered in sufficient depth. In this case, more clarity might have been required from the referring court, since it did not distinguish between the questions of the causal link and the question concerning the infringement of a subjective right of the claimant. Since both problems were addressed in one question, the Court also gave an answer in one question, with the result that half of the question referred remained unanswered. It can be questioned why the Court did not follow the structure of reasoning adopted by the Advocate General, who clearly distinguished between the two elements. One can wonder whether the problem was simply overlooked, whether it was not sufficiently understood or whether it was considered to be unimportant. In any event, it would have been helpful if the Court had clearly stated why it did not agree with the opinion of the Advocate General. As discussed previously in this paper, there is still no certainty on how the allegations of claimants other than environmental organisations have to be dealt

with. The case of *Altrip* provided the Court of Justice with the chance to give some guidance on this issue, but the Court did not take the opportunity. The question remaining unanswered will probably become an issue for litigation again.

As an interim conclusion, it can be said that, in the two preliminary rulings, the questions concerning the (underlying) problems which the doctrine of protective provisions creates were only insufficiently answered. This may be partially due to the fact that the preliminary ruling procedure is a mechanism which is aimed only at providing answers to questions. One might legitimately wonder whether the mechanism of preliminary rulings is suitable to tackle highly complex theoretical and doctrinal questions. In this type of procedure the Court is hardly in the position to elaborate on the (entire) national doctrinal fundament[73] of a legal system. Furthermore, the actual effects of an answer to a preliminary question is not always foreseeable – it is up to the specific court to understand and apply the answer. Moreover, what the result will be for other cases is even less foreseeable. The Court of Justice, being composed of judges of various legal traditions who are not familiar with the intricacies of all national legal systems, can give impulses, sometimes turning into shock waves, but not establish a new doctrinal fundament. However, the unsatisfactory outcome of *Trianel* and *Altrip* seems to be also partially caused by the Court's attempt to shorten the question (*Altrip*) or the answer (*Trianel*).

The ensuing question is, therefore, to what extent the infringement procedure, adopting a broad approach, was able to mitigate these shortcomings.

In the infringement procedure brought against Germany, the plea brought forward by the Commission was very bold: one of the most fundamental provisions of general administrative court procedure law, § 113 (1) VwGO, allegedly violated the provisions of the EIA and IPPC Directives. On the basis of an extremely thin line of argumentation, the Court of Justice disagrees and rejects the plea on this issue. In this case, problems of communication can be observed on two sides. First, the plea by the Commission is too broad. Taken literally, the Commission considers that the German approach making access dependent on the infringement of a right contravenes the two directives in question. Thus, there is no differentiation as regards the groups of claimants instituting an action for annulment, nor any differentiation of the situations in

73 It should be recalled that the German doctrine on protective provisions is rooted in article 19 (4) Basic Law and has been developed in jurisprudence and scholarship in a lengthy process.

which they bring the claim. Moreover, this plea completely omits to consider rules which are in place in special legislation. The Court is basically asked to re-write the German doctrine of protective provisions under the EIA and IPPC Directives. This would have been an enormous task for the Court and would have led to a revolution of the German system. Second, the reasons given by the Court for rejecting the plea, are too scarce. It was already clear before the ruling, just by reading the text of the Union provisions at stake, that Member States are allowed to make access dependent on the infringement of a right. But again the crucial questions remain unanswered: in which situations can individuals, companies and municipalities be barred from enforcing rules of environmental Union law and what does the "impairment of a right" mean. As explained previously, these two questions will continue to play a role in litigation, also before the Court of Justice. In this regard, the infringement procedure is a missed chance to elaborate on these issues.

Hence, in theory, the procedures could be complementary as to the communication between institutional actors (national court and European court on the one hand, national government and Commission, on the other hand) and as to their approach (specific answers to specific questions on the one hand, broader questions and answers with far-reaching implications, on the other hand). In practice, however, at least for the case study selected for this paper, they proved not to be. This is however not due to a badly designed mechanism of Union law enforcement, but mainly due to a complete lack of or highly imprecise argumentations.

Based on these observations on the three cases decided by the Court of Justice concerning the same underlying legal problem, it will now be asked whether some general conclusions on the relationship between the two Union enforcement mechanisms can be drawn.

7 The Two Mechanisms Aiming at Ensuring Compliance with Union Law: Some Final Remarks on Complementarity

Content-wise, the preliminary ruling procedure and the infringement procedure have the same aim, namely to ensure that national legal systems comply with Union law. The question of this paper was to what extent the preliminary ruling procedure and the infringement procedure are complementary to achieve this aim in practice and whether this complementarity has improved or created new complications with respect to compliance with EU environmental standards.

This paper has shown that the two procedures can be complementary in theory, but might not be in practice. The case of *Trianel* related to a very specific situation, namely a claim by an environmental organisation relating to an infringement of the Habitats Directive. In *Altrip*, concerning a claim of individuals, no answer was given. So, in the end, after two references for preliminary ruling, only one specific problem was solved. The infringement procedure complemented the previous procedures in that it confirmed the *general* approach taken in Germany of making access to courts dependent on the infringement of rights is not, as such, in violation of EU law. However, it did not provide for an answer to the remaining question of *Altrip*, nor did it provide for any further guidance about the question under which circumstances the German rule might come into conflict with Union law. As explained, the result of the three procedures is that many questions remain open. One of the reasons was, simply said, that the answer in the preliminary ruling procedure in *Altrip* was too narrow and that the decision in the plea of the infringement procedure was too broad. The 'problem' in the interplay between the two procedures does therefore not lie in the mechanisms as such, but to some extent in the lack of argumentation and reasoning in the specific judgments under consideration. In *Trianel* and *Altrip* the Court could have taken the opportunity to elaborate on the conditions and interpretation of a 'right' and also in *Commission v Germany* the Court could have elaborated on this concept more extensively.

Finally, none of the procedures has solved the practical problem that the national administration and courts are left with a patchwork of rules and cases. This problem is reinforced by the lack of argumentation in the cases, from which only little can be deduced for the daily application and enforcement of Union law. In the end, new claims will be brought to the Court of Justice, as there will be a need to talk again seriously about the doctrine of protective provisions under Union law. In this process of communication between all institutional actors involved, clarity, precision and transparency of arguments is of utmost importance. National courts are faced with the challenge to present the legal problem clearly to the judges, especially taking the variety of legal backgrounds present in the Court of Justice into account. On the other hand, the Court of Justice could not only set out the national rules in its rulings, but also explain how they are interpreted by the national courts. This would be of added value also for the understanding of the judgment from the perspective of other national legal systems. Moreover, merging the answers of questions should be done as seldom as possible, since this might blur the lines of argumentation which is difficult to understand. In any event, even if

these aspects were taken into consideration, it is clear that the courts in the European Union cannot remedy any uncertainty and problem of interpretation through the procedures provided for in the Treaties. Instead, some issues necessitate "serious talks" in legislative processes, on both the European and the national level. The question of effective judicial protection in environmental matters is an issue which might need some further clarification through guidance documents and directives.