Collective redress in environmental matters in the EU: a role model or a 'problem child'?

Collective Redress in Environmental Matters in the EU: A Role Model or a 'Problem Child'?

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The issue of collective redress in the European Union (EU) has been gaining increasing attention thanks to recent initiatives on the part of the European Institutions. European action in the field of collective litigation in competition and consumer matters is, however, still at an early stage of development. In environmental matters, however, while not primarily EU-driven, there is already a well-established framework of collective litigation established by the Aarhus Convention. The subject matter of this article is whether the mechanisms of collective redress envisaged by this international Convention are working within the EU legal system as they should. After providing some background on the special features of environmental law (which affect their enforcement modalities) and an overview of the mechanisms of collective litigation in the Member States, this article will contextualize the issue of collective redress in environmental matters in the framework of the Aarhus Convention, and will explore the current obstacles faced in the enforcement of EU environmental law before national courts. This analysis provides some ground to draw a conclusion as to whether the current system of collective redress in environmental matters can be regarded as a model for the current debate on this topic for competition and consumer issues.

1 INTRODUCTION

The issue of collective redress in the EU has been gaining increasing attention thanks to recent initiatives on the part of the European Institutions.

The reasons in favour of collective litigation are manifold and well known: individuals harmed by infringements of EU law are often dissuaded from initiating individual actions especially if they are confronted with significant difficulties in quantifying the low-value damages they suffered and in bearing the costs and risks of litigation.[1] Furthermore, considering the fact that claims are – due to the low value of the sustained damages – usually non-viable unless aggregated, an intervention by the Commission would be appropriate to set up an adequate

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1 Dimitrios-Panagiotis L. Tzakas, *Effective Collective Redress In Antitrust and Consumer Protection Matters: A Panacea or a Chimera?*, 48 C.M.L. Rev. 4, 1125 (2011).

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procedural framework. This framework could mitigate social losses arising from illicit business practices,[2] and ensure the effective enforcement of European legislation, especially in consumer protection and competition policies.[3]

The Commission has not been insensitive to these issues and some initiatives have indeed been brought forward to tackle the problem on a European level.[4] Recently, in particular, the Commission has launched a public consultation on collective remedies,[5] which led first to a Communication[6] and then to a Recommendation[7] calling for a horizontal approach towards collective redress mechanisms for the violation of rights stemming from EU law.

European action in the field of collective litigation for competition and consumer matters is still at an early stage of development.[8] In environmental matters, however, while not primarily EU-driven, a well-established framework of collective litigation has already been established by the Aarhus Convention.[9] Whether the mechanisms of collective redress envisaged by this international Convention are working within the EU legal system as they should is the subject matter of this article.

This article will first provide some background on the special features of environmental law (which affect their enforcement modalities) and an overview of the mechanisms of collective litigation in the Member States. Then the issue of collective redress in environmental matters in the framework of the Aarhus Convention will be set out, together with an exploration of the current obstacles faced in the enforcement of EU environmental law before national courts. This analysis will provide some ground to draw a conclusion as to whether the current

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2 *Ibid.*, p. 1133.

3 Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures – European Debates'*, 58 I.C.L.Q. 2, 379, 382 (2009).

4 See, e.g., in the field of consumer law, the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013 – Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them*, COM(2007) 99 final, 13 Mar. 2007; Commission Green Paper on consumer collective redress COM(2008) 794 final, 27 Nov. 2008; Resolution of the European Parliament of 20 May 2008 on EU consumer policy strategy 2007–2013, P6_ TA(2008)0211. As regards competition law, see Commission Green Paper *Damages Actions for Breach of the EC Antitrust Rules* COM(2005) 672 final, 19 Dec. 2005; Commission White Paper, *Damages Actions for Breach of the EC Antitrust Rules*, COM(2008)165 final, 2 Apr. 2008.

5 See the Commission Staff Working Document *Towards a Coherent European Approach to Collective Redress* SEC(2011) 173 final, 4 Feb. 2011.

6 Communication from the Commission *Towards a European Horizontal Framework for Collective Redress* COM(2013) 0401 final, 11 Jun. 2013.

7 Commission Recommendation *On Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law*, http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf (accessed 29 Mar. 2014).

8 See the contributions by Dimitrios-Panagiotis L. Tzakas and Iris Benohr in this Special Issue.

9 A comparison with and connection to environmental policy was already made by the Commission itself in the Commission Staff Working Document *Towards a Coherent European Approach to Collective Redress* SEC(2011) 173 final, 4 Feb. 2011, p. 4.

system of collective redress in environmental matters can be regarded as a model for the current debate on this topic for competition and consumer issues.

2 THE PECULIARITY OF ENVIRONMENTAL LAW AND THE COLLECTIVE LITIGATION MECHANISMS THROUGHOUT THE EU

2.1 The special features of environmental law

In the Commission Staff Working Document 'Towards a Coherent European Approach to Collective Redress', the European Commission has stated that '[E]ffective enforcement of EU law is of utmost importance for citizens and businesses alike' and that '[R]ights which cannot be enforced in practice are worthless. Where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation'.[10]

However, the Commission added that :

> where the same breach of EU law harms a large group of citizens and businesses, individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices: Citizens and businesses are often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices cause significant aggregate loss to European citizens and businesses.[11]

These considerations could be deemed as applicable to environmental matters as well. To a certain extent, they could be taken further: in environmental matters, the hurdle to an effective enforcement of EU law is not merely due to citizens being discouraged from bringing a lawsuit, but because there is no citizen who would be in a position to bring a claim in the first place.

Such a situation would mainly occur when a certain rule of EU law is not aimed at protecting individual rights, but merely at serving the general interest. Also, in such cases, there is no one who, according to the applicable national procedural rules, would have standing before a national court. This is the case in the field of nature protection law:[12] most of the rules contained, for example, in the Habitats Directive[13] and the Birds Directive,[14] do not protect individual rights

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10 *Ibid.*, p. 1.

11 *Ibid.*, p. 2.

12 See further on this point, Chris Backes & Mariolina Eliantonio, *Access to Courts for Environmental NGOs' at European and National Level: What Improvements and What Room for Improvement Since Maastricht?*, in *The Treaty on European Union 1993-2013: Reflections from Maastricht* 559–560 (Maartje de Visser & Anne-Pieter van der Mei eds, Intersentia 2013).

13 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

or interests and generally do not confer any rights on individuals, but serve the public interest of the protection of biodiversity. For this reason, in this area of law, with the exclusion of rather exceptional situations,[15] no individual would have standing before a national court, as nobody could prove an infringement of his or her rights or interests by a public authority.

While the issue of the effective enforcement of EU law is one which is equally felt across the different policy areas, it is specifically in the framework of environmental law that it acquires a special significance. This is in light of the conception of the environment as a 'common good' and the rules aimed at protecting the environment as provided for the interest of no one and everyone at the same time. From this perspective, the role of collective litigation and, specifically, of non-governmental organizations (NGOs) seems of particular relevance, in light of the fact that, in certain environmental matters, individuals may not have an interest in, or may not be able to bring proceedings. The effectiveness of the enforcement of EU environmental law, therefore, can be seen as highly dependent on the effectiveness of the possibilities for environmental NGOs (ENGOs) to bring claims for alleged violations of environmental provisions.[16]

In order, therefore, to supplement the lack of interest or ability of citizens to bring claims in such cases, virtually all the Member States have provided for rules concerning the standing of ENGOs before their national courts.

2.2 The national requirements for standing of ENGOs

The national requirements for the standing of ENGOs vary in different legal systems, but there are some common characteristics which can be, and have been, identified by previous comparative research.[17]

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[14] Directive 2009/147/EC of the European Parliament and of the Council of 30 Nov. 2009 on the conservation of wild birds [2010] OJ L20/7.

[15] That, is, excluding the rare cases of legal systems offering the possibility of an *actio popularis* i.e., where anyone can bring a claim against the actions of public authorities without showing that his or her rights or interests have been violated. This possibility is very limited, and, as comparative research has shown, almost non-existent in environmental matters with some notable exceptions, such as the case of Portugal. See further Mariolina Eliantonio, Chris Backes, C.H. van Rhee, Taru Spronken & Anna Berlee, *Standing up for Your Right(s) in Europe* s. 4.6, 69 and 70 (Intersentia 2012), http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=75651 (accessed 29 Mar. 2014); Sophie Roussel & Olivier Fuchs, *Accès Des Citoyens à La Justice et Organisations Juridictionnelles en Matière d'Environnement, Spéficités Nationales et Influences du Droit de l'union Européenne - Rapport General*, 8, <http://www.aca-europe.eu/seminars/Bruxelles2012/Rapport_general.pdf (accessed 29 Mar. 2014).

[16] That is, if one excludes the possibility of a public prosecutor, ombudsman or other public authority in charge of pursuing environmental violations in the public interest.

[17] Eliantonio, Backes, van Rhee, Spronken & Berlee, *supra* n. 15, at s. 4.7.4; Roussel & Fuchs, *supra* n. 15, at 9–12; Jan Darpö, *Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and*

One shared characteristic for ENGOs to be able to initiate collective litigation is their capacity to show that the issue at stake in the dispute falls within the scope of purpose of the group, possibly found in their articles of association. This is the case, for example, in France, Italy, Romania and the Netherlands. In some Member States, such as Belgium, Spain, Hungary and the Netherlands, the articles of association also have a 'geographical relevance'. This means that if an ENGO is, according to its articles of association, concerned with environmental protection in one specific area, it is not able to challenge measures which affect the environment in a different area. Sometimes, as in the Netherlands, this criterion is supplemented by a requirement of actual activities in the area which is affected by the challenged measure.

Furthermore, in many legal systems, such as Germany, Italy, France, Finland and Sweden, ENGOs have to follow a registration procedure. Another commonly found criterion is that, in order to be able to initiate proceedings, ENGOs must have been active for a minimum period of time, as is the case in Belgium and Spain and, also that they have a minimum number of members, as in Sweden.

Finally, in some legal systems, such as Finland and Germany, specific statutes – rather than general rules – give ENGOs the ability to challenge measures in breach of the environment (and standing is given only in specific environmental matters), while in other legal systems, like Slovakia, Hungary and Poland, standing is only granted to organizations that have been parties to the administrative decision-making proceedings which led to the adoption of the contested measure.

While Member States are free to set procedural rules on NGO standing before their national courts, these requirements have to be (or should be) in compliance with the Aarhus Convention, the aim of which is to ensure 'a wide access to justice' in environmental matters. In the following, the Aarhus Convention and its 'access to justice' pillar is introduced, together with its influence on collective litigation before the national courts.

3 THE AARHUS CONVENTION AND ACCESS TO JUSTICE

The Aarhus Convention[18] is a UN Convention which was developed within the UNECE (United Nations Economic Commission for Europe) and is structured around three main pillars, id est, access to information, public participation and

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9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union, 13, http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf (accessed 29 Mar. 2014).

[18] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (accessed 29 Mar. 2014). The EU and all EU Member States are contracting parties to the Convention.

access to justice in environmental matters. The Convention was adopted by the European Community on 17 February 2005 by Decision 2005/370/EC[19] and is, therefore, binding upon the EU as such, as well as the Member States when they are acting within the scope of application of EU law.[20]

Specifically with regard to the access to justice pillar, Article 9(2) of the Convention provides that the contracting parties should ensure that concerned members of the public with (1) a sufficient interest or (2) maintaining impairment of a right (where the administrative procedural law of a state requires this as a precondition), have access to a review procedure to challenge the substantive and procedural legality of decisions concerning activities subject to the public participation requirements contained in Article 6 of the Convention itself. Article 9(2) covers projects which can have a significant environmental impact. Furthermore, Article 9(3) provides for a general obligation for the parties to provide for wide access of the members of the public to review procedures to challenge the legality of all kinds of decisions affecting the environment.[21]

With a view to aligning Member States' legislation with Article 9(2) of the Convention, and before the Convention was actually approved, the EU has, amongst others, enacted Directive 2003/35/EC.[22] This Directive has inserted Article 10a into the text of the Environmental Impact Assessment (EIA) Directive[23] and Article 15a into the text of the Integrated Pollution Prevention

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19 Council Decision 2005/370/EC of 17 Feb. 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L 124/1.

20 It should also be added that, since all the Member States have ratified the Aarhus Convention, this international instrument is binding on them outside the scope of application EU law as well. However, in such cases, the effect of the Convention within the legal order of the Member States is dependent upon their constitutional orders.

21 See further on Art. 9 of the Aarhus Convention, Luc Lavrysen, The Aarhus Convention: Between Environmental Protection and Human Rights, in: Paul Martens, Marc Bossuyt, Marie-Francoise Rigaux, Bernadette Renauld, *Liber amicorum Michel Melchior* 663 (Anthemis 2010; Jerzy Jendroska, *Accès à la justice: remarque sur le statut juridique et le champ des obligations de la convention d'Aarhus dans le contexte de l'Union Européenne*, R.E.D.E.Revue Juridique de l'Environnement, 31 Special Issue (2009); Thomas von Danwitz, *Aarhus Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten*, NVwZ 3, 272 (2004).

22 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 [2005] OJ L156/17. On this point, see Birgit Dette, *The Aarhus Convention and Legislative Initiatives for its Implementation*, in *Liber amicorum Betty Gebers* 63 (Thomas Ormond, Martin Führ & Regine Barth eds, Lexxion 2006). Further on the interplay between the Aarhus Convention and EU law, Jonas Ebbeson, *Access to Justice at the National Level – Impact of the Aarhus Convention and European Union Law*, in *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* 247 (Marc Pallemaerts ed., Europa Law Publishing 2011).

23 Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 as amended by Directive 97/11/EC [1997] OJ L73/5 and Directive 2003/35/EC [2003] OJ L156/17.

and Control (IPPC) Directive.[24] These provisions are an almost literal copy of Article 9(2) of the Aarhus Convention.

These Articles, like Article 9(2) of the Convention, propose two models of access to justice. They require parties to the Convention to provide access to a review procedure wherein qualified members of 'the public concerned' can challenge 'the substantive or procedural legality' of decisions that are subject to the participation requirements mandated by the said Directives. However, the provisions leave the parties free to decide whether to allow standing for the 'public concerned' only where the claimant can maintain the impairment of a right or when it is able to show a sufficient interest.

Articles 10a and 15a go on to state that what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, according to these provisions, any NGO promoting environmental interests and meeting any requirements under national law shall be deemed as capable of showing sufficient interest. Such organizations shall also be deemed to have rights capable of being impaired in a legal system that has opted for a rights-based approach.

Articles 10a and 15a only affect procedural rules which are to be applied in a claim concerning an allegation that the provisions of the EIA Directive or the IPPC Directive have been violated. They do not apply, therefore, to environmental measures taken outside the scope of these Directives, such as in the case of measures taken for the protection of an endangered species under the Habitats Directive or permits to discharge waste water. A more general provision on access to justice covering all environmental matters, which would transpose the requirements of Article 9(3), is currently lacking. The Commission had originally presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters,[25] (which would give effect to Article 9(3) of the Convention), but the Directive has to date not yet been adopted, since 'Member States remained unconvinced that legislative action at EU level was needed to implement Article 9(3)'.[26] Since 2012, however, the Commission has been preparing a new proposal for a Directive, which would take

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[24] Council Directive 96/61/EC of 24 Sep. 1996 concerning integrated pollution prevention and control [1996] OJ L257/26. This Directive has been amended again, and will be renamed the Industrial Emissions Directive: Directive 2010/75/EU of the European Parliament and of the Council of 24 Nov. 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

[25] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, 24 Oct. 2003.

[26] European Commission, *Explanatory Consultation Document*, 2, http://ec.europa.eu/environment/consultations/pdf/access.pdf (accessed 29 Mar. 2014).

the legal situation in the Member States and the recent case law of the CJEU into account and has, for these purposes, undertaken some studies.[27]

The transposition of Article 9(2) of the Aarhus Convention has been in general rather smooth, although some instances of incorrect transposition have been brought to the attention of the Court of Justice of the European Union (CJEU), which also had to rule on the consequences of the lack of transposition of Article 9(3). This case law will be analysed in the sections below.

4 ARTICLE 9(2): PROBLEMATIC TRANSPOSITION AND THE CJEU'S CLARIFICATIONS

Directive 2003/35/EC had to be transposed by the Member States by 25 June 2005.

Recent comparative research has shown that these provisions have been correctly transposed in most of the Member States examined. In many of the legal systems examined, the legislation on access to justice has been amended in order to adequately transpose the Directive. In most of the other countries, the existing law has been interpreted differently due to the coming into force of the Aarhus Convention and Directive 2003/35/EC.[28]

However, there are also Member States in which the legislation and case law did not change because the Member States were convinced that it met all the requirements even before the Convention and Directive 2003/35/EC came into force. For some Member States (such as France, Greece and Italy), the outcome of this assessment may have been correct, in that no changes to their access to justice provisions were required. Others may have been wrong, and therefore their national legislation would be in breach of Article 9(2) of the Aarhus Convention. The most prominent exception is Germany, which, as will be shown below, had chosen an overly limited transposition of Directive 2003/35/EC. Finally, for some other legal systems (such as Poland) it is either doubtful whether they currently meet the requirements of the Convention, or it is certain that they do not.

Directive 2003/35 (and, therefore, indirectly, Article 9(2) of the Aarhus Convention) has been the subject matter of some preliminary references by national courts. The CJEU has been able to interpret these provisions and clarify the obligations they entail, as well as point to the fact that some Member States did not transpose the Directive correctly.

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[27] European Commission, *The Aarhus Convention – 2012/2013 access to justice studies*, http://ec.europa.eu/environment/aarhus/access_studies.htm (accessed 29 Mar. 2014).

[28] Eliantonio, Backes, van Rhee, Spronken & Berlee, *supra* n. 15, at secs 4.7.4 and 4.10.1; Roussel & Fuchs, *supra* n. 15, at 16–17.

In the *Djurgården* case,[29] the CJEU ruled that a requirement of Swedish law that an NGO had to have at least 2,000 members to have access to court did not ensure a 'wide access to justice' and did not comply with the standards set by Directive 2003/35/EC.

After the CJEU judgment, the Swedish Supreme Court set aside the Swedish rule on NGO standing and referred the case back to the Environmental Court of Appeal.[30] As of 1 August 2010, the minimum membership requirement in the Environmental Code has been lowered to 100 members.[31]

A few years later, the CJEU decided on another preliminary reference, this time sent by a German court, concerning the German transposition of Directive 2003/35/EC in the *Trianel* case.[32] According to the contested German provisions, non-governmental organizations promoting environmental protection were granted standing before a court, in an action contesting a decision authorizing projects likely to have 'significant effects on the environment' for the purposes of Article 1(1) of the EIA Directive, only where they could show the potential infringement of a rule which confers individual rights. However, in the proceedings before the national court, the NGO was not maintaining the impairment of an individual right; instead, it was seeking to challenge an administrative measure in so far as it authorized activities which, while not violating an individual's subjective rights, were likely to harm the environment as such. As Advocate General Sharpston put it, '[I]n that sense, it may be said that the environmental NGO [was] seeking to act on behalf of the environment itself'.[33] According to the applicable procedural rules, therefore, the NGO could not be granted standing. The question posed by the German judge was thus whether the German transposition of Directive 2003/35/EC could be considered in line with the requirement of 'wide access to justice' mandated by the Directive and the Aarhus Convention.

The Court of Justice held that whichever option a Member State chose for the admissibility of an action (id est, a rights-based or an interest-based model), environmental protection organizations were entitled, pursuant to Article 10a of the EIA Directive, to have access to a review procedure before a court of law or

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29 Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd* [2009] ECR I-09967. For a comment to this case, see Aine Ryall, Comment to *Djurgården*, 47 C.M.L. Rev. 5, 1511 (2010).

30 Ruling of the Swedish Supreme Court, 7 Jul. 2010, Ö1824-07, http://www.notisum.se/rnp/domar/hd/HD010419.htm (accessed 29 Mar. 2014).

31 §13, Ch. 6, Miljöbalk (1998:808) http://www.notisum.se/rnp/sls/lag/19980808.HTM (accessed 29 Mar. 2014).

32 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* (intervening party: *Trianel Kohlekraftwerk Lünen GmbH & Co. KG*), [2001] ECR I-3673.

33 Opinion of AG Sharpston in Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland*, para. 1.

another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that Article. This possibility had to be guaranteed, according to the Court, even where the rules relied on protected only the interests of the general public and not the rights or interests of individuals. The German rules which prevented such challenges were therefore considered in breach of Article 10a.

It is worth noting that, unlike the Advocate General, the Court of Justice also made reference to the principle of national procedural autonomy, as limited by the principles of equivalence and effectiveness. From this reference, the Court derived the consequence that adopting an interpretation of Article 10a of the EIA Directive such as Germany's would be in breach of the principle of effectiveness. However, given that the principle of national procedural autonomy only applies 'in the absence of Community rules governing the matter',[34] there was probably no immediate need to mention this principle (which was also not mentioned by the referring court), as Article 10a of the EIA was the basis of the questions. The principle of national procedural autonomy was, therefore, already limited by secondary EU legislation in the field of procedural law. Nevertheless, the Court has chosen to explicitly refer to the need to ensure an effective judicial protection of the rights which individuals derive from EU law as a way to limit the procedural autonomy of the Member States even where they are implementing secondary EU law setting procedural standards.

Since this judgment, the relevant provisions of Directive 2003/35/EC have been applied directly by the German courts and the restrictive German provisions have been disregarded.[35] Furthermore, recently, the relevant German rules have been amended (with effect from 29 January 2013)[36] by eliminating the requirement that, in order for an ENGO to have standing in claims concerning the scope of Directive 2003/35/EC, the challenged measure must be based on a provision intended to confer rights on individuals. However, the Aarhus Compliance Committee, before which a complaint was pending before the ruling in *Trianel* and before the amendment to the relevant German standing rules were issued, has recently held that Germany is, even after the relaxation of the standing requirements imposed on environmental organizations, still in breach of Article 9(2) of the Convention.[37]

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34 Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern* [2007] ECR I-2271, para. 39.

35 See the ruling of the Higher Administrative Court of Muenster, 1 Dec. 2011, 8 D 58/09 AK; and the ruling of the Higher Administrative Court of Mannheim, 20 Jul. 2011, 10 S 2102/09.

36 BGBl. I, p. 95.

37 Draft findings and recommendations with regard to communication ACCC/C/2008/31 concerning compliance by Germany http://www.unece.org/env/pp/compliance/Compliancecommittee/31Table Germany.html (accessed 29 Mar. 2014).

The *Trianel* ruling may also, in turn, have consequences for other Member States which have chosen an approach similar to that of Germany with regard to the standing rules applicable when an NGO wishes to bring a claim against an alleged violation of the EIA or IPPC Directives. However, according to a report prepared by the European Network of Environmental Law Organisations, it seems that in no other Member State are NGOs faced with a German-like hurdle of access to court to request a review of a decision on permission of the projects subject to Article 6 of the Aarhus Convention.[38]

5 ARTICLE 9(3): NO TRANSPOSITION, THE CJEU'S INTERVENTION, AND THE FUTURE PROSPECTS

As mentioned above, Article 9(3) of the Aarhus Convention has not yet been implemented by the EU through an instrument with harmonized requirements for access to justice for ENGOs before national courts. The question which, therefore, was submitted by a national court to the CJEU was whether, without implementation, Article 9(3) could be directly relied upon by individuals before national courts. This issue was decided by the CJEU in a preliminary reference coming from a Slovakian court in the *VLK* case.[39]

Unsurprisingly, the CJEU denied direct effect to this provision, stating that Article 9(3) of the Aarhus Convention does not contain any clear and precise obligation capable of directly regulating the legal position of individuals. This because the provision is subject, in its implementation and effects, to the adoption of a subsequent measure, namely one which would establish the criteria for the identification of those who are entitled to exercise the rights provided for in Article 9(3) itself.

However, it considered the objective of Article 9(3) to ensure effective environmental protection, and, while it acknowledged the principle of national procedural autonomy, it reinstated that this principle must in any event be counterbalanced by the principles of effectiveness. Unlike the *Trianel* situation, the Court in this case made a correct reference to the principle of effectiveness, given the lack of secondary law provisions in the area. In fact, it could be asked whether

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[38] European Network of Environmental Organisations, *Report on Access to Justice in Environmental Matters – On Practical application of Article 9 of the Aarhus Convention*, 6–7 (2010), http://aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/J_E_Aarhus_AtJ_Report.pdf (accessed 29 Mar. 2014). See, however, for a different opinion on the Polish legal system, Eliantonio, Backes, van Rhee, Spronken & Berlee, *supra* n. 15, at 84.

[39] Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255. For a comment to this case, as well as the *Trianel* ruling discussed above, see Mariolina Eliantonio, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, 49 C.M.L. Rev. 2, 767 (2012).

it would have been easier and perhaps more straightforward for the applicant NGO to claim that the national procedural rule at stake violated the principle of effectiveness without trying to rely on the direct effect of Article 9(3) of the Convention.

Having dismissed the possibility of giving Article 9(3) direct effect and having considered the principle of effectiveness implied, in the Court's view, that in order to ensure effective judicial protection in the fields covered by EU environmental law, national courts had a duty to interpret their national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. The Court of Justice did not merely reiterate the duty of consistent interpretation,[40] but, in a way, it also 'directed' the results of the interpretive exercise, since it held that the interpretation had to be such 'as to enable an environmental protection organization, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'.[41]

This passage of the ruling is remarkable for a variety of reasons, as the CJEU seems to broaden the scope of indirect effect quite significantly, and to overstep the competences of the EU legislature, which has, as mentioned above, not yet legislated on Article 9(3). Also, it seems that the Court somehow challenges the limits it has set for indirect effect.

As it is well known, according to the case law of the CJEU itself, national courts have the duty to interpret their national law in light of the aims and objectives of EU law. However, the CJEU has also held that a national provision can only be interpreted in the light of a provision of Union law if the wording of the national provision leaves sufficient margin for such an interpretation. Union law does not require Member States to conduct an interpretation *contra legem*.[42] However, in the case at hand, the Court required domestic courts to 'enable an environmental protection organisation, such as zoskupenje, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'.[43] The Court thus does not only impose a duty of consistent interpretation, but it clearly also directs its results. The question which arises is then how national courts would have to go about their interpretative duty

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40 The duty of consistent interpretation ('indirect effect') was established by the CJEU in *Von Colson* und *Kamann,* in which the Court established that (ex) Art. 10 TEC obliged Member States to interpret their national law in light of the aims and objectives of EU law. Case 14/83, *Von Colson und Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, para. 28.

41 Case C-240/09, *Lesoochranárske zoskupenie*, para. 51.

42 Case C-212/04, *Konstantinos Adeneler and Others v. Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, para. 110; Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005] ECR I 5285, para. 24.

43 Case C-240/09, *Lesoochranárske zoskupenie*, para. 52.

if national procedural law did not allow for such an interpretation, or if there was no national law to be interpreted.[44] This statement seems to be stronger than the CJEU's previous statements on the scope of the national courts' interpretive duty.[45]

As a consequence of this ruling, the referring court, by way of interpretation, has admitted the NGO as a party to the proceedings. On 2 August 2011, the Slovakian Supreme Court decided on the cases in the framework of which the CJEU had been addressed, by ruling that, despite the lack of direct effect of Article 9(3) of the Aarhus Convention in the Union law, it was necessary, in order to make effective protection of the environment as laid down by Union law possible, to grant standing to the applicant NGO.[46]

The ruling may also have consequences on other legal systems in which NGOs are subject to overly restrictive circumstances, or are not able to challenge decisions which could be contrary to EU environmental law.

This includes, for example, Germany, in which no measure was taken to implement Article 9(3) of the Aarhus Convention, upon the conviction that it was fully implemented in Germany by existing European and national law.[47] Indeed, in Germany, the *VLK* case has encouraged courts to adopt a more open approach concerning legal standing of NGOs: soon after the *VLK* case was delivered, for example, standing has been granted to an NGO which was challenging the omission on the part of the Land Hesse to draw an air quality plan by explicitly referring to the CJEU's case law.[48] Recently, on the basis of Article 9(3) of the Convention, standing was granted to an environmental NGO by a German court in a case concerning a general administrative measure allowing a derogation from the prohibition to hunt beavers.[49]

Similarly, the Finnish Supreme Administrative Court has referred to the Slovakian case in a 2011 decision concerning an expropriation permit for a land-based natural gas pipeline. An NGO lodged an appeal against the expropriation permit, *inter alia*, on environmental grounds. While the court stated that the NGO would not have the right to appeal pursuant to the established

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44 Further on this point Backes & Eliantonio, *supra* n. 12, at 575.

45 See, e.g., Case C-403/01, *Pfeiffer and others v. Deutsches Rotes Kreuz* [2004] ECR I-8835, in which the Court held that 'the national court . . . must, when applying the provisions of national law specifically intended to implement [a] directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive' (para. 117).

46 These cases can be found with numbers 3Sžp/49/2009, 3Sžp/50/2009, 3Sžp/48/2009 and 3Sžp/47/2009 on the website of the Supreme Court of the Slovak Republic, http://www.supcourt.gov.sk/rozhodnutia/ (accessed 29 Mar. 2014).

47 See the discussion on the German transposition of Directive 2003/35/EC of 4 Sep. 2006, 48, http://dip.bundestag.de/btd/16/024/1602497.pdf (accessed 29 Mar. 2014).

48 Ruling of the Lower Administrative Court of Wiesbaden, 10 Oct. 2011, 4 K 757/11.

49 Ruling of the Lower Administrative Court of Augsburg, 13 Feb. 2013, Au 2 S 13.143.

interpretation of the applicable rules, the court nevertheless examined the appeal and granted standing.[50]

Finally, according to the above-mentioned report prepared by the European Network of Environmental Law Organisations, this ruling might have implications and bring about the possibility of standing for environmental NGOs in other legal systems as well, such as Slovenia, Hungary and the Czech Republic.[51]

In general, this ruling implies the national courts are under the duty to test all requirements for access to court for ENGOs against Article 9(3) of the Aarhus Convention. It is doubtful whether some of them, such as, for example, that related to 'geographical scope', as discussed above, would pass the 'wide access to justice' threshold.

Recently, as mentioned above, the Commission has been working on a new proposal for a directive, which would take the legal situation in the Member States and the recent case law of the CJEU into account, and essentially mirror what has been done in Directive 2003/35/EC with regard to Article 9(2). Alternatively, the Commission has proposed three other possible options: first, to reiterate the 'old' proposal which has been stalled in the Council since 2003; second, to use soft law instruments to promote collaboration between national courts, possibly supplemented by Commission guidelines explaining the significance and implications of the case law; or, third, to use the infringement proceedings as a tool to promote compliance with the requirements of the CJEU's case law.

The study undertaken to compare these options rightfully opts for a legislative option, and deems it more effective to achieve the aims set out in Article 9(3). In particular, the study considers that the 'soft law' option would leave national differences intact, would not provide any incentive for Member States to comply with European case law, and that the infringement proceedings option is too time and resource consuming, with the result that it does not ensure the necessary uniformity. Furthermore, none of these options are considered as ensuring a sufficient level of legal certainty and a level playing field of ENGOs throughout the EU.[52]

Given the legal uncertainty generated by the current situation and the unsuitability of the alternative mechanisms, it is certainly desirable to set the criteria for NGO standing at the European level. While no hard and fast conclusions can be established as to which criteria are the best, it is desirable to

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50 Ruling of the Finnish Supreme Administrative Court n. 49/2011, http://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2011/201101351?search[type]=pika&search[pika]=2011%3A49 (accessed 29 Mar. 2014).

51 European Network of Environmental Law Organisations, *Report on Access to Justice in Environmental Matters – On Practical application of Article 9 of the Aarhus Convention* (2010).

52 Darpö, *supra* n. 17, at 23.

maintain a balance between, 'on the one hand, recogniz[ing] the important of the influence of civil society in environmental decision making, and, on the other, requir[ing] some level of stability or engagement of the ENGO in order to achieve standing'.[53]

The remaining question is whether this conclusion should be put into question by the recent Commission Recommendation calling for 'common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law'.[54] This instrument explicitly covers environmental matters too, and states that the requirements of Article 9(3) of the Aarhus Convention have been taken into account in the formulation of the Recommendation. The requirements for NGO standing are set out in section III of the Recommendation and partly overlap with those proposed in the preliminary study mentioned above. However, the same considerations made above with regard to the 'soft law option' considered in the preliminary study apply.

6 CONCLUSION

Much like competition and consumer law, environmental law is a field where individual redress is often not pursued or not even available, given that the aim of many environmental provisions is to protect the general interest. In this area, therefore, the effectiveness of the actions of ENGOs is of paramount importance for the effectiveness of the enforcement of EU law. Unlike competition and consumer law, in environmental law there is an existing framework for collective redress. This framework, based on the Aarhus Convention, stems from international law. However the EU is, as a contracting party to the Convention, bound by it and bound to ensure its respect by the Member States.

The analysis carried out above provides a mixed picture as regards the effective realization of the 'wide access to justice' requirement mandated by the Aarhus Convention.

Article 9(2), more limited in scope, has found legislative implementation through Directive 2003/35/EC. The lesson to be learnt concerning this process is that, despite the different national traditions playing a role in this field, Member States have in general adequately transposed the Directive. When this was not the case, as with Germany and Sweden, a preliminary question was sent to the CJEU

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53 *Ibid.*, p. 30.

54 Commission Recommendation *On Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law*, http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf (accessed 29 Mar. 2014).

by the national courts. The outcome of the CJEU's rulings have been that both Member States brought their legislation in line with EU requirements.

As far as Article 9(3) is concerned, instead, the lack of transposition and the uncertainties surrounding the obligations that this provision entails, has led to unequal conditions of access to court throughout the EU. These uncertainties and inequalities have, to a certain extent, been remedied by the intervention of the CJEU, which, in turn, gave the national courts an important role in ensuring that the requirements of the Aarhus Convention are respected.

What the past and current experiences of collective redress mechanisms in environmental matters can teach is therefore that the necessary legal certainty and level playing field can only be achieved through clear legislative intervention setting criteria to be applied EU-wide. The CJEU, using the preliminary reference mechanism, can then contribute to the interpretation of the relevant legislative provisions. However, it cannot be considered as a self-standing alternative to legislative intervention given the case-by-case nature of the intervention, and the necessary reliance on the national court's willingness to question their national laws. Infringement proceedings, similarly, cannot be considered as a viable alternative because of the delays and inefficiencies it entails. However, while acknowledging the limits of jurisprudential intervention, the *VLK* case has shown that the alliance between national and EU courts, and the reliance on the principles of effectiveness and effective judicial protection may be seen as important factors in the development of a 'workable' system of collective remedies, even in the event of legislative gridlock.

In addition, the recent recommendation issued by the Commission, although not binding, may contribute to pave the way towards finding a Europe-wide consensus on access to justice in environmental matters which, in turn, could make an agreement on a legislative instrument more feasible in the future.

One last word should be dedicated to addressing one of the more frequent objections towards a broader role for ENGOs in the enforcement of environmental law. As the German government submitted in the *Trianel* case, a broader access to justice will lead to a steep increase in claims brought by environmental NGOs, which would, in turn, lead to a reduction in administrative efficiency, an excessive burden for courts and, ultimately, worse judicial protection of the concerned parties. The data collected in previous studies, however, do not seem to point to a correlation between broad standing rules and high environmental association claims.[55]

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[55] Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters* – ENV.A.3/ETU/2002/0030 – Final Report, 5, http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexHSadeleerReport.pdf (accessed 29 Mar. 2014).

In conclusion, while NGO enforcement of European environmental law is clearly far from perfect at the moment, it can provide a certain degree of 'inspiration' in the debate concerning other policy areas in which individual enforcement is ineffective.