The impact of EU law on access to scientific knowledge and the standard of review in national environmental litigation: A story of moving targets and vague guidance

The Impact of EU Law on Access to Scientific Knowledge

The Impact of EU Law on Access to Scientific Knowledge and the Standard of Review in National Environmental Litigation: A Story of Moving Targets and Vague Guidance

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Abstract:
This article examines the European Union (EU) legal requirements contained in secondary law and in the European courts' case law concerning, firstly, the standard of review to which national courts must adhere when deciding matters within the scope of EU law and, secondly, access to scientific knowledge in environmental litigation. The article shows that national courts are limited to an assessment of whether a "manifest error" has been committed by the public authorities. However, it is argued, in order to make that assessment, national courts have to be empowered, under EU law, to access the scientific knowledge necessary to review the choices of the administration.

I. Introduction

The legal regime of the European Union (EU) is based on a system of decentralized enforcement, whereby the main responsibility for the application and adjudication of EU environmental law violations is entrusted to national authorities and national courts, respectively.[1]

In this system of decentralized enforcement, in the absence of EU rules, it is in principle a matter of national law to designate the competent courts in EU cases and to determine the applicable procedural rules.[2] This approach is generally considered to descend from the principle of "national procedural autonomy". This principle is, however, not absolute, but is limited by the principles of effective judicial protection, equivalence and effectiveness.[3] These principles set out minimum common denominators for national procedural rules, thereby tracing the "outer limits"[4] of national procedural autonomy while, at the same time, leaving EU Member States a margin of discretion in defining and maintaining their own procedural framework. Since there are no EU harmonized rules concerning the ability or the duty of national courts to access scientific knowledge in environmental litigation,[5] it is left to the Member States to set national procedural rules on this issue. This room for discretion at the national level implies that national differences remain in the way in which judges can – or must, in some Member States – review the scientific aspects of decisions taken by national authorities.[6]

Two questions arise from the EU's reliance on the applicable national procedural framework in the enforcement of EU environmental law: firstly, whether all national procedural variations are acceptable under EU law or if, instead, some procedural rules fall below EU standards and thereby violate the principle of effective judicial protection. Secondly, the question arises whether acceptable national differences, by virtue of their sheer existence, hamper the uniform enforcement of EU law.

This article examines the EU requirements for access to scientific knowledge by national courts when adjudicating EU environmental litigation. By "access to scientific knowledge" one is to understand all procedural means available to courts, such as the possibility to engage an independent expert or the possibility to carry out inspections, through which the courts seek to understand the technical (e.g., chemical, biological, physical) aspects of a dispute. The need to understand the technical elements of a controversy is particularly salient in environmental litigation, where

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[1] J. Jans *et al, Europeanisation of Public Law* 2nd edn (Europa Law Publishing, 2015), pp. 13 and ff.

[2] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188.

[3] See Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* v. *Bundesrepublik Deutschland* ECLI:EU:C:2010:811; Joined Cases C-317/08 to C-320/08, *Alassini and Others* ECLI:EU:C:2010:146. The principle of equivalence provides that national procedural rules used to enforce EU law should not be less favourable than those used for the enforcement of national law; the principle of effectiveness requires that national procedural rules not render the exercise of rights conferred by EU law excessively difficult or impossible in practice. Finally, national procedural rules should ensure effective judicial protection of rights conferred by EU law.

[4] S. Prechal & R. Widdershoven, "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection" (2011) 4(2) *Review of European Administrative Law*, pp. 31–50, at 46.

[5] For a discussion of the existing secondary EU rules concerning procedural matters, see M. Eliantonio & E. Muir, "The proceduralisation of EU law through the backdoor" (2015) 8(1) *Special Issue of the Review of European Administrative Law*.

[6] See on the enforcement of the Environmental Impact Assessment Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1), F. Grashof, *National Procedural Autonomy Revisited* (Europa Law Publishing, 2016), pp. 215 and ff.

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courts are called to adjudicate on legal matters that are deeply entangled with non-legal assessments. For instance, to determine the legality of an industrial permit issued in accordance with the Industrial Emissions Directive,[7] a court may need to examine whether Best Available Techniques (BAT) in the sector have been observed.

Before embarking on the analysis, two preliminary points must be made. Firstly, access to scientific knowledge is deeply connected with the standard of review which the courts feel entitled to exercise in their assessment of complex, technical choices of the administration. Hence, the analysis of the relevant EU secondary law and case law requirements will not focus solely on procedural rules concerning the availability of technical expertise in environmental litigation, but also on the intensity of the national courts' review of decisions in EU cases.

Secondly, the following analysis requires that a distinction be drawn between "discretionary choices" and "technical choices" (or, as some legal systems call it, "technical discretion") by EU and national administrative authorities. This distinction is important, although not necessarily easily made.[8] Discretion *stricto sensu* is taken here to mean the process through which the administration assesses and weighs competing public interests. "Technical discretion", in turn, entails the assessment, within the framework of set legislative criteria, of the aspects of the decision-making process that require expert knowledge (and which may occur within a legislative framework that ultimately leaves no actual discretion *stricto sensu* to the authority). To the extent that this acquired technical knowledge still leaves room for choice, the authorities are then authorized to choose an alternative by exercising their "technical discretion".[9] This article is in principle concerned only with the exercise of "technical discretion" on the part of national authorities, with a specific focus on environmental decision-making.

The article proceeds as follows. Firstly, the European case law on the standard of review applicable before the national and European courts will be analyzed. As will be shown below, despite the fact that the focus of this article lies on judicial review of environmental decisions before *national* courts, the standard of review performed by the *European* courts is essential to understanding what EU law requires in terms of the standard of review applicable before national courts. Secondly, the analysis will move towards the EU secondary rules and EU case law concerning the standard of review and access to scientific knowledge in the specific field of environmental policy. In this context, the international requirements provided by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[10] will also be discussed. The article will argue that the requirements imposed by EU law only provide vague guidance and minimum denominators, thereby leaving Member States a wide margin of discretion on the standard of review and the way to access scientific knowledge when EU environmental law is at stake.

II. The European Case Law on the Standard of Review and the Consequences of the "*Upjohn* Equivalence"

2.1. The standard of review required by EU law: *Upjohn*

In some areas of EU law, secondary provisions prescribe a specific standard of review and a particular level of expertise required of national courts.[11] However, in most fields of EU law, no specific standard of review is prescribed and there are no concrete EU rules on the standard of review for national courts when the enforcement of Union law is at stake. According to the principle of national procedural autonomy, the Member States remain therefore competent to create and to apply their own rules on the standard of review, as long as the principles of effectiveness and equivalence and of effective judicial protection are complied with.

The Court of Justice of the European Union (CJEU) was specifically asked to answer a question concerning the necessary standard of review in EU law claims in the case of *Upjohn*, which concerned the standard of review used by English courts for the revocation of medical marketing authorizations.[12]

[7] Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

[8] See further on this point, J. Mendes, "Discretion, Care and Public Interests in the EU Administration: Probing the Limits of Law" (2016) 53(2) *Common Market Law Review*, pp. 419–452.

[9] Advocate General (AG) Leger calls this form of appraisal "discretion of 'technical' nature", see Opinion in C-40/03 P, *Rica Foods (Free Zone) NV* v. *Commission* ECLI:EU:C:2005:93, para. 46; Schimmel and Widdershoven prefer the term "margin of appreciation", see M. Schimmel & R. Widdershoven, "Judicial Review after Tetra Laval: Some Observations from a European Administrative Law Point of View", in O. Essens, A. Gerbrandy & S. Lavrijssen (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, 2009), pp. 51–78, at 65.

[10] Available at: http://www.unece.org/env/pp/welcome.html.

[11] E.g., in the field of telecommunications: Art. 4(1) of Directive 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services [2002] OJ L108/33; in the field of asylum: Art. 46(3) of Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L180/60. See on this point, J. Jans *et al,* n. 1 above, p. 400.

[12] C-120/97, *Upjohn Ltd* v. *The Licensing Authority established by the Medicines Act 1968 and Others* ECLI:EU:C:1999:14.

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According to the Court of Justice, EU law does not require that national courts must be empowered to substitute the assessment performed by the public authority with their own assessment of the facts of the case.[13] As a mere "negative test", this stipulation says nothing about what *is* positively required of national courts. The benchmark that the Court set in this case was its own standard of review in cases concerning decisions by EU authorities. In *Upjohn*, the Court used its own standard of review as a benchmark and stated that the Union Courts are restricted to:

> examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by *a manifest error* or *a misuse of powers* and that it did *not clearly exceed the bounds of its discretion*.[14]

According to the Court of Justice, Member State courts are not required to adopt a more intense standard of review that the standard observed by the CJEU itself.[15] Interestingly, this is one of the few procedural areas in which the Court, in the context of assessing national procedural rules, used EU procedural rules as a benchmark. The CJEU has repeated this line of argumentation in other cases,[16] and it referred to *Upjohn* recently in a case concerning access to environmental information.[17]

In *Upjohn*, the Court thus established that the minimum level of scrutiny for national courts is that of "manifest error". In *Krankenhaustechnik*, a case concerning public procurement, the Court specified that it was not "lawful for Member States to limit review of the legality of a decision to withdraw an invitation to tender to mere examination of whether it was arbitrary".[18] In this sense, the Court seemed to indicate that a "manifest error" assessment involves closer scrutiny than a determination of arbitrariness.

This position seems to imply that the "traditional" English standard of review, whereby decisions are quashed only if they are "so unreasonable that no reasonable authority would have adopted them"[19] would fall foul of EU law.[20]

Whether *Upjohn* constitutes a minimum denominator or a uniform benchmark was clarified by the Court of Justice in *Arcor*, which concerned a decision in the field of telecommunications.[21] In this case, the German government and a third party claimed, relying on *Upjohn*, that the decisions of the telecommunications authority constituted complex economic assessments and that, consequently, the review of national courts had to be limited to the "manifest error" threshold. The Court, however, made very clear that *Upjohn* only constitutes a minimum denominator and, within the framework of national procedural autonomy, Member States are free to set their own standards of review in respect of the decision in question. This entails that the Court of Justice is aware that different standards of review exist and considers them all acceptable if they meet the minimum threshold of "manifest error". Acceptable differences thus inherently remain in the standards of review when the national authorities take complex technical decisions in the field of EU law.

While *Upjohn* does not require full review of administrative decisions, it is interesting to note that the Court also added that:

> nevertheless, any national procedure for judicial review of decisions of national authorities revoking marketing authorisations must enable the court or tribunal seised of an application for annulment of such a decision effectively to apply the relevant principles and rules of Community law when reviewing its legality.[22]

This statement too has been repeated on other occasions.[23] Although apparently going beyond the "manifest error" threshold in answering the questions submitted by the national court,[24] in the recent *East*

[13] *Ibid*., para. 33.
[14] *Ibid*., para. 34, emphasis added.
[15] *Ibid*,, para. 35.
[16] E.g. Case C-211/03, *HLH Warenvertriebs GmbH*, and C-299/03 and C-316/03 to C-318/03, *Orthica BV v Bundesrepublik Deutschland* ECLI:EU:C:2005:370, para. 75 ff.
[17] C-71/14, *East Sussex County Council v Information Commissioner and Others* ECLI:EU:C:2015:656, para. 58.
[18] Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI)* v. *Stadt Wien* ECLI:EU:C:2002:379, para. 63.
[19] See *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223. Paul Craig has observed that, "if one takes the *Wednesbury* test at face-value, there can be no pretence of any meaningful substantive review and it is difficult to think of a single real case in which the facts meet this standard", see P. Craig, "The Nature of Reasonableness Review" (2013) 66(1) *Current Legal Problems*, pp. 131–67, at 161.
[20] See A. Ryall, "Enforcing the Environmental Impact Assessment Directive in Ireland: The Evolution of the Standard of Judicial Review" (2018) *Transnational Environmental Law* (forthcoming). For a comparative overview of the different standards of review see, T. Zwart, "The Scope of Review of Administrative Action From a Comparative Perspective", in O. Essens *et al*, n. 9 above, pp. 23–37. Vasiliki (Vicky) Karageorgou "The Scope of the Review in Environment-related Disputes in the Light of the Aarhus Convention and EU Law – Tensions between Effective Judicial Protection and National Procedural Authority" in Jerzy Jendroska and Magdalena Bar (eds) *Procedural Environmental Rights: Principle X on Theory and Practice* (Intersentia 2018), 229-261.
[21] Case C-55/06, *Arcor AG & Co. KG* v. *Bundesrepublik Deutschland* ECLI:EU:C:2008:244.
[22] *Upjohn*, n. 12 above, para 36.
[23] Cases C-211/03, *HLH Warenvertriebs GmbH*, and C-299/03 and C-316/03 to C-318/03, *Orthica BV* v. *Bundesrepublik Deutschland* ECLI:EU:C:2005:370, para 79.
[24] See on this point, M. Eliantonio & F. Grashof, "C-71/14, *East Sussex County Council v Information Commissioner, Property Search Group, Local Government Association* (Judgment of 6 October 2015) Case Note" (2016) 9(1) *Review of European Administrative Law*, pp. 35–47.
[25] *East Sussex County Council*, n. 17 above, para 57.

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Sussex case the Court repeated that a Member State does not act contrary to EU law if it does not provide for a standard of review that allows for a "complete review".[25] However, according to the Court, national judicial review procedures must enable courts "to apply effectively the relevant principles and rules of EU law".[26]

In conclusion, on the basis of *Upjohn,* the Court of Justice seems to require that the national courts exercise a form of review of administrative decisions which is at least as thorough as that exercised by EU courts, and that this review should in any case be sufficient to ensure the effective control by national courts of national authorities' decisions.

2.2. The consequences of *Upjohn* and the evolving standard of review at the EU level

The basis of the CJEU's stance on the required standard of domestic judicial review is the standard of review exercised by the European courts, namely the General Court and the Court of Justice. The EU requirements for national courts seem therefore to be a sort of "moving target" which may need to be adapted to the changing approach to review performed at the European level. Indeed, the standard of review applied by the European courts seems to have evolved somewhat in the past years.

The question of the appropriate standard of review in administrative decision-making has come to the attention of the European courts in competition cases. Here the European courts, for example, scrutinize the decisions of the European Commission, whereby the latter finds a violation of Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union (TFEU) or declares a concentration compatible or incompatible with the common market, and is thus faced with decisions that are the product of so-called "complex economic assessments". Although less often than in competition law, the European courts have also scrutinized decisions requiring technical assessments in the field of environment and human health.[27]

As a starting point, the attitude of the CJEU was one of clear deference to the discretionary choices of administrative authorities. According to early CJEU case law, and as indicated by the Court itself in *Upjohn*, judicial review should be limited to verifying "whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or misuse of powers".[28] During this early period, "review of the sufficiency of the evidence supporting an administrative measure is virtually non-existent".[29]

The test thus established since the early years, and still formally in place, is that of "manifest error". However, throughout the years, this initial position of deference has not prevented the CJEU from carrying out a rather strict scrutiny of EU administrative decisions in as far as the establishment of facts is concerned.[30] As Paul Craig has argued, the reference to the threshold of "manifest error" has not changed, but its scope has evolved throughout time to permit an increasingly intensive review.[31] The standard scope of review applicable in cases of "complex economic assessments" is the one enunciated in *Tetra Laval*,[32] in which the Court of Justice explained that:

> whilst ... the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature.[33]

On the contrary:

> not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether the evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[34]

Despite the formula being repeated on several occasions,[35] "academics and practitioners alike are

[26] *Ibid*., para 58.

[27] See, e.g., Case C-77/09, *Gowan Comércio Internacional e Serviços Lda* v. *Ministero della Salute* ECLI:EU:C:2010:803, concerning whether a substance meets the safety requirements of Council Directive 91/414/EEC concerning the Placing of Plant Protection Products on the Market [1991] OJ L 230/1.

[28] See, e.g., Case 42/84, *Remia and Others* v. *Commission* EU:C:1985:327, para. 34.

[29] C. Anderson, "Contrasting Models of EU Administration in Judicial Review of Risk Regulation" (2014) 51(2) *Common Market Law Review*, pp. 424–454, at 434.

[30] Case C-12/03 P, *Tetra Laval* ECLI:EU:C:2005:87. For an examination of the *Tetra Laval* test and the distinction between establishing the facts which are relevant in the decision-making and the appraisal of these facts, and the different review of the European courts, see M. Schimmel & R. Widdershoven, "Judicial Review after *Tetra Laval*: Some Observations from a European Administrative Law Point of View", n. 9 above, pp. 51–78, at 61 and ff.

[31] P. Craig, *EU Administrative Law*, 2nd edn (Oxford University Press, 2012), pp. 415–416.

[32] See the *Tetra Laval* case, n. 30 above.

[33] *Ibid*, para. 39.

[34] *Ibid*, para. 39. This test has been reiterated in a long line of case law after that. See recently Case C-389/10 P, *KME Germany and others* v. *Commission*: ECLI:EU:C:2011:816, para. 121; Case T-177/13, *TestBioTech eV and Others* v. *Commission*, ECLI:EU:T:2016:736 para. 79. For an examination of *Tetra Laval* and the subsequent case law, see A. Meij "Judicial Review in the EC Courts: *Tetra Laval* and Beyond", in O. Essens, A. Gerbrandy & S. Lavrijssen (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, 2009), pp. 8–21.

[35] See, e.g., Case T-377/07, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE* v. *Commission*: ECLI:EU:T:2011:731, para. 22 and the case law cited therein.

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still struggling to grasp fully under what circumstances EU Courts are likely to take fault with the Commission's decision-making and what errors may strike a fatal blow to the lawfulness of its analysis".[36] Notwithstanding the elusiveness of this test, it can be established that the European Courts are consistent on the necessity of a thorough and careful examination of facts, where their establishment is objectively difficult and it requires expert knowledge.[37] Furthermore, the control exercised by the CJEU does not preclude establishing facts independently or reviewing the facts established by the EU authorities with regard to the content, rather than only the procedure.[38] On this basis, it has been argued that the Court of Justice has moved from a mere procedural review of discretionary decisions to a "*quasi-substantive* review of the scientific evidence relied upon in the decision-making *process*".[39]

Important for the purposes of the present analysis is the fact that the CJEU applied the same test not only to the economic field but also to that of the regulation of risks to public health or the environment.[40] A first step towards a more thorough review of the discretionary choices of the EU administration can be seen in *Pfizer*, which concerned a challenge against a measure withdrawing the authorization for an additive to animal feeding stuffs.[41] Again, while not formally departing from the test of "manifest error", the General Court (then called the Court of First Instance) carried out a thorough evaluation to assess *whether* a manifest error had been committed by the European Commission. This same approach has been repeated in later case law concerning the regulation of risks to public health or the environment.[42] Furthermore, in the *Schräder* case concerning the application for a plant variety right, the General Court (seized in first instance in an action for annulment under Article 263 TFEU) used the *Tetra Laval* formula and stated that this was the applicable standard of review for cases in which the decision is the result of a complex economic *or technical* assessment.[43] The General Court moreover added that the same standard would apply in cases where technical complexity stems from "appraisals in other scientific domains, such as botany or genetics".[44]

On the basis of this case law, it can be concluded that the CJEU has not formally moved away from the "manifest error" threshold as a standard of review in administrative decision-making. However, the case law suggest that, in order to assess *whether* a manifest error has been committed by the EU institutions, EU courts are required to be able to assess the evidence submitted and, arguably therefore, to access all necessary scientific knowledge to do so. In the words of AG Kokott:

> it would be an error to assume that the Commission's margin of discretion precludes the Community Courts in any event from giving their own analysis of the facts and the evidence. On the contrary, it is essential for the Community Courts to undertake such an assessment of their own where they are assessing whether the factual material on which the Commission's decision was based was accurate, reliable, consistent and complete, and whether this factual material was capable of substantiating the conclusions the Commission drew from it. Otherwise, the Community Courts could not sensibly assess whether the Commission had stayed within the limits of the margin of discretion allowed to it or had committed a manifest error of assessment.[45]

This test requires, as has been argued, "a review of factual accuracy, reliability, consistency and completeness of evidence, and allows the court to assess whether it serves as a sufficient basis for Commission's conclusions".[46] This means that, when complex evaluations are at stake, or inconclusive or contradictory evidence is presented, the CJEU will examine whether the evidence brought forward by the Commission is capable of constituting a proper basis for the final decision.

The necessary corollary of this finding, on the basis of the "*Upjohn* equivalence" presented above, is that

[36] A. Kalintiri "What's in a Name? The Marginal Standard of Review of 'Complex Economic Assessments' in EU Competition Enforcement" (2016) 53(5) *Common Market Law Review*, pp. 1283–316, at 1285, with further references on the debate surrounding the standard of review in economic cases.

[37] Case T-13/99, *Pfizer Animal Health SA* v. *Council of the European Union* ECLI:EU:T:2002:209, para. 172; see also recently Case C-691/15 P, *Commission* v. *Bilbaína de Alquitranes and Others* ECLI:EU:C:2017:882, para. 35.

[38] *Tetra Laval*, n. 30 above, para 39. Of course, it is a different story whether the EU courts do carry out this review in practice and are equipped to do so. This consideration is not relevant for the current investigation and will not be explored further. See further Kalintiri, n. 36 above, pp. 1311–1312.

[39] G.C. Leonelli, "*European Commission* v. *Bilbaína and Others*: The Fine Line Between Procedural and Substantive Review in Cases Involving Complex Technical-Scientific Evaluations" (2018) *Common Market Law Review* (forthcoming).

[40] See Case T-475/07, *Dow Agro Sciences Ltd and Others* v. *Commission* EU:T:2011:445, paras. 150153; Case T-257/07, *France* v. *Commission*, EU:T:2011:444, para. 87.

[41] *Pfizer*, n. 37 above.

[42] *Dow Agro Sciences*, n. 40 above, paras. 150153; *France v. Commission*, n. 40 above, para. 87.

[43] Case T-187/06, *Ralf Schräder* v. *Community Plant Variety Office (CPVO)*, EU:T:2008:511, para. 61.

[44] *Ibid*, para. 62.

[45] Case C-413/06, *P Bertelsmann AG and Sony Corporation of America* v. *Independent Music Publishers and Labels Association (Impala)* ECLI:EU:C:2007:790, para. 240.

[46] M. Baran, "The Scope of EU Courts' Jurisdiction and Review of Administrative Decisions: The Problem of Intensity Control of Legality", in C. Harlow, P. Leino & G. della Cananea (eds), *Research Handbook on EU Administrative Law* (Edward Elgar, 2017), pp. 292–315, at 311.

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this standard of review applies not only before the European courts but also in domestic litigation. Arguably, therefore, while not required to fully review administrative decisions, national courts should nevertheless be equipped to assess all evidence submitted to them and to determine whether the evidence provided by the national authorities is capable of substantiating the conclusions contained in the challenged decision. Consequently, national courts should be able to obtain the necessary support for these tasks. This conclusion seems in line with the requirement, enunciated since *Upjohn*, that national courts should be able to perform a standard of review that allows them to *effectively* apply the relevant EU law provisions.

III. The Legislative and Jurisprudential Framework regarding the Standard of Review and Access to Technical Knowledge in Environmental Cases

3.1. The Aarhus requirements and the European case law on the standard of review

The case law discussed above, including *Upjohn*, does not specifically concern environmental policy. It is therefore necessary to analyze the relevant secondary EU rules and the applicable case law in this field to examine whether more concrete (or possibly different) requirements apply with regard to the standard of review applicable in environmental litigation involving EU law. In carrying out this analysis, the scope of the examination needs to be extended to the international level and in particular to the Aarhus Convention,[47] which contains specific provisions on access to justice in environmental matters.

As a starting point, it needs to be clarified that, to date, there is no case law which explicitly and clearly sets a minimum standard of review for national courts in environmental litigation. Some indications of a threshold can be found in the ruling in *Standley*.[48] In this case, the national court was concerned with the designation of nitrate-vulnerable zones under the EU Nitrates Directive.[49] The applicants were farmers seeking the annulment of the UK Government's decision to designate certain areas as vulnerable because of the restrictions that such designation would impose on farmers. With regard to the applicable standard of review, the court indicated that:

> when national courts review the legality of measures identifying waters affected by pollution [...] they must take account of the wide discretion enjoyed by the Member States which is inherent in the complexity of the assessments required of them in that context.[50]

This statement implicitly points to the "manifest error" threshold which more clearly emerges from the *Upjohn* string of case law.[51]

Moving to the examination of the legislative framework, Article 9(2) of the Aarhus Convention requires the possibility for national courts to review the "substantive and procedural legality" of certain decisions that are subject to the public participation requirements mandated by the Convention itself. Furthermore, Article 9(4) contains the requirement to ensure an "adequate and effective remedy" to censor violations of environmental law. These requirements are incorporated literally in the relevant Directives transposing Article 9(2) of the Aarhus Convention into the EU legal order, namely Article 11 of the Environmental Impact Assessment (EIA) Directive[52] and Article 25 of the Industrial Emissions Directive.[53] However, neither of these provisions gives clear guidance on the *intensity* of the review of substantive and procedural legality that needs to be undertaken.

Article 9(3) of the Aarhus Convention, which provides for access to justice with respect to all environmental law violations (and is thus wider in scope than Article 9(2)) does not make any reference to standard of review, nor does it provide for an obligation for courts to assess the substantive and procedural legality of decisions taken in the field of environmental law. This phrase is currently only to be found in Article 13 of the EU's Environmental Liability Directive,[54] which is technically unconnected to the transposition of the Aarhus Convention, yet within the field of application of its Article 9(3).[55] Article 13 of the Directive lays down a requirement for

[47] n. 10 above.

[48] Case C-293/97, *The Queen* v. *Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*: ECLI:EU:C:1999:215, para. 37 (*Standley*).

[49] Directive 91/676/EEC concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources [1991] OJ L375/1.

[50] *Standley and Others*, n. 48 above, para. 37.

[51] See C. Hilson, "Review of Legality of Member States Discretion under Directives", in T. Tridimas & P. Nebbia, (eds) *European Union Law for the Twenty-First Century* (Hart, 2004), pp. 223–238, at 236.

[52] Directive 2011/92/EU on the Effects of Certain Public and Private Projects on the Environment (Codification) [2011] OJ L26/1 as amended by Directive 2014/52/EU [2014] OJ L124/1.

[53] Directive 2010/75/EU on Industrial Emissions (Integrated Pollution Prevention and Control) [2010] OJ L334/17.

[54] Directive 2004/35/CE on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage [2004] OJ L143/56.

[55] On this point see further, M. Eliantonio, "The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to Go" (2015) 8(1) *Review of European Administrative Law*, pp. 99–123, at 114 ff.

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access to justice to review "the procedural and substantive legality" of decisions, which are the same terms as used in Article 9(2) of the Aarhus Convention.

According to the Aarhus Convention Implementation Guide, moreover:

> [A]lthough no explicit reference to substantive or procedural legality is made in paragraph 3, a Party cannot limit the scope of review under this provision to either procedural or substantive legality. Rather, the review procedures for acts and omissions challenged must enable both the substantive as well as the procedural legality of the alleged violation to be challenged.[56]

The Aarhus Implementation Guide thus suggests that the standard of review to be applied in the context of Article 9(3) is identical to the one to be applied in the context of Article 9(2) of the Convention.

Interestingly, while the CJEU on many occasions has interpreted the requirements of access to justice enshrined in Article 9(2) and 9(4) of the Aarhus Convention from the perspective of standing and costs of proceedings, there has been no extensive discussion on the standard of review mandated by these provisions. To date, the only ruling shedding any light on this issue is *Altrip*.[57]

In *Altrip*, the CJEU ruled that the right to challenge a decision taken in the context of a decision-making process during which an environmental impact assessment should have been carried out, could not be limited by national law solely to cases in which the legality of this decision is challenged on the ground that no environmental impact assessment has been carried out. According to the Court of Justice, excluding access to justice in cases where, "having been carried out, an environmental impact assessment is found to be vitiated by defects – even serious defects – would render largely nugatory"[58] the provisions of the EIA Directive governing public participation. To an extent, this position has been reiterated in *Commission* v. *Germany*,[59] in which the Court stated that the objective of Article 11 of the EIA Directive:

> [I]s not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety.[60]

In conclusion, it seems that, even after *Altrip*, *Commission* v. *Germany* and *East Sussex*, the standard of review has not moved from the "manifest error" threshold. However, these cases do clarify that national courts must be able to review the technical assessments (in the relevant cases, the environmental impact assessment) on which the challenged decisions are based with reference to all aspects of legality, not only the procedural ones. Furthermore, any standard of review must be sufficient to enable the national court to effectively apply the relevant EU environmental law.

It could therefore be argued that, while not prescribing explicitly a certain standard of review, the international and EU framework requires national courts to be able to review the substantive legality of an environmental decision and to provide an effective remedy. This implies an expectation that national courts be able to understand the technical aspects and background of the decision at issue. To meet this expectation, national courts must therefore have access to the scientific knowledge necessary to do so.

This conclusion, however, does not seem to be fully supported by the recent European Commission Communication on Access to Justice,[61] a non-binding instrument issued in order to provide guidance to national courts in the absence of transposition by the EU of Article 9(3) of the Aarhus Convention. With regard to the requirement to review substantive legality, and specifically, to review the facts of the case, the Communication states that:

> National courts are not generally required to carry out any information-gathering or factual investigations of their own. However, in order to ensure an effective review of the decisions, acts or omissions at stake, a minimum standard has to be applied to the examination of the facts in order to ensure that a claimant can exercise his or her right to ask for a review in an effective manner also so far as the examination of facts is concerned. If a national court could never review the facts on which the administration based its decision, this could, from the outset, prevent a claimant from presenting effectively a potentially justified claim.[62]

The Communication thus makes clear that no information-gathering activity is required of national courts under EU law. This seems to contradict the position of the Court of Justice concerning the necessity to:

> establish whether the evidence relied on is factually accurate, reliable and consistent but also whether the evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[63]

Furthermore, it can be argued that, while the Communication states that *a* minimum standard has to be applied to the examination of the facts, it does

[56] *The Aarhus Convention: An Implementation Guide*, 2nd edn (2014), p.199.
[57] Case C-72/12, *Gemeinde Altrip and Others* v. *Land Rheinland-Pfalz*: ECLI:EU:C:2013:71.
[58] *Ibid*., para. 37.
[59] Case C-137/14, *Commission* v. *Germany* EU:C:2015:683.
[60] *Ibid*., para. 80.
[61] Communication from the Commission, "Commission Notice on Access to Justice in Environmental Matters", C(2017) 2616 final.
[62] *Ibid*., para 137.
[63] *Tetra Laval*, n. 30 above, para. 39.

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not provide any guidance as to this standard. The following sentence of the Communication alludes to circumstances in which a court could "never" review facts, suggesting that if such a scenario is averted, the minimum standard required by EU law is met. Hence, it seems that the Communication sets a lower standard of review than *Upjohn* and lately *East Sussex*. While the case law of the CJEU requires a standard of review which, holistically, ensures the effective application of EU law, the Communication seems to suggest that the mere possibility to review facts may be sufficient to ensure compatibility with EU law.

It can be questioned whether this position supports the actual achievement of effective judicial protection in environmental matters. If the minimum requirement under EU law is the mere possibility to review facts, but EU law does not, at the same time, require national courts to understand the very facts under review through accessing the necessary scientific knowledge, this review arguably becomes largely useless for applicants.

The *Waddenzee* case[64] illustrates the problem. In the context of Article 6(3) of the Habitats Directive,[65] the CJEU ruled that competent public authorities may only authorize an activity in a protected Natura 2000 site where, taking into account the conclusions of an appropriate assessment, no reasonable scientific doubt remains that, in the light of the site's conservation objectives, the activity will not adversely affect the integrity of the site. This seems to imply that, when called upon to review a decision authorizing such an activity, the national court has to determine whether or not the scientific evidence relied upon by the public authority leaves no reasonable doubt. One may legitimately wonder how a national court is expected to carry out this assessment if no access to scientific knowledge is secured under national law and is not, at the same time, required by EU law.

This difference in legal requirements between the case law of the Court of Justice and the Commission Communication clearly does not make the life of national courts easier and will not contribute to foster legal certainty in the enforcement of EU environmental law.

3.2. The lack of guidance on access to scientific knowledge in environmental litigation

If the question of the standard of review required in environmental cases has not been subject to much case law, questions regarding the procedures to secure national courts' access to scientific knowledge have never been tackled by the CJEU.

The first, and to the date also the last, attempt to shed some light on this issue was made by an Italian administrative court in *Comitato di Coordinamento per la Difesa della Cava*.[66] The claim concerned a measure by which the Region of Lombardia had resolved upon locating a waste discharge plant for solid urban waste in a municipality within the region. A number of individuals had instituted proceedings against this decision, claiming that it undermined their right to environmental protection.

The Regional Administrative Court of Lombardia found that the national rule[67] (implementing the relevant provisions of EU law, i.e. the Waste Framework Directive)[68] provided for the disposal of waste to be carried out almost exclusively by means of creating a waste discharge plant. In the light of these findings, the Italian court expressed doubts as to the compatibility of these rules with EU law, which required the Member States to adopt appropriate measures to encourage the prevention, recycling and processing of waste.

Consequently, the Italian court decided to order a stay of the proceedings and refer a preliminary question to the Court of Justice concerning the direct effect of the provisions of EU law allegedly violated by the conduct of the Region. At the same time, the Regional Administrative Court of Lombardia took the opportunity to ask the Court of Justice a question concerning the evidence regime in Italian administrative proceedings and its compatibility with EU law. In particular, the Italian court asked the Court of Justice whether EU rights had to be protected in national courts with the possibility of requesting a technical assessment from an independent expert, or whether a report submitted by the administrative authorities could be considered as sufficient (notwithstanding the fact that the administration was itself party to the dispute).[69]

The Court of Justice, however, "disappointed" the expectations of the Italian court and did not answer all questions referred to it. Having considered that the relevant provisions of EU law at issue lacked direct effect, it abstained from tackling the question on the evidence regime. Nevertheless, a "European" point of view on this issue may still be found in the non-binding opinion issued by the Advocate General on this case.[70]

[64] Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* v. *Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:2004:482 (*Waddenzee*).

[65] Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7.

[66] Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others* v. *Regione Lombardia and others*: ECLI:EU:C:1994:60.

[67] Presidential Decree of 10 Sept. 1982, No. 915 GU of 15 Dec. 1982, No. 343.

[68] Directive 75/442/EEC on Waste [1975] OJ L194/39.

[69] For an analysis of the Italian rules on evidence applicable at that time and their subsequent evolution, see: M. Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing, 2008), pp. 181 ff, and R. Caranta in this Special Issue.

[70] Opinion of AG Darmon in Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others* v. *Regione Lombardia and Others* ECLI:EU:C:1993:893.

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In his opinion, Advocate General Darmon states that, where a provision of EU law confers rights, "genuine protection for them necessarily implies that experts appointed by the court must be independent so that the inquiries can be undertaken with rigorous impartiality and neutrality".[71] In particular, the Advocate General expresses the opinion that the principle of effective judicial protection *cannot* be reconciled with the lack of any guarantee of neutrality on the part of the expert, whose role is to provide clarification for the court with absolute impartiality, when the expert is employed by the administration and the latter is a party to the proceedings.

Thus, he concludes that, with regard to the national procedural rules at issue, the principle of effective judicial protection:

> is [...] compromised since, principally in technical matters where the administration is the other party, an ordinary individual has no standing to challenge what the administration says. The expert must thus reflect the independence of the judge, the need for which has been recognized by this Court.[72]

The issue of expert evidence has not been the explicit subject matter of rulings by the ECJ after the *Comitato di Coordinamento* case. However, it is could be foreseen that, should a question similar to the one posed by the national court in the *Comitato di Coordinamento* case be asked, the Court of Justice would be likely to follow the Advocate General's view and determine that the principle of effective judicial protection requires the procedural possibility for national courts to have access to independent and impartial technical experts, who are able assess the technical choices made by the national authorities.

IV. Conclusions

The question of courts' access to scientific knowledge in environmental litigation has not been subject to much doctrinal discussion or jurisprudential examination. The issue is deeply connected to the standard of review which national courts feel entitled or obliged to perform when EU environmental law is at stake.

The question of the standard of review mandated by EU law (and in particular the principle of effective judicial protection) was tackled by the Court of Justice in the *Upjohn* case and has, since then, never been explicitly revisited. The case makes a significant connection between the national and the EU standard of review and inextricably links the two. While the standard of review performed at the European level has never officially departed by the "manifest error" threshold, the European courts have, in the course of the years, made clear that this threshold entails checking the reliability and accuracy of the evidence presented before them. On the basis of the *Upjohn* equivalence, this threshold should equally be applicable before national courts, requiring, by consequence, the latter to have adequate procedural means (within the framework of national procedural autonomy) to access the scientific knowledge necessary to review the technical choices of the public authorities.

Specifically in environmental matters, the Court of Justice also never ruled clearly with regard to the required standard of review, but Articles 9(2) and Art. 9(4) of the Aarhus Convention (together with their transposition in EU secondary law), and the *Altrip* ruling seem to point in the direction that all aspects of legality of a decision must be assessed. This conclusion does not contradict *Upjohn*, and also does not set a higher threshold: all aspects of legality must be analyzed by the national courts to assess whether the national authorities committed a manifest error. In any event, the legislative and jurisprudential framework applicable in environmental matters seems to require that the national courts have access to the necessary technical knowledge to perform their assessments.

If manifest error is the threshold, and courts should be able to access the scientific knowledge required to control the administration's assessments, that last point is whether there are any EU requirements *on the manner* in which this knowledge must be accessed. The Court of Justice never provided any guidance on the availability and type of expert knowledge that must be made available in national proceedings. In *Comitato di Coordinamento* case, however, the Advocate General concluded that the non-availability of independent and impartial technical expertise is a breach of the principle of effective judicial protection. It can be expected that the Court will agree should a preliminary question to this effect be posed before it.

The conclusions do not however find full support in the recent Commission Communication on Access to Justice, where the Commission seems to indicate that the mere possibility for courts to review facts is enough to ensure compliance with EU law. One can question in how far this position fully ensures the realization of the principle of effective judicial protection in case the national court is able to review the facts on which the administration based its decision but is not able (and is not required under EU law) to access the necessary scientific knowledge to be able to effectively carry out that review.

Finally, it should be noted that the legislative and jurisprudential framework presented above certainly does not set a clear standard and guidance for national courts. As a consequence, different national solutions on the applicable standard of review and access to scientific knowledge may all be acceptable under EU law – provided that the court is able to assess whether a "manifest error" has been committed or review the factual background of the dispute. The ensuing

[71] *Ibid.*, para. 47.
[72] *Ibid.*, para. 50.

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questions are, therefore, firstly, whether there are any national solutions, which are below what is acceptable in terms of effective judicial protection and, secondly, whether the existence of (acceptable) different national solutions impair the uniform application of EU law. Comparative research is needed to answer both of these points.[73]

[73] See, on the first question, especially the contributions of Bar and to some extent that of Caranta in this Special Issue, and the contribution of Ryall, n. 20 above. On the second question, see the Foreword by T. Paloniitty and M. Eliantonio.