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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, nyr, and 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*) Judgment of the Court of Justice (Fourth Chamber) of 12 May 2011, nyr.

1. Introduction

The right to an effective legal remedy is a generally accepted principle of modern legal systems and is enshrined in national constitutions as well as international treaties, such as the European Convention on Human Rights and Fundamental Freedoms.[1] On the EU level, the general principle of effective judicial protection was first identified in *Johnston*,[2] and later came to be considered a general principle of Community law.[3] This principle has been stressed by the European Court of Justice on several occasions, especially in order to limit the autonomy of the Member States in setting their own procedural rules for the enforcement of rights which individuals derive from European law.[4] This principle thus requires national courts to adjust national procedures in order to secure the protection of EU law rights. The principle of effective judicial protection has shown itself capable of influencing all stages

1. See Arts. 6 and 13 ECHR.

2. Case 222/84, *Marguerite Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651.

3. Case C-125/01, *Peter Pflücke* v. *Bundesanstalt für Arbeit*, [2003] ECR I-9375. See, more recently, Case C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd* v. *Justitiekanslern*, [2007] ECR I-2271, para 37, in which the Court held that "according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms". A similar consideration is made in Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft* v. *Germany*, judgement of 22 Dec. 2010, nyr, para 29.

4. See e.g. Case C-213/89, *R.* v. *Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1990] ECR I-2433; Case C-208/90, *Theresa Emmott* v. *Minister for Social Welfare and Attorney General*, [1991] ECR I-4269; Case C-271/91, *M. Helen Marshall* v. *Southhampton and South-West Hampshire Area Health Authority (Marshall No. 2)*, [1993] ECR I-4367. More recently, see *Unibet,* cited *supra* note 3 and *DEB*, cited *supra* note 3.

of the judicial process, including interim relief, time-limits, evidential and standing rules.

The two cases annotated concern national procedural rules regarding the standing of environmental NGOs to challenge national measures which are allegedly in breach of EU law. It is important to place them in the relevant legislative context, which is that of the Aarhus Convention. In the comment, the two rulings will be examined within the context of the rules on access to courts at the EU level, and the inconsistency of the ECJ's approach concerning standing rules at national and European level will be shown. The concluding remarks will consider the significance of these rulings for the national autonomy of the Member States and the rules concerning access to justice of NGOs before national courts.[5]

2. The Aarhus Convention and its (non-) implementation in the EU legal order

The Aarhus Convention[6] was concluded by the European Community on 17 February 2005 by Decision 2005/370/EC;[7] it provides, in Article 9(2), that the contracting parties should "ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party 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 of Article 6 of the Convention itself. Furthermore, Article 9(3) provides for the obligation for the parties to provide for a wide

5. Please note that the issue of the jurisdiction to interpret a mixed agreement, which is relevant for the discussion of the case *Lesoochranárske zoskupenie*, will not be discussed in this paper. For a critical examination of this point, see Jans, "Who is the referee? Access to justice in a globalised legal order: A case analysis of ECJ judgment C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011", available at: <ssrn.com/abstract=1834102> (last visited 22 Nov. 2011).

6. United Nations Economic Commission for Europe, "Convention on access to information, public participation in decision-making and access to justice in environmental matters" (available at <www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>) (last visited 22 Nov. 2011). The EU and all EU Member States are contracting parties to the Convention.

7. 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, O.J. 2005, L 124/1.

access of the members of the public to review procedures to challenge the legality of decisions affecting the environment.[8]

With a view to aligning Member States' legislation with Article 9(2) of the Convention, and before the Convention was actually approved, the EU had, amongst others, enacted Directive 2003/35/EC.[9] This Directive inserted Article 10a into the text of the Environmental Impact Assessment (EIA) Directive[10] Like Article 9(2) of the Convention, Article 10a proposes two models of access to justice, based on rights or on interests. It requires Member States 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 EIA Directive. However, it leaves the Member States 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*.

Article 10a goes 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 this provision, any NGO meeting the requirements referred to in Article 1(2) of the Directive, shall be deemed capable of showing sufficient interest. Such organizations shall also be deemed to have rights capable of being impaired in case of a legal system choosing for a right-based approach. According to Article 1(2) of the EIA Directive, "non-governmental

8. Further on Art. 9 of the Aarhus Convention, see Lavrysen, "The Aarhus Convention: Between environmental protection and human rights" in Martens, Bossuyt, Rigaux and Renauld, *Liber amicorium Michel Melchior* (Anthemis, 2010), p. 663; 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", (2009) *Revue Juridique de l'Environnement*, 31; Von Danwitz, "Aarhus Konvention: Umweltinformation, Öffentlichkeitsbeteiligung, Zugang zu den Gerichten", (2004) *Neue Zeitschrift für Verwaltungsrecht* (hereafter: NVwZ), 272.

9. 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, O.J. 2005, L 156/17. On this point, see Dette, "The Aarhus Convention and legislative initiatives for its implementation", in Ormond, Führ, and Barth (Eds.), *Liber amicorum Betty Gebers* (Lexxion, 2006), p. 63. Further on the interplay between the Aarhus Convention and EU law, Ebbeson, "Access to justice at the national level – Impact of the Aahus Convention and European Union law" in Pallemaerts (Ed.), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), p. 247.

10. Directive 85/337/EEC in the assessment of the effects of certain public and private projects on the environment, O.J. 1985, L 175/40 as amended by Directive 97/11/EC, O.J. 1997, L 73/5 and Directive 2003/35/EC, O.J. 2003, L 156/17.

organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".[11]

Article 10a only affects procedural rules which are to be applied in a claim concerning an allegation that the provisions of the EIA Directive have been violated. A more general provision on access to justice in environmental matters 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,[12] (which would give effect to Art. 9(3) of the Convention), but the Directive has to date not yet been adopted.

Both cases under review concern preliminary questions by national courts on the relevance and meaning of Article 9 of the Aarhus Convention for their legal orders. However, while the German case relates to a measure falling within the scope of the EIA Directive and the obligations stemming from Article 9(2), the Slovakian one concerns a situation to which the EIA Directive (or any other Aarhus-implementing measure, for that matter) did not apply. Hence, while the first case concentrates on whether the German transposition of Article 10a is adequate, the second scenario lacks an intermediate EU provision and is focused on whether, given the lack of transposition of Article 9(3) the Convention in the EU legal order, this provision itself is capable of having direct effect. In both cases, the ECJ held that a broad access to justice for environmental NGOs before the national courts is necessary in order to achieve the objectives set by the Convention.

3. Case C-240/09, *Lesoochranárske zoskupenie VLK* v. *Ministerstvo životného prostredia Slovenskej republiky*: The "brown bear" case[13]

3.1. *Facts and procedural history*

This case was referred by the Slovakian Supreme Court in a claim brought by Lesoochranárske zoskupenie VLK ("LZ"), an association concerned with environmental protection. LZ had asked to participate, with the status as a party to the administrative proceedings (under Art. 14 of the Slovakian Administrative Procedure Code), in a number of administrative proceedings brought by, *inter alia*, various hunting associations requesting permission to derogate from the protective conditions accorded to the brown bear by the

11. This definition reproduces Art. 2(5) of the Aarhus Convention.

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

13. Judgment (C-240/09).

Habitats Directive.[14] In particular, LZ had argued that the proceedings in question affected its rights and legal protected interests arising from the Aarhus Convention. The Slovakian Ministry had stated that LZ did not have the status of a party to the proceedings, which, as a consequence, meant that they could not directly initiate proceedings to challenge the legality of the administrative decision which granted the derogations mentioned.

LZ lodged an action against the contested decision before the Bratislatva Regional Court arguing that their right to participate in the decision-making proceedings stemming from Article 9 of the Aarhus Convention had been violated and this Article had to be considered as having direct effect. The Court however dismissed LZ's application on the grounds of lack of standing. LZ appealed to the Supreme Court, which stayed the proceedings and essentially asked the ECJ whether Article 9 and, in particular, Article 9(3) of the Aarhus Convention, had to be regarded as having direct effect.

3.2. *The Opinion of Advocate General Sharpston*

In her Opinion, Advocate General Sharpston, who is not new to issues relating to environmental protection and, especially, to issues relating to Article 9 of the Aarhus Convention,[15] held that, in principle, the Court of Justice had no jurisdiction to rule on Article 9(3) of the Aarhus Convention.[16] She proceeded to answer the question of the direct effect of this provision (in case the Court disagreed on the jurisdictional issue), and proposed to answer in the negative. In particular, the Advocate General argued that Article 9(3) did not contain "obligations that are sufficiently clear and precise to govern the legal position of individuals directly, without further clarification or precision".[17] The Advocate General considered that Article 9(3) entitles NGOs to have access to administrative or judicial procedures only if they meet the criteria laid down in national law and that neither Article 9(3) itself nor the other provisions of the Aarhus Convention give guidance as to what those criteria might or should be. In this matter, the Advocate General also showed a clear deference to the EU legislator, holding that:

> "Attributing direct effect to Article 9(3), thus bypassing the possibility for Member States to lay down the criteria triggering its application, would be

14. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 1992, L 206/7.

15. See e.g. her Opinion in Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening* v. *Stockholms kommun genom dess marknämnd*, [2009] ECR I-9967**.**

16. As mentioned *supra* note 5, this issue will not be discussed in further detail in this annotation.

17. Opinion of A.G. Sharpston in Case C-240/09, para 87.

> tantamount to establishing an *actio popularis* by judicial fiat rather than legislative action. The fact that the proposal for a directive remains unadopted indicates that, in this particular context, such a step would indeed be inappropriate."[18]

3.3. *The ruling of the Court of Justice*

Unlike the Advocate General, the Court of Justice considered it had jurisdiction to decide whether Article 9(3) had direct effect. Thereafter, the Court followed, for the most part, the Opinion of the Advocate General, with one major difference. Like the Advocate General, the Court held 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, since the provision is subject, in its implementation or 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, while the Advocate General had almost stopped her reasoning there, merely adding that "the fact that a particular provision in an international agreement is not directly effective does not mean that the national courts of a Contracting Party have no obligation to take it into account",[19] the ECJ went much further in giving effect to Article 9(3). In particular, it considered the objective of Article 9(3), namely to ensure effective environmental protection, and, while it acknowledged the principle of national procedural autonomy, it recalled that this principle must in any event be counterbalanced by the principle of effectiveness. This implied, in the Court's view, that, in order to ensure effective judicial protection in the field of 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 did not merely reiterate the duty of consistent interpretation,[20] 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".[21] What could not be achieved through direct effect (i.e.

18. Ibid., para 89.
19. Ibid., para 92.
20. The duty of consistent interpretation ("indirect effect") was established by the ECJ in *Von Colson und Kamann,* in which the Court established that Art. 10 EC 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.
21. Judgment (C-240/09), para 51.

allowing the national court to disregard the national procedural rules and grant standing to the NGO directly on the basis of Article 9(3)) could, and, in fact, had to, be achieved through an interpretation of the national rules.

4. The *Trianel* case[22]

4.1. *Facts and procedural history*

The German case concerned a dispute between the Nordrhein-Westfalen branch of an NGO called Friends of the Earth and a German local administrative body (the Bezirksregierung Arnsberg), concerning the authorization granted by the latter to Trianel Kohlekraftwerk for the construction and operation of a coal-fired power station in Lünen. The NGO challenged this permit before the German *Oberverwaltungsgericht* of Nordrhein-Westfalen, arguing that the measure was in violation of the provisions implementing Article 6(3) of the Habitats Directive.

The German court considered the national procedural rules at issue, namely Paragraph 2(1) of the Environmental Remedy Act (*Umwelt-Rechtsbehelfsgesetz* – "UmwRG"), a law which implemented the access to justice requirements mandated by Article 10a of the EIA Directive.[23] According to this provision, non-governmental organizations promoting environmental protection are 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 Directive, only where they can show the potential infringement of a rule conferring individual rights. However, in the proceedings before the national court, the NGO was not maintaining impairment of an individual right, as it was required to do in order to have standing, but was seeking to challenge the contested permit insofar 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, "it may be said that the environmental NGO [was] seeking to act on behalf of the environment itself".[24] As such, therefore, the NGO, on the basis of the national procedural rules, should not have been granted standing. However, the German court wondered whether Article 10a had to be interpreted as permitting a provision such as the one at stake, if the result would indeed preclude standing for an NGO in the situation under scrutiny.

22. Judgment (Case C-115/09).

23. Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz), 7. Dec. 2006, BGBl. I S. 2816.

24. Opinion of A.G. Sharpston (Case C-115/09), para 1.

4.2. *The Opinion of Advocate General Sharpston*

The Advocate General found the German rule in breach of Article 10a. Considering her previous Opinion in *Djurgården-Lilla*,[25] this was not unexpected. That case dealt with a restriction of standing for NGOs before Swedish courts: Swedish procedural rules only allowed standing for those NGOs which had at least 2,000 members, and the Advocate General found that this rule did not satisfy Article 10a.

In the case at hand, the Advocate General proposed a reading of Article 10a which is consistent with the objective of this provision (and of Art. 9(2) of the Aarhus Convention), namely to provide a wide access to justice for NGOs wishing to challenge measures they deem likely to have a significant impact on the environment. According to the Advocate General, it is true that Article 10a (like Art. 9(2)), proposes two models of access, one based on the existence of an interest to bring the claim and another based on the impairment of a right. However, in her view, this cannot be taken to mean that NGOs can only be granted standing where they can demonstrate that either their own subjective rights have been infringed or those of the individuals they seek to represent. The Advocate General, therefore, proposed a broader reading of this provision, obtained by combining the first and the third paragraph of Article 10a. The third paragraph of Article 10a, which equally applies to interest-based and right-based systems, provides that

> ". . . the interest of any non-governmental organization meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article."

The Advocate General noted correctly that this provision implies that, if a legal system chooses for an interest-based model, NGOs who fulfil the requirements of Article 1(2) are by default considered to have sufficient interest to challenge the legality of decisions falling within the scope of the EIA Directive.[26] Now, if this is true for interest-based systems, the Advocate General reasoned that it must be equally true for right-based systems, since otherwise the latter systems would be more easily able to refuse standing to NGOs than the former systems, which would result in unacceptable

25. Cited *supra* note 15. For a comment on this case, see Ryall, annotation, (2010) CML Rev., 1511.

26. In the words of the A.G., "[T]hey need do nothing to prove that they have such an interest, but are treated as though in fact they had proved it". Opinion of A.G. Sharpston (Case C-115/09), para 65.

differences in access to justice and, ultimately, constitute a danger for the effectiveness of the EIA Directive in general. In the Advocate General's view, therefore, the correct interpretation of Article 10a is that "Member States must ensure that environmental NGOs *can* 'maintain the impairment of a right', and thus that the national legal system must recognize that they have 'a right' capable of being impaired, even if that right is fictitious" in a right-based legal system, such as Germany.[27] This interpretation is, according to the Advocate General, the only possible one taking the objective of the Aarhus Convention into account, namely to provide a wide access to justice in environmental matters. It is within this framework that the Member States' discretion in choosing the rules on standing may be exercised.

Two final points are worth noting. First, the Advocate General did not show much sympathy for Germany's argument that the counterbalance of the restrictive standing rules in Germany is a system of judicial review with an active court, who can check *ex officio* the factual and legal situation at stake and review the choices of the public administration. "Like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of actions", the Advocate General argued.[28]

Secondly, the Advocate General was also not convinced by Germany's argument that relaxation of the rules of standing would open the floodgates of litigation and that this would induce national courts to reduce the level of protection offered and ultimately diminish the effectiveness of the EIA Directive. On the contrary, allowing claims by NGOs would, in the Advocate General's view, actually result in a more efficient use of judicial resources.

4.3. *The ruling of the Court of Justice*

The Court held that whichever option a Member State chose for the admissibility of an action (i.e. a right-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 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 interests of individuals.

The Court thus aligned itself with the Opinion of the Advocate General. Two differences are, however, worth mentioning. The first is that, while

27. Ibid., para 68.
28. Ibid., para 77.

Advocate General Sharpston engaged in a deep hermeneutical operation on Article 10a and, in particular, its third paragraph, the Court limited itself to saying that, while the Member States are free to those between the two models proposed by Article 10a, this choice and its consequences must be consistent with the objective of giving the public concerned a wide access to justice. Hence, according to the Court, "the concept of 'impairment of a right' could not depend on conditions which only other physical or legal persons could fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation".[29]

The second difference is that, unlike the Advocate General, the Court referred 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 an interpretation of Article 10a of the EIA Directive such as that chosen by Germany would be in breach of the principle of effectiveness.

5. Comments: The Aarhus Convention, the EU, and the Member States: Broader access to justice for environmental NGOs before national courts

Both of these rulings significantly strengthen the possibility of access for environmental NGOs to challenge decisions which may have a significant impact on the environment. The rulings can be seen as a trend following the ruling in *Djurgården-Lilla*, in which the Court of Justice held that minimum membership requirements for NGOs to have access to court were too restrictive to comply with Article 10a of the EIA Directive.

5.1. *Implications of the Trianel ruling*

Following the *Trianel* case, limiting NGOs' access to court to situations of potential breach of a rule which confers subjective rights on individuals is also to be considered too restrictive. The possibility to admit the so-called "associational claim" in environmental matters (*Verbandsklage*) has been at the heart of a heated debate for many years in Germany,[30] and even took on a political connotation after the German Advisory Council on the Environment

29. Judgment (C-115/09), para 47.

30. See further on this point Koch, extensively reporting on this debate and on the arguments for and against the introduction of the associational claim in environmental matters. Koch, "Die Verbandsklage im Umweltrecht", (2007) NVwZ, 370 et seq.

(*Sachverständigenrat für Umweltfragen* – "SRU") had, on several occasions, expressed itself in favour of this type of claims.[31]

Such a claim could be considered significantly at odds with the conception of *recours subjectif* and the *Schutznorm* theory adopted by the German system of administrative justice. The system is based on the idea that an administrative action is admissible only if it is based on the alleged violation of a legal provision whose purpose is to protect individuals' rights *and* the individual applicant falls within the scope of this protection. The application of this idea is contained in Paragraph 42(2) of the Administrative Courts Procedure Act, the *Verwaltungsgerichtsordnung* – "VwGO"), according to which, "[U]nless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his/her rights have been violated by the administrative act or its refusal or omission."[32] In turn, this provision is based on Article 19 IV of the German Constitution (*Grundgesetz* – "GG") which guarantees recourse to a court when individual rights have been violated.[33] The decision whether a provision is aimed at protecting an individual's right lies with the legislator and is often subject to interpretation by the courts. Commencing an action without the potential infringement of an "individual right" by the claimant would generally result in a declaration of inadmissibility of a claim.

As has been considered, however, the strict application of the *Schutznorm* theory in the field of environmental law created a procedural inequality between the "users" and the "protectors" of the environment: while the users, such as a company receiving a permit for an installation, had standing to challenge all administrative decisions concerning them, an association acting for the protection of the environment had a hard time fulfilling the standing requirements.[34]

31. The most recent is the Stellungnahme No. 5 (2005), Sachverständigenrat für Umweltfragen, "Rechtschutz für die Umwelt – die altruistische Verbandsklage is unverzichtbar", published on 23 Feb. 2005 (available at <www.umweltrat.de/SharedDocs/Downloads/DE/04_Stellungnahmen/2005_Stellung_Rechtsschutz_fuer_die_Umwelt.html>) (last visited 22 Nov. 2011).

32. For standard German administrative procedure commentaries, where para 42(2) VwGO is examined see Kopp, *Verwaltungsgerichtsordnung: Kommentar*, 17th ed. (Beck, 2011); Sodan and Ziekow, *Verwaltungsgerichtsordnung*, 3rd ed. (Nomos, 2010); Redeker and Von Oertzen, *Verwaltungsgerichtsordnung*, 15th ed. (Kohlhammer, 2010) and further references contained therein.

33. On Art. 19 IV GG, see Schmidt-Bleibtreu, *GG: Kommentar zum Grundgesetz*, 12th ed., (Heymanns, 2011); Jarass, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 11th ed. (Beck, 2011); Von Mangoldt, *Kommentar zum Grundgesetz (Vol. 1)*, 6th ed. (Vahlen, 2010) and further references.

34. Alleweldt, "Verbandsklage und gerichtliche Kontrolle von Verfahrensfehlern: Neue Entwicklungen im Umweltrecht", (2006) DÖV, 623; Sachverständigenrat für Umweltfragen, cited *supra* note 31, 2–7.

Under the pressure to implement Article 10a of the EIA Directive, Paragraph 2(1) of the UmwRG,[35] which is the provision at stake in the *Trianel* proceedings, was enacted. This provision should be seen as an exception to the general rule of Paragraph 42(2) VwGO, since it allows NGOs to bring a claim for judicial review against the alleged violation of a rule which abstractly confers rights on individuals, even though the NGO itself, as the claimant, does not fall within the scope of the protection of the norm (so-called *Schutznormakzessorität*).[36] The threshold for the admissibility of the claim is thus whether the norm has, in the abstract, a *Schutznorm* character.

Even with this exception, introduced because of the need to comply with the EU obligations stemming from the EIA Directive, however, it remained outside the possibilities of environmental NGOs to bring a claim against the alleged violation of a norm (such as many in the environmental law field)[37] which does not aim at protecting individual rights, but solely at protecting the general interest.

The German legislature and some commentators did not see a problem of compliance of Paragraph 2(1) of the UmwRG with EU law and the Aarhus Convention, based on the argument that Article 10a of the EIA Directive left Member States free to choose between a right-based and an interest-based model and to determine what they considered sufficient interest or impairment of a right. The conclusion was thus that EU law did not require NGOs to be placed in a more favourable position than individuals as regards their *locus standi* and that, therefore, if a legal system chose for a right-based model, it would not be inconsistent with the requirements of the Directive to prescribe that both groups could only rely on norms protecting individual

35. On the UmwRG see, e.g. Ziekow, "Das Umwelt-Rechtsbehelfsgesetz im System des deutschen Rechtsschutzes", (2007) NVwZ, 259; Kment, "Das neue Umwelt-Rechtsbehelfsgesetz und seine Bedeutung für das UVPG", (2007) NVwZ, 274; Schlacke, "Das Umwelt-Rechtsbehelfsgesetz", (2007) *Natur und Recht* (hereafter: NuR), 8; Ewer, "Ausgewälte Rechtsanwendungsfragen des Entwurfs für ein Umwelt-Rechtsbehelfsgesetz", (2007) NVwZ, 267.

36. Ziekow, op. cit. *supra* note 35, 259 and 260. Further on this point, Oestreich, "Individualrechtsschutz im Umweltrecht nach dem Inkrafttreten der Aarhus-Konvention und dem Erlass der Aarhus-Richtlinie", (2006) *Die Verwaltung*, 29; Schwerdtfeger, "'Schutznormtheorie' and Aarhus Convention – Consequences for the German law", (2007) *Journal for European Environmental and Planning Law*, 270; Ekardt, "Die nationale Klagebefugnis nach der Aahus-Konvention", (2006) NVwZ, 55.

37. Roller maintains that "up to 90% of the legal obligations that a plant operator has to respect in practice will not give legal standing to NGOs". Roller, "*Locus Standi* for environmental NGOs in Germany: The (non-)implementation of the Aarhus Convention by the Umweltrechtsbehelfsgesetz" in Pallemaerts (Ed.), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), p. 363.

rights.[38] From this perspective, the aim, prescribed by the Aarhus Convention and the EIA Directive, of ensuring "wide access to justice" was to be regarded as having a mere programmatic value which could not prescribe a specific result.

On the other hand, many German commentators had questioned this view and held that, looking at the Aarhus Convention and its very *raison d'être*, it was clear that the objective of ensuring "wide access to justice" could not be contradicted under any circumstances. Furthermore, according to these commentators, Article 10a of the EIA Directive, by prescribing that NGOs should be "deemed to have rights capable of being impaired", had in essence created a special position for NGOs, for whom a sort of fiction of impairment of rights had to be presumed. Many authors had, therefore, considered the German interpretation of the EIA Directive incompatible with the aim of ensuring "wide access to justice" to NGOs and thus in violation of EU law, and leaving the pre-existing gaps in judicial protection untouched.[39]

Advocate General Sharpston and the Court agreed that the limitations set by Paragraph 2(1) of the UmwRG are unacceptable, as they are inconsistent with the general objective of the Aarhus Convention. The Court thus took the side of many of the German commentators, putting NGOs in a "privileged position"[40] with regard to their *locus standi,* given their role in the enforcement of environmental law; they should therefore be allowed to rely before the courts on infringement of EU environmental law, even where national law does not permit this for individuals.

Since the Court only dealt with the position of environmental NGOs in the context of a claim brought under the EIA Directive, the *Schutznorm* theory is not, by this ruling, called into question as such. It cannot, however, be applied

38. E.g. Von Danwitz, op. cit. supra note 8, 279; Schrödter, "Zur Rechtsprechung – Aktuelle Entscheidungen zum Umwelt-Rechtsbehelfsgesetz", (2009) NVwZ, 158; Schmidt-Preuss, "Aufsätze – Gegenwart und Zukunft des Verfahrensrechts", (2005) NVwZ, 496.

39. See e.g. Ziekow, op. cit. *supra* note 35, 259; Koch, op. cit. *supra* note 30, 378; Ewer, op. cit. *supra* note 35, 272; Schwerdtfeger, op. cit. *supra* note 36, 277; Alleweldt, op. cit. *supra* note 34, 626; Schlacke, op. cit. *supra* note 35, 14; Roller, op. cit. *supra* note 37, 362; Genth, "Ist das neue Umwelt-Rechtsbehelfsgesetz europarechtkonform?", (2008) NuR, 28; Gellermann, "Europäisierte Klagerechte anerkannte Umweltverbände", (2006) NVwZ, 8–9; Gassner, "Umweltrechtliche Treuhandklage", (2007) NuR, 147; Schmidt and Kremer, "Das Umwelt-Rechtsbehelfsgesetz und der "weite Zugang zu Gerichten", (2007) *Zeitschrift für Umweltrecht*, 61–62. Appel speaks about a "centuries-long" discussion on the "sense and nonsense" of granting standing to environmental NGOs. Appel, "Umweltverbände im Ferrari des deutschen Umweltrechtsschutzes – Anmerkung zur Trianel-Entscheidung des EuGH, Urt. v. 12.5.2011 – C-115/09", (2011) NuR, 414; Radespiel, "Entwicklungen des Rechtsschutzes im Umweltrecht aufgrund völker- und europarechtlicher Vorgaben", (2007) *Zeitschrift für Europäisches Umwelt- und Planungsrecht*, 122.

40. Müller, "Access to the Courts of the Member States for NGOs in environmental matters under European Union law", (2011) *Journal of Environmental Law*, 512.

in the context of these claims, so NGOs will now be able to have standing also where they allege the violation of a rule which seeks to protect the general interest. One could foresee, therefore, that the UmwRG will have to be amended in this sense.[41] For the time being, before an amendment to the UmwRG comes into force, it will be up to the German courts to admit claims by NGOs concerning an allegation that the provisions of the EIA Directive have been violated, even though these provisions are merely protecting the general interest and not the rights of one or more individuals.[42]

Furthermore, the *Trianel* ruling will only apply to claims brought by NGOs for alleged violation of EU environmental norms, and not for rules of purely national nature. This means that NGOs, in order to obtain standing, will have to prove that the German authorities were acting with the scope of application of EU law. The creation of a preferential avenue for NGOs in the context of claims based on the EIA Directive (while, for claims based on purely national environmental law, the "old" rules continue to apply) could endanger the overall coherence of the system of administrative justice and give a hard time to courts in maintaining the integrity of the system. Furthermore, as has been noted, it may not always be straightforward for courts to determine whether an NGO's claim is based on EU or national law.[43]

Additionally, it should not be forgotten that, although the ruling is focused on the violation of Article 10a of the EIA Directive, this provision reproduces almost verbatim the prescriptions of Article 9(2) of the Aarhus Convention, to which Germany is a party and which are, therefore, binding for Germany also outside the scope of application of EU law. The issue of the compliance of Paragraph 2(1) UmwRG with Article 9(2) of the Aarhus Convention had been

41. Of the same opinion, Müller, op. cit. *supra* note 40, 513; Durner and Paus, "Anmerkung", (2011) *Deutsches Verwaltungsblatt*, 762; Meitz, "Entscheidung des EuGH zum deutschen Umweltrechtsbehelfsgesetz", (2011) NuR, 422; Appel, op. cit. *supra* note 39, 414. The author also mentions the possibility to interpret the UmwRG in a "Europe-friendly" way, as well as to interpret extensively para 42(2) VwGO, 415.

42. Meitz, op. cit. *supra* note 41, 422.

43. Bunge brings the following example concerning the emission limits of polluting substances: if the limits are clearly set in an EU directive or if the limits are set by the Member States because the underlying Directive entrusts them with the task of doing so, one is clearly faced with an EU law-related situation, to which the *Trianel* ruling would be applicable. The situation, however, becomes more blurred when the limits are set in the Directive, but a Member State, as authorized by the Directive, has decided to set more stringent limits. Bunge, "Die Klagemöglichkeiten anerkannter Umweltverbände aufgrund des Umwelt-Rechtsbehelfsgsetzes nach dem Trianel-Urteil des Europäischen Gerichtshofs", (2011) NuR, 608. Along the same lines, Fellenberg and Schiller, "Rechtsbehelfe von Umweltvereinigungen und Naturschutzvereinigungen nach dem "Trianel Urteil" des EuGH (Rs. C-115/09)", (2011) *Umwelt- und Planungsrecht*, 323; Durner and Paus, op. cit. *supra* note 41, 762.

submitted in 2008 to the Aarhus Compliance Committee.[44] Given, however, the submission of the preliminary question to the ECJ in the *Trianel* proceedings, the Compliance Committee had decided to suspend the procedure until two months after the ECJ's decision.[45] It also subsequently decided to await the ruling of the referring court and a decision is expected by March 2012.[46]

If the Compliance Committee considers Paragraph 2(1) UmwRG in breach of Article 9(2) of the Aarhus Convention, one could thus foresee that the German legislature will opt for a complete reform of the system of access to justice for environmental NGOs, allowing the latter organizations to challenge any kind of rule, regardless of their EU or national nature, subject to the participatory requirements mandated by Article 6 of the Aarhus Convention.

This, in turn, gives rise to the question whether this reform towards a more interest-based model for claims brought by NGOs should not be the opportunity for using this model for the entire environmental law field. As has been noted, this switch could be made through an exception to Paragraph 42(2) VwGO to the effect that the *Schutznorm* theory and the "impairment of a right" requirement does not apply when the applicant is relying on norms which are aimed at protecting the environment.[47]

The *Trianel* ruling may also, in turn, have consequences for other Member States which have chosen an approach similar that of Germany with regard to the standing rules for NGOs' claims against alleged violations of the EIA Directive. However, according to a report prepared by the European Network of Environmental Organizations, it seems that in no other Member State are NGOs faced with a German-like hurdle to access to court to ask for a review of a decision related to permission of the projects subject to Article 6 of the Aarhus Convention.[48]

Finally, it is worth mentioning that the Court did not react to the point made by the German Government that the restrictive standing rules should be seen within the entire framework of the German judicial review system, which provides for an active court, able to check *ex officio* the factual and legal

44. Communication ACCC/C/2008/31, <www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-31/communication/Communication.pdf> (last visited 22 Nov. 2011).

45. Letter from the Secretariat, available at <www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-31/correspondence/toCommRe2008-31.2009.05.18.pdf> (last visited 22 Nov. 2011).

46. Letter from the secretariat, available at <www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-31/correspondence/toPartiesC31reCC34.pdf> (last visited 22 Nov. 2011).

47. Further on this point, Fellenberg and Schiller, op. cit. *supra* note 43, 328.

48. European network of environmental organizations, "Report on access to justice in environmental matters – On practical application of Article 9 of the Aarhus Convention" (2010), 6–7 (available at <aa.ecn.cz/img_upload/98a9a0fe3779d35f22dc8d93fe87df89/J_E_Aarhus_AtJ_Report.pdf>) (last visited 22 Nov. 2011).

situation at stake and review the choices of the public administration. Indeed, pursuant to the so-called principle of investigation (*Untersuchungsgrundsatz*), enshrined in paragraph 86(1) of the VwGO, the administrative courts have to enquire into the state of affairs *ex officio*, and are not bound by the factual allegations and arguments brought forward by the parties, nor by statements and offers to take evidence.[49] The *Untersuchungsgrundsatz* can be considered as being enshrined in the German Constitution. In particular, the guarantee of judicial protection against the acts of public authorities, set out in Article 19 IV of the German Constitution, demands a thorough analysis of the situation by the court, both in its legal and its factual aspects.[50]

In the German legal system, furthermore, the administrative courts are obliged to raise *ex officio* grounds of unlawfulness of an administrative decision that have not been brought forward by the applicant. This principle flows from Article 20 III GG, pursuant to which "legislation is subject to the constitutional order; the executive and the judiciary are bound by the law".[51] On this basis, all courts are bound by the *Grundgesetz* to respect and apply the law fully, and, consequently, also to find the legal provisions that are applicable to the cases coming before them.

It is submitted that this omission, while regrettable,[52] since the rules on standing should be seen in combination with the rules on the intensity of review and the system of administrative justice in general, would not have changed the conclusion reached by the Court. If the aims of the Aarhus Convention are to be upheld and a wide access to justice is to be guaranteed, there cannot be a bar to relying on rules protecting only the interests of the general public and not the interests of individuals, even where the counterbalance to this restrictive approach is a thorough review by the courts.

It remains to be seen whether a broader access to justice will lead, as the German government seems to be afraid of, to a steep increase of claims brought by environmental NGOs, which would, in turn, lead to a reduction of administrative efficiency, an excessive burden for courts and, ultimately, a worse judicial protection for the concerned parties. The data collected in previous studies should, however, reassure the German government.[53] For the

49. For an analysis of para 86(1) VwGO, see further the commentaries listed *supra* note 32.

50. BVerfG, decision of 5 Feb. 1963, BVerfGE, 15, 275; BVerfG, decision of 17 Apr. 1991, BVerfGE, 84, 34. On Art. 19 IV GG see *supra* note 33.

51. In general on Art. 20 III GG, see further the commentaries *supra* note 33.

52. On this point also Appel, op. cit. *supra* note 39, 415.

53. According to a study carried out for the European Commission, the claims brought by environmental NGOs amount only to 0.0148 % of the of all the cases the administrative courts decided in Germany between 1996 and 2001. De Sadeleer, Roller and Dross, *Access to Justice in Environmental Matters* – ENV.A.3/ETU/2002/0030 – Final report, 5 (available

moment, the proceedings concerning the power plant have re-started, and the claim by the German NGO has been allowed to proceed.[54]

5.2. *Implications of the "brown bear" case*

Where environmental NGOs claim that environmental rules other than those subject to the participatory requirements mandated by the EIA Directive have been violated, national courts will be able to take Article 9(3) of the Aarhus Convention and the "*brown bear*" ruling into account. While the Court, unsurprisingly, denied the direct effect of this provision, this ruling does nevertheless entrust national courts with the task of interpreting national standing rules in a way that ensures the respect of the objectives set by the Aarhus Convention.

This element of the ruling, which is absent in the Advocate General's Opinion, is remarkable for a variety of reasons. First of all, by setting an interpretative obligation in such situations on the national court, the Court 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 challenges the limits it set for indirect effect.[55] As it is well known, according to the case law of the Court itself, national courts have the duty to interpret their national law in light of the aims and objectives of EU law. However, the ECJ 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*.[56] However, the Court requires domestic courts to "enable an environmental protection organization, such as zoskupenje, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law".[57] The Court thus does not only impose a duty of

at <www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexHSadeleerReport.pdf>) (last visited 22 Nov. 2011).

54. Justizportal Nordrhein-Westfalen (available at <www.justiz.nrw.de/JM/Presse/presse_weitere/PresseOVG/17_11_2011/index.php>) (last visited 22 Nov. 2011).

55. On the doctrine of indirect effect, see further Drake, "Twenty years after Von Colson: The impact of 'indirect effect' on the protection of the individual's Community rights", (2005) EL Rev., 329; Amstutz, "In between worlds: *Marleasing* and the emergence of interlegality in legal reasoning", (2005) ELJ, 766; Betlem, "The doctrine of consistent interpretation – Managing legal uncertainty", (2002) *O.J. Leg.Stud.*, 397.

56. 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.

57. Judgment (C-240/09), para 52.

consistent interpretation, but it clearly directs its results. The question which arises is then how national courts would have to go about their interpretative duty if national procedural law did not allow for such an interpretation. This statement seems to be stronger than the previous statements of the ECJ concerning the scope of the national courts' interpretive duty.[58]

Finally, in this ruling the Court has certainly blurred the distinction between direct effect and consistent interpretation, given that what was not possible to achieve through direct effect is "pushed" by the ECJ through the backdoor of indirect effect. In this way, the ECJ has confirmed not only the significance and power of the doctrine of consistent interpretation, but also the paramount role of national courts in the effective enforcement of European law. National courts, as "courts of general jurisdiction",[59] have the task of ensuring that the rights derived to individuals from European law are effectively protected, even, if necessary, by disapplying or, as this ruling suggests, (more or less) creatively interpreting national procedural rules.

This ruling means the referring court must, by way of interpretation, admit the NGO as party to the proceedings. This outcome has, in fact, been reached. On 2 August 2011, the Slovakian Supreme Court decided on the cases in the framework of which the Court of Justice had been addressed. All rulings are based on a similar and quite short reasoning. The Supreme Court ruled that despite the lack of direct effect of Article 9(3) of the Aarhus Convention in EU law, it is necessary, in order to make effective protection of the environment as laid down by Union law possible, to treat the relevant NGO as a party to the proceedings (and not just an interested party who cannot challenge the administrative decisions before the courts).[60]

The ruling may also bring consequences for the legal systems in which NGOs are not, or, under very restrictive circumstances, able to challenge before a court decisions which are liable to be contrary to EU environmental law. These include, for example, Germany, in which, in principle, Paragraph 42(2) VwGO applies to the claims brought by NGOs, given that no measure was taken to implement Article 9(3) of the Aarhus Convention. In fact, when the German Government introduced the Bill which later became the

58. See e.g. C-403/01, *Pfeiffer and others* v. *Deutsches Rotes Kreuz*, [2004] ECR I-8835, para 117, 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".

59. See Case T-51/89, *Tetra Pak Rausing SA* v. *Commission*, [1990] ECR II-309, para 42. In this case, the CFI recognized for the first time that "national courts were acting as Community courts of general jurisdiction".

60. These cases can be found under 3Sžp/49/2009, 3Sžp/50/2009, 3Sžp/48/2009 and 3Sžp/47/2009 in the website of the Supreme Court of the Slovak Republic (<www.supcourt.gov.sk/rozhodnutia>, last visited 2 Dec. 2011).

Umwelt-Rechtsbehelfsgesetz, it declared that it was of the opinion that Article 9(3) of the Aarhus Convention was fully implemented in Germany by existing Community and national law.[61] The German courts are now, on the basis of this ruling, entrusted with the power and the duty, to interpret Paragraph 42(2) VwGO in such a way as to admit claims of NGOs alleging the violation of EU environmental law. Whether a broadening of standing for environmental NGOs is necessary also outside the scope of application of EU law, will be decided by the Aarhus Compliance Committee in response to the complaint discussed above, which concerns the violation of not only Article 9(2), but also Article 9(3) of the Convention.[62]

For Austria, a legal system also adopting, in principle, a right-based model to standing, this ruling comes together with the recent findings of the Compliance Committee which declared Austria in breach of its obligations arising out of Article 9(3).[63] The Austrian approach to standing[64] will thus have to be reformed both within and outside the scope of application of European law.

Finally, according to the above-mentioned report prepared by the European Network of Environmental Organizations, the "*brown bear*" ruling might have implications and extend the possibilities of standing for environmental NGOs also in other legal systems, such as Slovenia, Hungary and the Czech Republic.[65]

61. See the discussion on the UmwRG of 4 Sept. 2006 available at <dip.bundestag.de/btd/16/024/1602497.pdf>, 48 (last visited 23 Nov. 2011).

62. Communication ACCC/C/2008/31, *supra* note 44.

63. Draft findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2010/48 concerning compliance by Austria, 10 Nov. 2011, available at <www.unece.org/env/pp/compliance/Compliancecommittee/48TableAT.html> (last visited 23 Nov. 2011).

64. According to Art. 8 of the *Allgemeines Verwaltungsverfahrensgesetz,* persons who avail themselves of an activity of the authority or to whom the activity of the authority relates are to be considered as parties to the proceedings – and thus have *locus standi* – insofar as they are interested by virtue of a legal entitlement or a legal interest. The laws then specify the natural and legal persons whose legal interests are recognized by law and are thus considered as parties. The Compliance Committee found that "a number of Austrian environmental laws presented to the Committee do not provide standing for NGOs at all, while they may provide standing to neighbours" (para 73) and that these rules are so strict that they effectively bar NGOs from challenging acts or omissions that contravene national laws relating to the environment.

65. Report on Access to Justice in Environmental Matters, cited *supra* note 48.

6. Broader access to court for environmental NGOs: Practise what you preach?

A related comment should be devoted to what is perhaps the most striking feature of the outcome of these rulings: while the Court of Justice appears to be so critical towards national standing rules which restrict access to justice for environmental NGOs, it does not show nearly the same attitude when it comes to access to justice before the EU courts.

In the EU legal system, the action for annulment provided for in Article 263 TFEU (ex 230 EC) is the main mechanism for the judicial review of EU acts. This Article provides that a natural or legal person, which encompasses the "members of the public" within the meaning of the Aarhus Convention, may bring an action for annulment only in certain specific circumstances, namely in cases of challenges against "a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern" to the applicant.

As is well known, the Court's interpretation of its own standing rules, and specifically of the requirement of individual concern under Article 263(4) TFEU, is very restrictive, in application of the *Plaumann* test dating from 1963.[66] In the *Stichting Greenpeace Council* case, both the Court of First Instance and the ECJ[67] held that the *Plaumann* test "remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected"[68] and did not create an exception for environmental matters. This means that, in order to challenge an EU measure, environmental NGOs would have to show that the measure affects them "by reason of certain attributes which are peculiar to them or by reason of

66. Case 25/62, *Plaumann & Co* v. *Commission*, [1963] ECR 95. This case established that "[P]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed". For this approach, the ECJ has been widely criticized beyond the scope of environmental law. See e.g. Ward, "*Locus standi* under Article 230(4) of the EC Treaty: Crafting a coherent test for a wobbly polity", (2003) YEL, 45; Martin Cortés, "*Ubi ius, ibi remedium*? *Locus standi* of private applicants under Article 230(4) EC at a European constitutional crossroads", (2004) MJ, 233; Abaquense de Parfouru, "*Locus standi* of private applicants under the Article 230 EC action for annulment: Any lessons to be learnt from France?", (2007) MJ, 361. Specifically with regard to environmental policy, see e.g. Dette, "Access to Justice in environmental matters: A fundamental democratic right" in Onida (Ed.), *Europe and the Environment. Legal Essays in Honour of Ludwig Kra¨mer* (Europa Law Publishing, 2004), p. 1.

67. Case T-585/93, S*tichting Greenpeace Council (Greenpeace International) and Others* v. *Commission*, [1995] ECR II-2205. Appeal: Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others* v. *Commission*, [1998] ECR I-1651.

68. S*tichting Greenpeace* (T-585/93), cited *supra* note 67, para 50.

circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually".

To apply the provisions of the Aarhus Convention to EU institutions and bodies, the European Community adopted Regulation 1367/2006, which allows environmental NGOs, under certain conditions, to initiate proceedings before the European courts against acts of EU institutions and bodies.[69] One of the conditions is that environmental NGOs can only instigate proceedings "in accordance with the relevant provisions of the Treaty", namely Article 263(4) TFEU.[70] This phrase has been taken by the European Courts to mean, however, not just the provisions of Article 263(4) TFEU and the requirement of "individual concern", but also the interpretation which has traditionally been given to this phrase in the case law. After the approval of the Aarhus Convention and even after the entry into force of Regulation 1367/2006, the European courts have, in every case brought before them, refused to change the interpretation of "individual concern" established in *Plaumann*, with the result that environmental NGOs have consistently been refused access to the European courts.[71] This interpretation by the European courts of the requirement of individual concern under Article 263(4) EU does not seem to comply with the requirements of Article 9 of the Aarhus Convention, since the consequences of applying the *Plaumann* test to environmental issues is that in effect no NGO is ever able to challenge an environmental measure before the European Courts.

69. Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the application of the provisions of the Åarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, O.J. 2006, L 264/13.

70. Regulation 1367/2006, ibid., Art. 12(1). On this point and specifically with regard to the compliance by the EU with its obligations stemming from the Aarhus Convention, see Pallemaerts, *Compliance by the European Community with its obligations on access to justice as a party to the Aarhus Convention* (Institute for European Environmental Policy, 2009), p. 41. For a discussion of the drafting history of this Article, see Pallemaerts, "Access to environmental justice at EU level – Has the 'Aarhus regulation' improved the situation?", in Pallemaerts (Ed.), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, 2011), pp. 287 et seq.

71. Joined Cases T-236 & 241/04, *European Environmental Bureau (EEB) and Stichting Natuur en Milieu* v. *Commission*, [2005] ECR II-04945; Case T-91/07, *WWF-UK Ltd.* v. *Council*, [2008] ECR II-81, confirmed in appeal in case C-355/08 P, *WWF-UK* v. *Council*, [2009] ECR I-73; Case T-37/04, *Regiao autónoma dos Acores* v. *Council*, [2008] ECR II-103, confirmed in appeal in Case C-444/08, *Regiao autónoma dos Acores* v. *Council*, [2009] ECR I-200. For a closer examination of this case law, see Eliantonio, "Towards an ever dirtier Europe?: The restrictive standing of environmental NGOs before the European Courts and the Aarhus Convention", (2011) *Croatian Yearbook of European Law*, forthcoming; Pallemaerts (2011), op. cit. *supra* note 70, 297.

The Compliance Committee of the Aarhus Convention established in April 2011 that the standing requirements provided by Article 263(4) TFEU, as interpreted by the EU courts, are indeed "too strict to meet the criteria of the Convention".[72] Furthermore, the Committee stated that it was "convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned [i.e. the EU] would fail to comply with article 9, paragraph 3, of the Convention".[73]

It is worth noting that the ECJ has, on several occasions, justified this restrictive approach to the standing of private applicant in annulment actions by referring to the idea of a "complete system of remedies" created by the EC Treaty (now TFEU).[74] In the ECJ's view, this system is complete because an EU measure may be challenged either through a direct action under the former Article 230 EC (now 263 TFEU) or through the preliminary ruling procedure pursuant to the former Article 234 EC (now 267 TFEU). Hence, according to the ECJ, a restrictive interpretation of "individual concern" does not create a gap in the judicial protection, because individuals have the option to bring actions against the national implementation measures of EU measures before the national courts, which creates the obligation, pursuant to Article 267 TFEU and the ECJ's ruling in *Foto-Frost*,[75] to refer the questions of validity of EU measures to the ECJ.[76] However, for all the reasons highlighted by Advocate General Jacobs in the *UPA* case,[77] an indirect challenge of EU measures at the national level may not be regarded as an adequate substitute for a direct action before the European judicature, and may result in a complete denial of a remedy or in the denial of an effective remedy.[78] The first situation arises when the contested EU measure does not require any implementing act at the national level, so the only way for the applicants to have access to court is to violate the rules laid down in the contested EU measure and rely on the invalidity of this measure in domestic proceedings. It has been considered that this option is theoretically possible, but cannot be

72. Report of the Compliance committee of the Aarhus Convention, *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, 11–14 Apr. 2011, Geneva, available at: <www.unece.org/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1.edited.adv%20copy.pdf> (last visited 22 Nov. 2011), para 87.

73. Ibid., para 88.

74. Case 294/83, *Parti Ecologiste "Les Verts"* v. *European Parliament*, [1986] ECR 1339.

75. Case 314/85, *Foto-Frost* v. *Hauptzollamt Lübeck-Ost*, [1987] ECR 4199.

76. Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, [2002] ECR I-6677.

77. Opinion of A.G. Jacobs in *UPA*, cited *supra* note 76.

78. Koch, "*Locus Standi* of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy", (2005) EL Rev., 515.

sustained in a Union based on the rule of law.[79] As Advocate General Jacobs put it, individuals "cannot be required to breach the law in order to gain access to justice".[80] Hence, in such situations, the ECJ's reliance on the preliminary reference proceedings would result in a complete lack of judicial protection.

The second situation arises when applicants are able to gain access to national courts. For such situations, in the ECJ's view, "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection".[81] However, several problems can be observed with regard to the ECJ's reliance on national courts as a correct forum for cases in which the validity of EU legislation is in question, such as the fact that the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the ECJ or may err in their assessment of the validity of a EU measure and decline to refer a question to the ECJ on that basis. In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court. Furthermore, proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.

Hence, the argument of the alleged completeness of systems of remedies is not sufficient to escape a violation of Article 9 of the Aarhus Convention. The Compliance Committee also did not seem to be convinced by the "complete system of remedies" argument and argued that the indirect challenge of EU measures before national courts "cannot be a basis for generally denying member of the public access of the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies" and that the system of preliminary

79. Koch, op. cit. *supra* note 78, 515; Ragolle, "Access to justice for private applicants in the Community legal order: Recent (r)evolutions", (2003) EL Rev., 91; Albor-Llorens, "The standing of private parties to challenge Community measures: Has the European Court missed the boat?", (2003) CLJ, 87.

80. Opinion of the A.G. in *UPA*, cited *supra* note 76, para 43. The dilemma for individuals in such situations is explained by Corthaut: "either [the individual] obeys the regulation in spite of her doubts as to its validity – which may result in unnecessary losses – or she may choose to violate the regulation and hope that her hunch about its invalidity proves correct – if so, she walks free, otherwise little can save her from potentially severe punishment". Corthaut, Comment on *Jégo-Quéré*, (2002–2003) CJEL, 143. This situation is exactly what prompted the CFI to relax the test of standing in the *Jégo-Quéré* case and declare the action admissible.

81. *UPA*, cited *supra* note 76, para 41.

ruling does not compensate for the overly restrictive jurisprudence of the European courts on standing.[82]

7. Concluding remarks

The two rulings examined significantly broaden the access of environmental NGOs to national courts. The basis for this change is to be seen not just in the wording and objective of the Aarhus Convention, which is explicitly aimed at ensuring a broad access to justice in environmental matters, but also in the need for national procedural rules to respect the principles of effectiveness and effective judicial protection. At least for the *Trianel* ruling, there was probably no need to mention this principle, as Article 10a of the EIA was, in both cases, 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 chose to refer explicitly to the need to ensure an effective judicial protection of the rights which individuals derive from EU law as a limit to the procedural autonomy of the Member States even where they are implementing secondary EU law setting procedural standards. Following this ruling, German NGOs will no longer have to prove, in a claim based on an alleged violation of the EIA Directive, that they are relying on a provision which is abstractly intended to protect individual rights. Given the complaint pending against Germany before the Aarhus Compliance Committee, it is to be foreseen that a broader access to justice for environmental NGOs may have to be ensured also outside the scope of application of EU law.

For the *brown bear* ruling the situation is slightly different, as there is no measure taken at European level to give effect to Article 9(3) of the Convention. Here, the principle of procedural autonomy (as limited, as clearly stated by the Court, by the principle of effectiveness) still applies in full and, as Jans suggests, the facts of the case trigger the question whether it would not have been easier and perhaps more straightforward for LZ to claim that the national procedural rule at stake violated the principle of effectiveness.[83] The ruling entails an interpretive obligation on the part of the national courts which could, again, significantly impact the standing rules for environmental NGOs in various Member States.

In general, on the basis of these rulings, NGOs will have access to courts not only for the purposes of enforcing their right to participate in environmental

82. Report of the Compliance committee of the Aarhus Convention, cited *supra* note 72, para 90.

83. Jans, op. cit. *supra* note 5, 5.

decision-making procedures, but also in other matters covered by EU environmental law. From this, one may foresee that national authorities will prepare their decisions more carefully, which will ultimately enhance the effectiveness of EU environmental law.

Finally, in view of the Union's own failure to comply with Article 9 of the Aarhus Convention and to grant adequate standing to environmental NGOs before the European courts, it can only be hoped that, also thanks to the warning issued by the Compliance Committee, the EU courts will soon start to "practise what they preach". The final question is then whether the recognition of a broader standing for applicants would require a Treaty amendment. Despite the CFI's opinion to the contrary in the *Autonomous Region of the Azores* case, it can be argued that another interpretation of the criteria laid down in Article 263(4) TFEU is possible, and, in fact, required,[84] given that, according to Article 216(2) TFEU, international agreements are "binding upon the institutions of the Union". Nothing in Article 263 TFEU suggests that if an applicant is to prove individual concern *vis-à-vis* a measure of general application, that person needs to prove that he is differentiated from all other persons in the same way as an addressee: the *Plaumann* formula, in other words, is not contained in the Treaties, but it is the European courts' interpretation of the phrase "individual concern". The Treaty phrase itself cannot be altered by the ECJ, but changing the interpretation given to it is not something that needs to be left to the Member States, but it is the Court's responsibility.

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84. Pallemaerts, op. cit. *supra* note 70, 311.

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