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The EIA Directive and Access to Justice

Some remarks on the new directive, old provisions and the rapid development of case-law

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1. Introduction

The key provision on access to justice under the EIA Directive (2011/92) is Article 11. The definition of the “public concerned” in Article 1(e) is also essential in this respect. As no amendments or alterations have been discussed for these provisions, one might conclude that there is little to say on the subject in a book about “the new directive”. Even so, I still want to take the opportunity to make some general remarks about access to justice in this context. There are several reasons for this. First, the EIA Directive is one of the main tools in EU law for implementing the obligations of the Aarhus Convention.¹ Second, there are some clarifications in the new provisions about public participation and the duty of the administration to issue formal decisions on various positions that have an impact on the access to justice issue, albeit indirectly. And third, the case-law of the Court of Justice of the European Union (CJEU) has developed rapidly – and also quite radically – in the last couple of years. One can argue that this has given the existing provision on access to justice a new meaning, or at least, improved the understanding of the requirement for judicial protection under the Directive.

In my article, I begin by describing the key provisions on public participation and access to justice in the Directive and the amendments to them that now are in place. Thereafter, I draw a broad picture of the most important cases from the CJEU concerning access to justice. This is followed by discussions of a couple of key issues that I think are worth elaborating upon in this context. Here, I also include some of the most important decisions from the Aarhus Convention’s Compliance Committee. First, I set out some starting points for the discussion to follow. Next, I highlight the relationship between the concepts of “direct effect” and individual’s “rights” and the principles of effectiveness and judicial protection according to EU law. Thereafter, I discuss how to define “public concerned” and the distinction between general and personal interests in relation to individual’s standing. The next issue concerns the role of environmental non-governmental organisations (“NGOs”). This is followed by an analysis of the concept “courts or tribunals” in environmental decision-making procedures. This last point also touches on questions concerning the implementation of the Aarhus Convention into EU law. However, the reader will notice that I choose not to discuss the cost issue. The main reason is that, because of its scope and complexity this issue requires an article of its own. Another reason is that a scholar coming from a country which basically has no costs in its environmental procedure is not in a strong position to discuss these questions in any detail.

2. Provisions on public participation and access to justice in the EIA Directive

As can be read from recitals 16 and 17 in the preamble to the Directive, the provisions on public participation aim at increasing the accountability and transparency of the decision-making processes and contributing to public awareness of environmental issues and support for the decisions taken. According to recitals 18-21, those provisions, together with the provision on access to justice, serve to implement Articles 6, 9.2 and 9.4 of the Aarhus Convention.

¹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998, 2161 UNTS 447).

The “public” and “the public concerned” are key elements in public participation and access to justice. The definition of the latter in Article 1(e) of the EIA Directive echoes the wording of Article 2.5 of the Convention, namely “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.

Article 4.2 of the Directive states that the competent authority shall determine whether a project shall be made subject to an EIA (“screening decision”). According to Article 4.4 of the existing Directive, the authority’s decision shall be made available to the public. This requirement is replaced by a new provision in the coming Directive, clarifying that the obligation to issue a formal decision and make it public applies irrespective of whether or not the authority finds that a project shall be made subject to an EIA. If the authority finds that an EIA is not required, the reasons for this have to be presented. As a rule, the screening decision shall be issued within 90 days from the date on which the developer has submitted all the information required (Article 4.5).

Article 6 of the Directive deals with public consultation in the EIA procedure. This provision is amended with the requirement that the notices to the public shall be made electronically (Article 6.2), and that the Member States shall provide for reasonable timeframes for the procedure, no less than 30 days (Articles 6.6 and 6.7). Also minor adjustments are made to Article 8 about the information that shall be made public when the competent authority decides whether or not to permit the project.

As mentioned above, the key provision on access to justice lies in the unaltered Article 11. As with the definition in Article 1(e) of the Directive, this article uses the same wording of the Aarhus Convention. In short, the Member States are required to offer the public concerned access to a review procedure before a court of law or another independent and impartial body to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. Those who belong to the public concerned can either be individuals and groups having a sufficient interest or those maintaining the impairment of a right. Environmental non-governmental organisations (ENGOS) shall be deemed to meet both these criteria. The requirement for access to justice does not preclude the possibility for the Member States to maintain a system of administrative appeal as a condition for going to court. Finally, the procedures of administrative appeal or judicial review shall be fair, equitable, timely and not prohibitively expensive.

3. The CJEU’s case-law on Article 11 of the EIA Directive

As already mentioned, the EIA Directive has triggered a huge amount of cases in the CJEU. Only a fraction of this body of case-law deals directly and expressly with the requirements for access to justice. However, one cannot easily distinguish those cases from the ones that deal with issues such as “direct effect” of the EIA Directive. Moreover, important standpoints have been taken by the CJEU on the principles of effectiveness and judicial protection under EU law in all kinds of cases. Clearly, those judgments are also instrumental when discussing access to justice under the Directive. I therefore also refer to some of these landmark cases in order to give a fuller picture.

When adopted in 1985, the EIA Directive did not include any express provisions on access to justice. Although the requirements for public participation were strengthened in

the 1997 amendments, the main reform on access to justice came with the implementation of the Aarhus Convention through the 2003 “Public Participation Directive” (PPD), i.e. Directive 2003/35/EC.² Even so, the CJEU clarified long before that date the doctrine of direct effect together with the principle of judicial protection of EU law in relation to the EIA Directive. Examples of landmark cases in this respect are C-431/92 *Grosskrotzenburg* [1995], C-72/95 *Kraaijeveld* [1996], C-435/97 *WWF* [1999] and C-201/02 *Delena Wells* [2004]. Here, the CJEU declared that individuals must be able to rely on unconditional and sufficiently precise provisions in the Directive before a national court and that that court is obliged to set aside (“disapply”) any national rule incompatible with those provisions. Already at this stage, the CJEU clearly included environmental non-governmental organisations (NGOs) such as the WWF in the circle of persons who have access to justice rights.³ In *Delena Wells*, the court stated that the Member States are free to decide how those rights shall be enjoyed according to their own procedural order in accordance with the principle of procedural autonomy. However, the national procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to come to court (principle of effectiveness).⁴ Moreover, at the request of the public concerned, the national authorities must undertake the necessary measures to remedy any breach of the provisions of the EIA Directive, even if that would lead to negative effects for the operator of the activity in question. Such a fulfilment of the obligations to protect the environment and interests of the neighbours – and the fact that the operations must be halted to await the result – cannot be described as an illicit effect of the Directive.⁵

Since the ratification of the Aarhus Convention in 2005, the development of case-law on access to justice has been rapid.⁶ Most of these cases deal with the EIA Directive. In C-75/08 *Mellor* [2009], the CJEU made clear that, at the request of the public concerned, a competent authority must give reasons for its decision that an EIA is *not required*. The information thus provided can be regarded as sufficiently reasoned if it enables the public concerned to decide whether to appeal the authority’s standpoint on the issue. The criteria for NGO standing in Sweden requiring organisations to have at least 2,000 members, was found in breach of Article 11⁷ of the EIA Directive in C-263/09 *Djurgården* [2010].⁸

² Directive 2003/35/EC of the European Parliament and of the Council 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.

³ See for example C-435/97 *WWF* [1999], para. 68-71.

⁴ C-201/02 *Delena Wells* [2004], para. 70.

⁵ C-201/02 *Delena Wells* [2004], para. 57-58, see also Advocate General Kokott’s opinion in C-165/09, para 147.

⁶ See Brakeland, J-F: Access to justice in environmental matters – development at EU level. The article is published in *Gyoseiho-kenkyu*, 2014, No 5, an anthology of contributions at the conference Towards an effective guarantee of green access, held at Osaka University in Japan in March 2013. All contributions in the anthology are in Japanese, although Brakeland’s article is also available in English on the link <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf>. The conference papers can be found at <http://greenaccess.law.osaka-u.ac.jp/english/international-symposium-march-2013>

⁷ The judgment actually concerned Article 10a of EIA Directive (85/337) before the codification through 2011/92. Throughout the article, however, I refer to today’s provisions where the content of the Article is unaltered.

In C-115/09 *Trianel* [2011], the CJEU made it clear that ENGOs have standing rights of their own to challenge decisions according to rules in national law implementing EU environmental law, as well as provisions under that EU law having direct effect. In two cases – C-128/09 *Boxus* and C-182/10 *Solvay* [2012] – the Belgian Supreme Administrative Court and the Constitutional Court respectively asked the CJEU for a preliminary ruling on Article 1.4 that exempts projects from EIA requirements when they are adopted by a specific act of national legislation. The CJEU set up strict conditions for this exemption. Moreover, it clarified that any restriction in the ability of national courts to review those conditions in a specific case is incompatible with the access to justice provision of the Aarhus Convention and the EIA Directive and must therefore be disapplied. The judgment in C-72/12 *Altrip* [2014] came just some months ago. Here, the CJEU made clear that the public concerned must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by the EIA Directive. Therefore, individual members of that public have standing rights to challenge permit decisions based on the claim that there have been defects in the EIA, unless it can be clearly established from information provided by the developer and the authority that the contested decision would not have been different without the procedural defect.

In many Member States of the Union, environmental proceedings involve high costs for the public concerned.⁹ Such costs include participation or administrative appeal fees, court fees, lawyers' fees, experts' and witness' fees and bonds for obtaining injunctive relief (also called securities or cross-undertakings in damages). On this issue the CJEU has, as of today, delivered three leading cases. In the first – C-427/07 *Irish costs* [2009] – the court found that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the Directive. In C-260/11 *Edwards* [2013], the court stated that the assessment as to what is prohibitively expensive cannot be carried out solely on the basis of the financial situation of the person concerned. It must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, they must neither exceed the financial resources of the person concerned nor appear to be objectively unreasonable. In deciding that figure, other factors are relevant, including whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and the protection of the environment as well as the complexity of the relevant law and procedure. Also the existence of legal aid or a cost protection regime should be taken into account. Finally, in C-530/11 *Com v. UK* [2014], the CJEU repeated the statement that mere judicial practice in a Member State without any other guidance on the cost issue is uncertain by definition and cannot therefore be regarded as a valid implementation of the cost requirement in Article 11 of the EIA Directive. The CJEU also emphasized once again that the evaluation of the “prohibitively expensive” criterion must cover all financial costs resulting from participation in the judicial proceedings in order to assess them as a whole. The evaluation of expenses must also include cross-undertakings

⁸ A summary of the CJEU cases from *Djurgården* and onward is published on the website of the Task Force on Access to Justice under the Aarhus Convention, see <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/jurisprudenceplatform.html>.

⁹ See Darpö 2013, section 2.4.

in damages as a condition for the granting of interim relief. Even though Member States are required to offer the public concerned the possibility to ask for such injunction, it is a matter for national law to decide the conditions for this. The requirement that environmental proceedings must not be prohibitively expensive cannot be interpreted as immediately precluding the application of a financial guarantee in this situation. The CJEU also said that the same is true of the financial consequences that might result from an action that constitutes an abuse.

As mentioned above, Article 11 of the EIA Directive also requires that the national procedures are fair, equitable and timely and not prohibitively expensive. This effectiveness criterion was dealt with in C-416/10 *Križan* [2013], although it concerned the access to justice provision of the IPPC Directive (96/61, today 2008/1), which is identical. Here, the CJEU stated that this provision means that members of the public concerned must be able to ask the reviewing court or tribunal to order interim measures such as injunctive relief to suspend the application of a permit, pending the final decision.

One cannot discuss access to justice in environmental matters without reference to C-240/09 *Slovak Brown Bear* [2011]. Although this case does not concern the EIA Directive – or even Article 9.2 of the Convention – it is essential for the understanding of mixed agreements in EU law and Member State law, and, in addition to that, also for issues concerning access to justice in environmental matters.¹⁰ The *Slovak Brown Bear* was decided by the Grand Chamber of the CJEU and started as a reference for a preliminary ruling concerning whether Article 9.3 of the Aarhus Convention has “self-executing effect” within an EU Member State’s legal order. The background is that in its declaration of competence at the signing of the Aarhus Convention the EU stated that the Member States are responsible for the performance of the obligations according to this provision and will remain so unless and until the Union adopts provisions covering implementation. In answering the questions, the CJEU first pointed out that the Aarhus Convention is signed and approved by the Community and that, according to settled case-law, the provisions of the *Convention form an integral part of its legal order*. The Court therefore has jurisdiction to give preliminary rulings on the interpretation of provisions falling under that agreement, especially in a situation which fell within the scope of both national law and EU law and therefore required a uniform interpretation. The CJEU went on to say that, according to Article 216 TFEU, a provision in an agreement concluded by the EU with a non-member country is directly applicable when it contains a clear and precise obligation which is not subject to the adoption of any subsequent measure.¹¹ This cannot be said about Article 9.3 of the Aarhus Convention, since only members of the public who meet certain criteria in national law are entitled to exercise the rights provided for therein. However, the CJEU stated that even so, the courts of the Member States have a *Union law obligation to interpret, to the fullest extent possible, the procedural rules of environmental law in accordance with the objectives of Article 9.3 and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation to be able to challenge before a court an administrative decision liable to be contrary to EU environmental law*.

¹⁰ Brakeland 2014, p. 9f.

¹¹ Among a great number of cases, the CJEU made a reference in this context to C-213/03 *Étang de Berre*.

4. Starting points for the discussion on access to justice

To begin with, I would like to give some starting points for the discussion to follow. The first concerns the relationship between the case-law of the CJEU and the decisions of the Compliance Committee of the Aarhus Convention. The following relates to a couple of important conclusions that can be drawn from the judgments and decisions from both those bodies concerning two important issues, which are worth emphasizing from the outset.

As already mentioned, the CJEU's case-law on the EIA Directive consists of a great number of judgments. Furthermore, the number of decisions on substantive matters from the Compliance Committee is now getting close to 50. The CJEU obviously plays a central role in interpreting EU law concerning access to justice and thereby – albeit indirectly – the provisions of the Aarhus Convention. In contrast, the Compliance Committee does not have a self-evident position in relation to the access to justice provision of EU law. And as usual, the CJEU rarely refers to any body outside of Luxembourg. However, it is noteworthy that, from 2012 and onwards, there has been an increasing acceptance of the Implementation Guide of the Aarhus Convention. Although the CJEU emphasizes that the Guide is not binding as to the interpretation of the Convention, it still can be taken into consideration for the understanding of certain provisions therein.¹² Not very surprisingly, the Advocate Generals have been even more generous in their reference to the Convention documents and the Compliance Committee. Be that as it may, in my discussion of EU law I feel free to make references to various decisions of the Compliance Committee. The reason for this is that, although the statements are not binding, they play an important part in the understanding of the Convention and accordingly work as “interpretive factors”. This is, of course, especially true when the decisions have been endorsed by the Meeting of the Parties. In those cases, they have become important elements of the building of international norms in the field of environmental democracy.¹³

In the early days of the Aarhus Convention and its implementation into EU law, many Governments in the Member States took the view that the access to justice rights for the public concerned – and especially for the ENGOs – only covered the possibility to appeal on formal grounds and only when their participatory rights had been breached. In other words, Article 9.2 of the Aarhus Convention is only meant as a guarantee that the public concerned will be invited to make its voice heard in the participation phase. With this view, the access to justice rights do not require a possibility of using legal means to challenge the outcome of those proceedings, that is the permit decision. Today, in the light of recent years' case-law from the CJEU and the national courts in most Member States, that view seems outdated and overtaken by a more democratic attitude. Even if Article 9.2 does not clearly say so, the meaning of “substantive or procedural legality” is hard to understand in any other way than requiring that all kinds of decisions under the environmental procedure are challengeable, including the final one. This was also something that the CJEU made clear in the *Djurgården* case, when it said that the organisation “must be able to have access to a review procedure to challenge the decision by which a body has given a ruling on a request for development consent”.¹⁴ This was repeated in *Trianel*,

¹² C-204/09 *Flachglas Torgau* [2012], para 36, C-182/10 *Solvay* [2012], para 27, C-260/11 *Edwards* [2013], para. 34 and C-279/12 *Fish Legal* [2013], para 38, 46, 50, 60 and 61.

¹³ See Koester 2008.

¹⁴ C-263/08 *Djurgården* [2010], para. 37-39.

where the court stated that the ENGOs have “a right to rely before the courts, in an action contesting a decision authorising projects” according to the EIA Directive.¹⁵ It may also be noted that the Compliance Committee has found the idea that access to justice covers only the public’s rights in the participation phase of the procedure in non-compliance with Art. 9.2 of the Aarhus Convention.¹⁶ Clearly, today it is safe to say that Article 11 covers all kinds of decisions under the EIA Directive.

A closely related issue concerns administrative omissions and the relationship between Articles 9.2 and 9.3 of the Convention. As noted, Article 9.2 is implemented through the PPD (2003/35) to the EIA Directive and IPPC/IED Directives. Article 4.2 of the EIA Directive states that the competent authority shall determine whether a project shall be made subject to an EIA (“screening decision”). The new Article 4.5 clarified that the obligation to issue a formal decision applies irrespective of whether or not the authority finds that a project shall be made subject to an EIA. A comparison of this provision with Article 11 – stating that the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions shall be appealable – makes clear that the public concerned shall be able to challenge a negative screening decision in court. In my view, it also clarifies that the possibility to challenge the authority’s omission in that respect belongs to Article 9.2 of the Aarhus Convention. Understood otherwise, the word “omission” would lose all meaning. This is also how I read the CJEU’s reasoning in *Mellor*.¹⁷ Similar reasoning is found in the *Boxus case*, where the national courts are called upon to check the legality of a measure undertaken in a Member State, whereby certain projects *are exempted* from the requirements of the EIA Directive.¹⁸ To conclude, if an authority decides that an EIA is not needed, this still falls under Article 9.2, not under Article 9.3.¹⁹

Article 3.5 of the Aarhus Convention states that the provisions therein shall not affect the right of a Party to maintain or introduce broader access to justice or wider public participation in environmental decision-making procedures. In addition, the Convention does not require any derogation from existing rights (Article 3.6). Early on, these provisions – especially Article 3.6 read together with the “Sofia Guidelines” – were interpreted as a “non-deterioration clause”, that is, a general prohibition on the Parties weakening the possibilities for the public concerned to obtain environmental information, make their voices heard in public participation and have access to justice. For example, this was the viewpoint that was expressed in the Implementation Guide of 2000.²⁰ However, this cannot be read from the text of either of the Articles, which instead merely states that nothing prohibits the Parties from giving the public wider possibilities in relation to the three pillars of the Convention. This issue was discussed by the Compliance Committee in a case concerning Hungary (C/2004/4 *Hungary*). After the ratification of the Aarhus Convention, access to justice in that country was weakened by the introduction of a form of

¹⁵ C-115/09 *Trianel* [2011], para. 59.

¹⁶ C/2008/33 *United Kingdom* (2011-08-24), para. 123 and C/2010/50 *Czech Republic* (2012-06-29), para. 79-81.

¹⁷ C-75/08 *Mellor* [2009], para. 66.

¹⁸ Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus* [2011], para. 57. See also Darpö 2013 (sections 3.2.2 and 3.2.3) with similar reasoning concerning Article 24 and 25 of the IED.

¹⁹ This view is also shared by the Compliance Committee, see C/2010/50 *Czech Republic*, para. 82 and C/2011/60 *United Kingdom*, para 83.

²⁰ Implementation Guide (2000), p. 46, 115, 119 and 129.

narrower judicial review concerning decisions on large scale projects.²¹ In its decision, the Compliance Committee stated that this issue had been discussed during the preliminary proceedings which led up to the Convention, and that the Parties deliberately chose at that time not to rule out the possibilities to undertake changes or deteriorations at national level in these matters, as long as the requirements of the Convention were not breached. Nevertheless, as the Committee found that deterioration in this respect were not in line with the spirit of the Convention, it suggested that the Meeting of the Parties should issue a recommendation on the matter. As the MoP2 in Almaty did not adopt such a recommendation, I conclude that Article 3.6 does not prohibit deterioration in the information, public participation and access to justice possibilities, provided, of course, that the requirements of the Convention still are met.²² This is also stated in the second edition of the Implementation Guide (2013).²³

Finally, some words about the interests of the operators from the perspective of access to justice under the EIA Directive. As noted above, the CJEU stated in *Delena Wells* that the national authorities must undertake the necessary measures to remedy any breach of the provisions of the EIA Directive, even if that would lead to negative effects for “third parties”, that is those who operate the activity in question. Furthermore, in some cases, objections have been raised to the effect that the access to justice for the public concerned might result in infringements of the operator’s property rights according to the European Convention on Human Rights (ECHR). The CJEU has not been convinced. In *Križan*, the Court stated that a decision of a national court that annuls a permit granted in breach of that directive is not capable, in itself, of constituting an unjustified interference with the developer’s right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.²⁴ This was further developed in *Com v. UK*, where the CJEU stated that the right to property is not an absolute right, but must be viewed in relation to its social function. It may therefore be restricted, provided that those restrictions correspond to objectives of general interest and do not constitute disproportionate and intolerable interference. Protection of the environment is one of those objectives and is thus capable of justifying a restriction on the right to property.²⁵ CJEU has also dealt with the closely related prohibition against retroactive legislation in Article 7 of ECHR. In *Altrip*, the Court held that the EIA Directive as such does not apply when the application for consent for a project was lodged before the implementation date of the Directive. However, the access to justice provisions do not create new requirements, but are instead designed to improve access to a legal remedy. Even if this will cause delays in the procedure, a disadvantage of that kind is inherent in the review of the legality of administrative acts falling within the scope of the Directive. It is also in line with the objectives of the Aarhus Convention, aiming at the contribution of the public concerned in preserving, protecting and improving the quality of the environment and protecting human health.²⁶

²¹ C/2004/4 (Hungary), para. 18.

²² See ECE/MP.PP/2005/2/Add.6 (decision II/5), para. 3. See also Koestler in EPL 2007 p. 92. Professor Veit Koestler from Denmark was chairing the Compliance Committee between 2004 and 2011.

²³ The Aarhus convention: An implementation guide (2nd ed., Geneva 2013), p. 59ff.

<http://www.unece.org/env/pp/publications/aig.html>

²⁴ C-416/10 *Križan* [2013], para. 111-116.

²⁵ C-530/11 *Com v. UK* [2014], para. 70.

²⁶ C-72/12 *Altrip* [2013], para. 21-31.

5. Direct effect of EU law and the principle of judicial protection

When discussing access to justice and EU law, I think it is essential to raise some points about the relationship between the concepts of “direct effect” and individual’s “rights” and the principles of effectiveness and judicial protection.

As the reader is well aware, Article 288 TFEU states that directives are binding as to the result to be achieved, but leave to the Member States the choice of form and methods for their implementation. Moreover, the primacy of EU law in the Member States is – broadly speaking – secured by the Colson principle of loyal interpretation and the doctrine of direct effect. The CJEU commonly describes direct effect as something that belongs to provisions of a directive that are unconditional and sufficiently precise. In those cases concerned individuals must have the possibility to rely on those provisions in legal proceedings, thus enabling the national court to take them into consideration in determining whether the national rules have failed to implement the directive correctly. If it is not possible to interpret the national provisions in line with the directive, the courts are obliged to set them aside (“disapply”) and the authorities of the Member States are obliged to undertake all measures necessary to secure the implementation of the Union law requirements. Thus, the idea of sufficiently precise and unconditional provisions having direct effect contains two elements; first, the possibility to rely on those provisions before a national court, and, second, the obligation for the court to apply them directly in preference to any national legislation inconsistent with them.

The starting point for the doctrine of direct effect originally came in 1963 in the renowned case *Van Gend en Loos*.²⁷ From the outset the CJEU applied the doctrine in relation to “rights” for individuals. The first cases on this question concerned competition, social security, consumer protection and so on. In those situations, there is typically an easily identified actor able to trigger the case. Early on, however, the Court also found that the doctrine of direct effect should be employed with respect to environmental protection. Initially, this viewpoint was adopted with regard to health protection in the *TA Luft* cases of 1991 (C-361/88 and C-59/89). The case-law continued in this vein and the landmark case in this respect is C-237/07 *Janecek* from 2008. It concerned an individual who lived close to the ring road around Munich. He demanded that the authorities should undertake all measures necessary to secure that the ambient air concentration of particulate matter did not exceed the quality standards according to Directive 96/62, including drawing up an action plan. The CJEU stated that the Directive conveys a clear obligation when there is a risk that the limit values will be exceeded. Therefore, natural and legal persons directly concerned must be in a position to require the competent authorities to draw up such plan, if necessary, by bringing an action before the competent courts. Moreover, the Union law obligation exists irrespective of any other course of action according to national law that the public concerned may have for requiring the authorities to take measures to combat atmospheric pollution.²⁸ In *Janecek*, as in many cases thereafter concerning air quality, the CJEU has emphasized that the possibility for the public concerned to rely on a provision with direct effect applies in particular in respect of a directive that is designed to protect public health.²⁹ This has led many authors to discuss the

²⁷ Case 262/62 *Van Gend en Loos*, REG 1963 s. 13.

²⁸ C-237/07 *Janecek* [2008], para. 34-42.

²⁹ For a fairly recent example, see joined cases C-165/09 to C-167/09 *Stichting Natuur en Milieu* [2011].

issue of direct effect as something that primarily concerns individual rights for private persons. The underlying reasoning seems to be that the concept of rights has now expanded to health issues, such as a certain quality of ambient air and water.³⁰ In my view, this perspective is too narrow.

As mentioned above, some of the first cases on the EIA Directive – long before the EU ratification of the Aarhus Convention – dealt with the doctrine of direct effect. Many of these cases were brought to court by ENGOs. A reasonable conclusion to be drawn from the very outset is therefore, that organizations are equal to “individuals” in this context. In addition, in these cases the CJEU seems to focus not on “rights”, but on “obligations”. Thus, in *WWF*, the court stresses the possibilities for those concerned to be able to rely on the provisions in the Directive in order to challenge an administrative decision in court, especially in relation to the obligation of Member States “to pursue a particular course of conduct”.³¹ Accordingly, other authors argue that “rights” for individuals is a procedural rather than a substantive issue. To these authors, it is all about the possibilities open to the public concerned, and the ways and means available, to challenge decisions by authorities in relation to demands for a certain environmental quality in accordance with clear indications under EU law.³² The Direct effect of EU law has also been described as the duty of the court or another authority to apply the relevant provision ex officio, either as a norm governing the case or a standard for legal review”.³³ In this way, they argue, provisions with direct effect could be used by all concerned parties, regardless of whether or not they provide “individual rights”. In my view, the latter position is correct and it was finally confirmed in *Trianel*, a landmark case on ENGO standing. Here, the CJEU stated that the “rights capable of being impaired” – which is the condition for ENGO standing in the EIA Directive – *must necessarily include the rules of national law implementing EU environment law and the provisions of the directive having direct effect*.³⁴

Viewed from this perspective, the rights of individuals and direct effect form two separate and distinct concepts. Rights for individuals mainly become of interest when claims for damages are made on a Member State for failing to implement correctly EU law according to *Francovich*.³⁵ The principle of direct effect also goes further than the Colson principle of loyal interpretation, since it means that sufficiently precise and unconditional provisions of EU law have primacy over national legislation under certain circumstances. Furthermore, the requirement “to be able to rely on” means that the public concerned shall have standing in order to challenge decisions of national authorities on subjects that are covered by the provisions of the directive, irrespective of whether they are implemented in national legislation or not. The underlying reason for this is that the public plays a crucial role as guardian of the correct application of EU law, as was already

³⁰ See Craig & de Burca (2011), part XX. Even Krämer 2011 (part XX) discusses the doctrine of direct effect mainly in relation to Environmental Quality Standards for air and water.

³¹ C-435/97 *WWF* [1999], para. 68-71.

³² Jans & Vedder 2011, Chapter 5 (pp. 222-231).

³³ Prechal p. 241.

³⁴ C-115/09 *Trianel* [2011], para. 48.

³⁵ Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357. C-420/11 *Leth* [2013], shows that there is little room for State liability towards individuals who suffer damage from an activity that has been approved without a preceding EIA in breach of the Directive.

stressed by the CJEU in *Van Gend en Loos*.³⁶ This is even more true when it comes to EU environmental law and has been emphasized by the CJEU in a number of cases concerning the Aarhus Convention and its implementation into the EIA Directive.³⁷

6. The double approach on standing

Article 11 of the EIA Directive states that those members of the public concerned who either have a “sufficient interest” in the matter or maintain an “impairment of a right” have standing in environmental cases. What constitutes a sufficient interest and impairment of a right shall be determined consistently with the objective of giving the public concerned wide access to justice. The provision thus builds on a “double approach” to standing in environmental cases, allowing both for interest-based and rights-based systems. This reflects the fact that within the Member States, there are great variations between those systems that allow anyone to challenge administrative decisions and omissions on environmental matters (*actio popularis*) and those that restrict the possibility of judicial review only to those members of the public who can show that their individual rights have been affected. Several countries have a system of “municipal review” which is close to *actio popularis* for citizens of the local community (e.g. Austria, Belgium, Finland and Sweden). In contrast, a strict form of the right based system is expressed in the protective norm theory (*Schutznormtheorie*), which applies in other countries. In Germany and Austria, the complainants have to show that the decision or omission may concern their individual or subjective public-law right. For example, in the case of a permit for an industrial installation, affected persons can only challenge those parts of the decision that are designed to protect their individual interests in a very limited sense (“rights”), commonly concerning discharges known to be hazardous to human health. Even if they are allowed to appeal the decision, all other arguments invoked in favour of the cause are dismissed as being outside the scope of the trial. Thus, general issues of environmental protection are regarded as the prerogative of the administration and can never be brought before the court for review. However, most of the Member States of the Union use a more or less “interest-based” approach when determining standing. Even if the distinction between a “right-based” and an “interest-based” system is not always easy to identify, the latter countries may be said have a more liberal approach to standing. If potential litigants live or spend time in the vicinity of the above-mentioned industrial activity and there is a risk that they will be affected by emissions, disturbances and other inconvenience from that activity, they are allowed to challenge the permit in court. In addition to this, there is commonly no or little restriction as to the scope of the trial, meaning that any argument can be used to advance their cause, including general compliance with environmental law.

A number of issues can be discussed in this context. To begin with, what individuals should have standing according to EU law to appeal decisions under the EIA Directive? A closely related question concerns what is sometimes called “the intensity of the review”, that is, what lies within the wording “substantive and procedural legality”. The starting-point for this discussion is that both Article 9.2 of the Aarhus Convention and

³⁶ *Van Gend en Loos* [1963], the second last paragraphs (not numbered) above “The second question”, see Brakeland 2014, p. 6.

³⁷ C-260/11 *Edwards*[2013], para. 40, C-530/11 *Com v. UK* [2014], para. 47, XX...

Article 11 of the EIA Directive allow for *actio popularis*, but do not require such a solution.³⁸ Neither do they require abstract norm control, a procedural solution which is quite common in the Member States of the Union.³⁹ Instead, restrictions can be made in the circle of persons who have standing by defining the individual's interests or rights. This was expressed by the CJEU in *Trianel*, confirming that the Member States have significant discretion to determine the conditions for the admissibility of actions. In doing so, standing for individuals can be confined to those with *individual public-law rights*.⁴⁰ However, the Court did not explain in more detail what this expression means, as the *Trianel* concerned ENGO standing. In *Altrip*, Advocate General Cruz Villalón found reason in his opinion to elaborate on the relationship between individual and general interest, mainly drawing conclusions from *Trianel*.⁴¹ To begin with, Cruz Villalón pointed to the CJEU's statement that Article 11 requires that decisions, acts and omissions under the EIA Directive must be actionable in a review procedure to challenge their *substantive or procedural legality*, without in any way limiting the pleas that could be put forward in support of such an action.⁴² In his view, the provision contains discretion for the Member States, but only in order to decide the issue of standing. When it comes to what kind of interests individuals can use to advocate their cause, no such restriction can be set. Instead, according to Cruz Villalón, it follows from the Aarhus Convention, Article 19 TFEU and the principle of effectiveness that individual members of the public concerned may invoke any provision of Union law concerning the environment in order to show that their action is well-founded. In this respect, "individual" and "general" interests are closely related.⁴³ However, in the judgement in *Altrip*, the CJEU never discussed this issue. The Court merely repeated the statement about Member States' discretion in *Trianel*, adding that it would be permissible for national law not to recognise impairment of a right if it established that a contested decision would not have been different without the procedural defect.⁴⁴ It is for the national court to decide this on the basis of the material that the authorities have provided for in the case, taking into account the seriousness of the defect and, in particular, whether that that defect has deprived the public of its information and participation rights according to the EIA Directive.

It is not easy to draw any clear conclusions from these dictums by the CJEU. A first observation is that the Advocate General seems to be analysing what individuals can invoke in the case, once they are in court. The CJEU, for their part, seems to discuss a different question, namely standing to come to court. This may make a difference. And furthermore, I am not sure whether I agree with Cruz Villalón's conclusion that it follows from the Court's statements in *Trianel* that individuals can invoke all kinds of interests

³⁸ This was made clear in a decision from the Compliance Committee in a case concerning Belgium (*C/2005/11 Belgium* para. 35).

³⁹ Even though the possibility of abstract norm control exists in many Member States, it cannot generally be regarded as a requirement under EU law – or required by the European Convention of Human Rights for that matter (ECtHRs judgments in the cases *Norris v. Ireland*, *Klass v. Germany* and *Västberga taxi v. Sweden*).

⁴⁰ C-115/09 *Trianel*, para 45 and 55.

⁴¹ The opinion (62012CC0072) is available in 22 of the official languages, but not in English.

⁴² 62012CC0072, para 66, 82 and 85.

⁴³ 62012CC0072, para 100. Advocate General Kokott seems to share this viewpoint, see her opinion in C-165/09, para 145.

⁴⁴ C-72/12 *Altrip*, para 50 and 51.

from EU law to argue their case in court. Another interpretation is that the CJEU actually meant what it said: that Member States have a significant discretion to determine the conditions for the standing of individuals, including the confinement to *individual public-law rights*. The crucial question here is to understand what that expression – deriving from German “subjektiv-öffentliches Recht” – actually means. To me at least, it is not very clear. What is clear, though, is that in *Janecek*, the CJEU derived “rights” from Directive 96/62 that went further than just protecting his interests, namely to the drawing up of an action plan for improving ambient air quality. And in *Stichting Natuur en Milieu*, the CJEU said that, concerning provisions with direct effect, “natural and legal persons directly concerned must be able to require the competent authorities, if necessary by bringing the matter before the national courts, to observe and implement such rules”.⁴⁵ What this means in a concrete situation remains to be seen. In my view, these statements – together with the wording in Article 11 of the EIA Directive that the public concerned shall have the possibility to challenge “the substantive and procedural legality of any administrative acts and administrative omissions” – suffice to show that the trial concerns all aspects of the legality of the administrative decisions under the Directive. This is also the standpoint which the Compliance Committee has taken in relation to Article 9.2 of the Aarhus Convention.⁴⁶

7. The role of ENGOs

It has been argued that it follows from the Aarhus Convention that there always has to at least one individual who is able to appeal a decision on environmental law. The proponents assert that this can be derived from the statement of the Compliance Committee in 2008 in a case concerning Denmark. Here, an individual claimed that he was denied access to justice because national procedural law failed to give him the possibility of challenging in court a municipality’s decision on the culling of rooks. However, the Committee stated that the mere fact that that particular private person could not challenge such a decision did not constitute a breach of the Convention, *but some member of the public must be able to do so*.⁴⁷ My reading of this statement is different from the one mentioned above. Standing for individuals is an issue that is basically left to the national courts to decide. Accordingly, there are great disparities in the Member States as to how to define this interest in relation to individual complainants. In some systems, standing is allowed to individuals as soon as they spend time in an area, for example to birdwatchers in a forest or bathers on a shore where developments are being planned.⁴⁸ In other interest based systems those persons would surely not have standing. In fact, many Member States do not allow standing for individuals to appeal decisions concerning “green issues”, e.g. on nature conservation or species protection. I do not think one can immediately rule out these systems as being inconsistent with the Aarhus Convention or EU law. The CJEU has confirmed that it is acceptable to have a standard for individual’s standing that requires some kind of connection between that person and the activity in question. If this

⁴⁵ C-165/09 *Stichting Natuur en Milieu* [2011], para 100.

⁴⁶ See C/2010/48 (Austria), para 66.

⁴⁷ C/2008/18 (Denmark), para 32.

⁴⁸ Darpö 2013, p. 13f.

connection is very weak or remote, the system comes very close to *actio popularis*. And, as I have argued above, this is not required by either the Convention or EU law.

My understanding of the Compliance Committee's statement in the Danish case is that *some member of the public must be able to challenge the decision* means, that an individual or an ENGO must have the possibility to take action against the environmental decision in question. This reading is also in line with the EU law principle of effectiveness. Read this way, the statement emphasizes the crucial role that is played by the ENGOs in this area of law, as was expressed in the *Trianel* case. According to the CJEU, these organisations are carriers of such "interests" and "rights" that follow from provisions of EU environment law and for which they should enjoy legal protection.⁴⁹ Or as Advocate General Sharpston puts it, ENGOs have "automatic" standing.⁵⁰ Thus, Article 11 has direct effect concerning ENGO standing and the CJEU has left very little room for Member State discretion in this context. And as argued above, these standing rights relates to all kinds of omissions and decisions under the EIA Directive. Accordingly, the Member States are not allowed to restrict ENGO standing to certain categories of decisions under the Directive, such as "permits", "exemptions", etc.

Some criteria for ENGO standing, however, may be given in national procedural law. To begin with, the aim of the organisation must be clear from its statutes or activity. In a few Member States, a numerical criterion for the minimum of members is used.⁵¹ According to the *Djurgården* case, this is allowed, but only in order to ensure that the ENGO does in fact exist and still is active.⁵² After the judgement of the CJEU in this case, the numerical criterion in Swedish law was changed in this respect, requiring only 100 members for an ENGO to have standing. As an association in my country can be formed by as few as three members, this is, in my view, still not in line with EU law. More common among the Member States are requirements for registration, length of existence or activity and that the organisation should be non-profit. Of these, the time criterion is commonest and most debated. To my knowledge, Member States' criteria in this respect range from one or two years year to five years.⁵³ It can also be noted that the Aarhus Regulation (1367/2006) requires ENGOs to have been active for at least two years to have standing in the CJEU. The time criterion is an effective barrier to access to justice for ad hoc organisations. However, as the CJEU stressed in the *Djurgården* case, local organisations play an important role in public participation in environmental decisions, it would not be very surprising if the Court set restrictions on what the Member States can do in this respect. The effects of using a time criterion may, in fact, be inconsistent in certain situations with the objective of giving the public concerned wide access to justice. For example, this may occur when it is required that the organisation must already have been active for a certain period of time at the beginning of an EIA procedure, even for the challenging of decisions made under that procedure many years later.

⁴⁹ C-115/09 *Trianel*, para. 55-59.

⁵⁰ Sharpston's opinion in *Trianel*, para 49-53.

⁵¹ See Darpö 2013, section 2.2. As a curiosity, it can be mentioned that SAS – surfers against sewage – is an active ENGO in UK.

⁵² C-263/08 *Djurgarden* [2010], para. 47.

⁵³ As of today, only Slovenia has five years and is under pressure from the Commission to shorten this time.

One final observation will be made here that is generally applicable to both individuals and ENGOs in environmental decision-making procedures. In some Member States participation is used as a gate-opener for access to justice, meaning that anyone who took part in that stage of the procedure has access to justice thereafter. But more common is a system in which participation is a prerequisite for access to justice. Understood this way, only those who have raised their voices in the participatory stage of the decision-making procedure are allowed to challenge the final outcome in court. In a number of these countries, this condition is read narrowly, only allowing those issues that were objected to in the participatory stage to be challenged in court. For my part, I have concerns as to the negative effect on access to justice. Individual members of the public have basic confidence that the authorities are protecting their interests and rely on the idea that they are “doing their job”. In my experience, it is actually quite common for even a permit decision to come as a surprise to neighbours and people residing in the vicinity. To respond to them afterwards with the argument that they should have showed more interest in the preparatory stage of the decision making is therefore not very convincing. Furthermore, in complex projects where an EIA is required, it is often difficult to get a clear picture of every element of the permit decision in the participatory stage. In addition to these concerns, one might also argue that this issue was addressed and settled in the *Djurgården* case. Here, the CJEU stated that the public concerned should have access to justice “*regardless of the role they might have played in the examination of that request by taking part in the procedure before that [permit] body and by expressing their views*”.⁵⁴ Although the issue at stake in *Djurgården* was not whether participation was a prerequisite for access to justice, the CJEU statement has widely been understood to mean that participation cannot be used as a condition for standing in environmental cases.⁵⁵ Be that as it may, I think it is debatable whether this criterion is compatible with the basic idea of access to justice in environmental matters. It is therefore conceivable that the CJEU will rule out this criterion, reasoning that members of the public shall have standing even without having participated in the decision-making procedure.

8. Court and tribunal

When discussing access to justice, standing is, for obvious reasons, one of the key issues. As noted, another concerns the intensity of the review. In addition, it is also important to highlight the question of *what means* are available for the public concerned when challenging environmental decisions. A aspect of this issue concerns *what kind of reviewing body* the public has access to. This has been discussed by the CJEU in many cases, e.g. *Delena Wells* and *Trianel*. Here, the Court stated that, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction in those cases. However, the national rules must not be less favourable than those governing similar domestic actions (*principle of equivalence*) and must not make it impossible or excessively difficult in practice to exercise rights conferred by EU law (*principle of effectiveness*). The latter reflects what has also been called the principle of judicial protection, now laid down in Article 19 TFEU. This Treaty pro-

⁵⁴ C-263/08 *Djurgården*, para 39.

⁵⁵ See for example *Jans & Vedder* at p. 232f. For a fuller description of the issue in the *Djurgården* case, see *Darpö* 2013, section 3.3.5.

vision makes clear that the Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. In my view, it is noteworthy that – in contrast to Article 47 of the Charter of Fundamental Rights and Freedoms of the European Union – Article 19 TFEU does not mention “rights”. Instead, the principle of judicial protection means, together with the doctrine of direct effect, that whenever there is a provision in EU environmental law that is unconditional and sufficiently precise, the public concerned must have standing before a court to protect the interest protected therein. From the *Boxus* case, it may also be concluded that if there is no such possibility in the national system, it is the obligation of any court in the Member State to review the case at the request of that public.⁵⁶

All these cases concerned Article 11 of the EIA Directive, which expressly requires that the public have access to a review procedure before a court of law or another independent and impartial body established by law. However, they also touch on the question of whether the principle of judicial protection applies even in situations when there are no clear provisions of EU law on access to justice. This was expressed by Advocate General Sharpston in the *Djurgården* case, when she pointed to the fact that the case-law of the CJEU contains numerous statements to the effect that Member States cannot lay down procedural rules which render impossible the exercise of the rights conferred by Union law (the *Unibet* formula).⁵⁷ This conclusion is actually not very surprising, as Union law “rights and obligations” cannot survive all by themselves, in a vacuum so to speak. There must also be someone who has the possibility of going to court for the protection of those rights and obligations. In this way, the principle of judicial protection sets up clear restrictions on the procedural autonomy of Member States. In the following, I will discuss this issue in the light of both Article 9.2 and Article 9.3 of the Aarhus Convention.

The expression “court of law or another independent and impartial body established by law” in Article 11 of the EIA Directive derives directly from Article 9.2 of the Convention. This expression is commonly understood as similar to “independent and impartial tribunal established by law” according Article 6 ECHR. Therefore, guidance as to what constitute a court or tribunal can be found in the case-law of the European Court of Human Rights (ECtHR).⁵⁸ This jurisprudence shows that a number of tribunals outside the ordinary courts system, dealing with various areas of law, have generally satisfied the formal requirements. The ECtHR regards the expression “tribunal” as an autonomous concept, meeting certain criteria.⁵⁹ First, it must be established by law and undertake its functions of determining matters within its competence on the basis of rules of law, fol-

⁵⁶ C-128/09 *Boxus* [2011], para. 57.

⁵⁷ Opinion by Advocate General Sharpston in C-263/08 *Djurgården* [2010], para. 80 with reference to joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995], para. 17, case C-129/00 *Commission v Italy* [2003], para. 25, case C-432/05 *Unibet* [2007], para. 43 and joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007].

⁵⁸ The description here of the case-law of the ECtHR is the same as in the Implementation Guide 2013, see box at p. 196. However, I feel free to copy, as I am the author of the text in that box. See also Darpö 2009, section 3.2.

⁵⁹ Thus the following tribunals were accepted by the European Court of Human Rights: a board for deciding compensation for criminal damage in Sweden, *Rolf Gustafsson v. Sweden*, ECHR 1997-07-01; an authority for real estate transactions in Austria, *Sramek v. Austria*, ECHR 1984-10-22; a prison board in UK, *Campbell and Fell v UK*, ECHR 1984-06-28; and an appeals council of the Medical Association of Belgium, *Le Compte et al v Belgium*, ECHR 2000-06-22.

lowing proceedings conducted in a prescribed manner. Second, the members of the tribunal must be independent and impartial. The independence of a body is to be determined in the light of the manner of appointment of its members, the duration of their terms of office, and guarantees against outside pressures. It is also important whether or not the body is seen to be independent by impartial observers. Lay assessors are generally acceptable, but in specific cases their objectivity can be questioned.⁶⁰ Moreover, there cannot be any restrictions on the scope of the examination in the reviewing body. Finally, the decision of the court must be binding, prohibiting the government or other authorities from having it set aside. In relation to EU law, it is widely understood that the bodies meeting the requirements of being “tribunals” according to Article 6 of the ECHR, are also regarded as courts under Article 267 TFEU.⁶¹ Thus, one can conclude that the expression “court of law or another independent and impartial body established by law” in Article 9.2 of the Aarhus Convention and Article 11 of the EIA Directive requires that the reviewing body meets the criteria for being a court or tribunal according to ECHR and EU law. So when the CJEU states in *Trianel* that Member States have a significant discretion to determine the bodies before which an environmental action actions may be brought,⁶² these bodies still have to meet this standard.

In my view, it follows from Article 216 TFEU and the *Slovak Brown Bear* that the requirement of a “court or tribunal” in Article 9.2 has “self-executing effect” in the contracting Parties to the Aarhus Convention, including the Union and its Member States. In addition, the similar requirement in Article 11 of the EIA Directive has direct effect in the Member States. It is important to note the difference between Article 9.2 and Article 9.3 in this respect. The first provision allows for a system where the complainant is required to have exhausted the possibilities for administrative appeal before s/he is able to take action in court, but does not allow that administrative appeal replaces judicial review. This is also reflected in Article 11 of the EIA Directive. The demand for impartiality and independence thus rules out common administrative appeal, although certain appeal bodies may pass the test.⁶³ In contrast, Article 9.3 of the Aarhus Convention is open to a system that allows for only administrative appeal, even though certain demands regarding impartiality can be derived from the general criteria of Article 9.4, requiring that the remedies must be appropriate and fair. Accordingly, it may also be crucial to decide under what Article of the Aarhus Convention a decision falls, in respect of the quality of the reviewing body.

⁶⁰ In the case of *Langborger v. Sweden*, ECHR 1989-06-22, the Housing and Tenancy Court was not accepted in a case concerning the right of the applicant to stay outside the organisations that had nominated the lay assessors. However, in this case, the European Court also commented that such members “appear in principle to be extremely well qualified to participate in the adjudication of disputes between landlords and tenants and the specific questions which may arise in such disputes” (para 34).

⁶¹ See C-9/97 and C-118/97 about the Finnish Maaseutuelinkeinojen Valituslautakunta (Rural Business Appeals Board) and C-205/08 about the Austrian Umweltsenat.

⁶² C-115/09 *Trianel*, para 55.

⁶³ In my view, the English tribunal system is one example, the Danish Nature and Environmental Appeals Board (NMKN) might be another. However, concerning NMKN, this question is complicated by the fact that the Board cannot request the CJEU for a preliminary ruling without asking the Ministry of Justice for its opinion. In addition to this, concerns have been raised about the independence of the Board’s members, see Pagh, P in MAD 2009.1405. For a general view on the Nordic court systems, see Tegner Anker, H & Fauchald, OK & Nilsson, A & Suvantola 2009, also Darpö 2009.

As argued above, in my view all decisions during an EIA procedure fall under Article 11 of the Directive, including negative screening decisions. However, there are other situations that are covered by Article 9.2 of the Aarhus Convention that may not be correctly implemented in EU law. For example, different viewpoints have been expressed on whether all activities that are covered by the Convention are included in the Directive. Article 6.1.a and Annex I cover listed activities where an EIA is obligatory, basically reflected in Annex I to the Directive. Some doubts have, however, been expressed as to whether the provisions about changes and extensions of those activities are the same as in the Convention.⁶⁴ Moreover, Article 6.1.b applies to all kinds of other activities that may have a significant effect on the environment, even unlisted ones. As this provision includes the wording “in accordance with its national law”, different interpretations are possible. Some governments argue that the provision gives the Parties absolute discretion to decide on which activities are covered the requirement for an EIA, whereas others take the view that the Convention obliges the Parties to apply the test to every activity that might have a significant effect on the environment.⁶⁵ Forestry can be used as an example. Clear-cutting activities may cover hundreds of hectares and have an immense effect on the environment. Nevertheless, those activities are not covered by either by Annex I to the Convention, or Annex I or II to the EIA Directive. Be that as it may, we can agree that *if* there are divergences between the Convention and the Directive, Article 6.1 has self-executing effect in this respect and shall, accordingly, be applied directly by the Member States. As a consequence, the access to justice provision in Article 9.2 also applies directly.

Other situations clearly fall outside the scope of Articles 6 and 9.2 of the Convention. Various decisions under the Habitats Directive (92/43) have been used as an example. If an Appropriate Assessment according to Article 6.3 of that Directive is undertaken in an integrated procedure together with an EIA according to the new Article 2.3 in the EIA Directive, this decision falls under Article 11. In contrast, if such an assessment is made in a separate procedure, that decision falls under Article 9.3 to the Convention. The same applies to various decisions under Article 16 of the Habitats Directive, derogating from the strict protection of listed species. In these situations, the Union law requirements for the public concerned to have a say in the matter will depend upon all the factors discussed above; the doctrine of direct effect and the principle of judicial protection, together with the “so as to enable-formula” of the *Slovak Brown Bear*. As described above, that formula means that when someone who is concerned by the decision – typically an ENGO – appeals, the reviewing body has to interpret the national procedural rules “so as to enable” the organisation to have standing. This formula has had an immediate and quite astonishing impact on the national courts in the Member States. Perhaps one of the most important judgments came in September 2013 from the Federal Administrative Court in Germany in the *Darmstadt* case. Here, the Court granted an ENGO standing to appeal a clean air plan, arguing that the German Code on Administrative Court Procedure needed to be interpreted in light of Article 23 of Directive 2008/50 and Article 9.3 of the Aarhus Convention. In my country, Sweden, ENGOs traditionally did not have standing

⁶⁴ See Jendroska, J: Public Participation under Article 6 of the Aarhus Convention. Role in Tiered Decision-Making and Scope of Application. In *Environmental Democracy and Law - Public Participation in Europe* (ed. G. Bandi), Europa Law Publishing 2014, p. 132 and 138.

⁶⁵ Jendroska 2014, p. 134.

to appeal hunting decisions on wolves, despite the fact that the species is protected by the Habitats Directive.⁶⁶ In 2012, the Supreme Administrative Court decided to alter its position under the influence of international and EU law and allowed ENGO standing for the first time.⁶⁷ Recently, that court applied the same approach to a decision concerning permits for clear-cutting operations according to the Swedish Forestry Act, legislation which is purely national. The underlying reason for this – along with the usual arguments about international obligations – is systematic. One can hardly handle a procedure where there is one kind of standing for decisions covered by Union law, and another for purely domestic ones. In the environmental law area, Union law and the national law are extremely interwoven and any effort to already make a distinction at the appeal stage in a case would lead to endless and futile discussions.

Finally, there also exist situations where it is not possible for the national court to interpret the national procedural rules “so as to enable” ENGO standing. Let me give yet another Swedish example. The Government and the hunters’ associations in my country are very upset by the fact that the administrative courts consistently disallow the wolf hunting decisions of the Environmental Protection Agency (EPA). The countermove from the Government – which is taken in the midst of an ongoing infringement proceeding with the Commission – is to delegate decisions on hunting of large carnivores to the county administrative boards. The main reason for this is that such regional decisions are appealable to the EPA, but no further. Thus, they cannot be reviewed by a court, at least if the decision is appealed by an ENGO. The applicant may in some situation appeal to court if the hunt concerns his or her “civil rights and obligations” according to ECHR, which certainly is the case when the decision concerns protective hunting according to Article 16.1.b of the Habitats Directive. The applicable provision in the hunting legislation about appeal is absolute and not possible to interpret “so as to enable” ENGO standing. Any court which is nevertheless faced with such an appeal must therefore dismiss it, or, alternatively, grant ENGO standing *contra legem*. The latter solution is not required by the *Slovak Brown Bear* formula, but, on the other hand, is not unthinkable. If I am not mistaken, this is actually what the Slovak Supreme Court did when the CJEU had delivered the answers to their questions.⁶⁸ And one can argue that this is where the principle of judicial protection comes into play. There are many reasons why a system with only administrative appeal is questionable from the perspective of the principle of judicial protection under EU law. The most important is that interests that are protected in provisions in EU law with direct effect need legal protection. In addition to this, there is another reason, which, even though it is not so obvious, may prove decisive. Parts of the administration – such as the Swedish EPA – are not regarded as courts according to Article 267 TFEU and cannot ask the CJEU for preliminary rulings. The consequence is that a procedural order only providing for administrative appeal deprives the CJEU of its role as the ultimate interpreter of EU law. The Swedish Government thinks that the reform is a bril-

⁶⁶ See Darpö 2009b and Darpö 2011.

⁶⁷ For a comment on the case, see Darpö and Epstein 2013. Both the *Darmstadt* case and the *Kynna* case are posted on the website of the Task Force on Access to Justice, see footnote 8XX. For more cases where national courts have applied the formula from the *Slovak Brown Bear* case, see Brakeland 2014 p. 15f.

⁶⁸ See *The VLK Case Slovakia – Application of Art. 9 Para. 3 of the Aarhus Convention According to the Decision of the Court of Justice of the European Union*. Justice and the Environment 2011, <http://www.justiceandenvironment.org/files/file/2011%20ECJ%20SK.pdf>.

liant solution to the problem of the “court circus”. For my own part, I am not convinced. However, I think it is quite obvious what the CJEU would say about such a procedural order. But of course, that would require that someone to request the Court for a preliminary ruling on the matter.

9. Concluding remarks

Throughout the years that have elapsed since the EU’s ratification of the Aarhus Convention in 2005 and its implementation into the EIA Directive, the development of access to justice in the Member States show diverging trends. On the one hand, the possibilities for members of the public to challenge environmental decisions have improved in some countries in various ways, e.g. by relaxation of the standing criteria for individuals or ENGOs, or increased possibilities to go to court. To some extent, this has been the result of pressure from the European Commission or the Compliance Committee of the Aarhus Convention. The main driving force, however, has been the case-law of the CJEU. In addition to the many cases directly concerning the EIA Directive, the *Slovak Brown Bear* has had a very strong impact in this respect.⁶⁹

On the other hand, there is a tendency in the opposite direction, much in line with the strong movement for “better regulation”. Of course, this tendency has been strengthened by the economic crises in our countries. One fairly common feature is that large-scale projects, such as nuclear power stations, offshore activities, infrastructure projects and other activities considered to be of vital public interest are decided at a high level of the administrative hierarchy (government or central authorities) or are approved according to a “plan”. The possibilities for the public to effectively challenge such policy decisions in court are commonly weak or non-existent. Despite the fact that most of these projects are covered by the EIA Directive, there has been an increasing tendency to “escalate” the decision-making in such projects. A closely related trend is that in some countries, the use of generally binding rules that replace individual permits have disallowed the public from “interfering” in decision making. In addition, several of the Member States studied have introduced or raised court fees or have started to apply the loser pays principle in some environmental cases.

The overall picture of the status of access to justice under Article 9.2 of the Aarhus Convention and Article 11 of the EIA Directive can therefore still be described as quite divergent, random and inconsistent. Still more guidance from the CJEU on the issue is therefore needed and will surely come in both Article 258 TFEU and Article 267 TFEU proceedings. I guess we all can agree that this will be very welcome.

⁶⁹ In addition to those national cases that have been touched on previously in the article, it is also worth mentioning a decision from the Belgian Supreme Court. Here, the Court changes its traditional position and allowed an ENGO to take action for reparation in a criminal case dealing with illegal construction (PP and PSLV v. Gewestelijk Stedenbouwkundig Inspecteur and M vzw (Hof van Cassatie, 11 June 2013, Nr. P.12.1389.N). The case is posted on the website of Task Force on access to justice, see footnote 8XX.

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