

**Study Paper**

**No 4/15**

**The principle of effective judicial protection  
when Member States implement EU law -  
An analysis of the rules on access to court and  
standing for environmental NGOs in Belgium  
and Germany**

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November, 2015

**Europa-Kolleg Hamburg  
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**Please quote as follows:**

Europa-Kolleg Hamburg, Institute for European Integration, Study Paper No 4/15,  
<http://www.europa-kolleg-hamburg.de>

# **The principle of effective judicial protection when Member States implement EU law -**

## **An analysis of the rules on access to court and standing for environmental NGOs in Belgium and Germany**

Celien Coltura\*

### **Abstract**

This thesis analyses the extent to which the EU legal order influences the national procedural frameworks of the Member States. There exists a tension between the general principles of EU law that grant Member States autonomy regarding their procedural framework (the principle of procedural autonomy) and those that restrict it (the principles of equivalence & effectiveness, of effective judicial protection and of a complete system of legal remedies and procedures). The question thus arises to what extent the EU legal order may influence the national procedural frameworks. This is examined for the concrete example of the rules on access to court and standing for environmental organisations in the Belgian and German legal order. The Aarhus Convention is of great relevance in this respect as it requires the parties to it to grant environmental NGOs a wide access to justice, in contrast with the traditionally very restrictive rules found in many legal systems. As the Convention forms an integral part of the EU legal order binding the EU as well as the Member States, the Member States have to take account of the Convention and of the requirements imposed by the EU legislation and case-law relating to the Convention. Belgium and Germany traditionally restrict access to court, albeit in a different way, requiring respectively the demonstration of an interest and the demonstration of an individual right. The analysis showed that the EU legal order influences the procedural frameworks of both countries to a considerable extent. The influence on the German legal system has however been more outspoken.

**Keywords:** Principle of national procedural autonomy - principle of effective judicial protection – principle of equivalence – principle of effectiveness – Access to court – locus standi – environmental NGOs – Aarhus Convention – implementation of EU law – Belgian procedural law – German procedural law

\* This paper was submitted by Celien Coltura in June 2015 as a thesis for the degree “Master of Laws (LL.M.)” at the Europa-Kolleg Hamburg (supervisor: Prof. Dr. Markus Kotzur).

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## **List of Abbreviations**

AC	Aarhus Convention
ACCC	Aarhus Convention Compliance Committee
BNatSchG	Bundesnaturschutzgesetz
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
Cass	Hof van Cassatie (Belgian Court of Cassation)
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ENGO	Environmental non-governmental organisation
EU	European Union
GwH	Grondwettelijk Hof (Belgian Constitutional Court)
MS	Member States
RvS	Raad van State (Belgian Council of State)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UmwRG	Umweltrechtsschutzgesetz
VwGO	Verwaltungsgerichtsordnung

## A. Introduction

In order to ensure environmental protection it is of outmost importance to grant environmental non-governmental organisations (hereafter: ENGOs) access to justice and standing so as to overcome the enforcement deficit in the area of environmental law.<sup>1</sup> Traditionally, many legal systems only granted standing – *locus standi* – to subjects with a private interest or an individual right.<sup>2</sup> As violations of environmental law frequently concern the population as a whole without any particular person being singled out, it was difficult, if not impossible, to enforce environmental law via court proceedings.<sup>3</sup> The environment has indeed “no voice of its own”.<sup>4</sup> In this regard the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, better known as the Aarhus Convention (hereafter: AC), constitutes a great innovation as it reinforces the role of ENGOs by requiring that they are granted a wide access to justice.<sup>5</sup>

The European Union (hereafter: EU) and its Member States (hereafter: MS) are both parties to the AC. The Convention forms an integral part of the EU legal order implying that the rules concerning interpretation, implementation and enforcement of the *acquis* are applicable.<sup>6</sup> For the MS the AC and the related EU legislation constitute a complex whole of which they need to take account in addition to their national rules.<sup>7</sup>

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<sup>1</sup> Zengerling, Greening International Jurisprudence – Environmental NGOs before International Courts, Tribunals, and Compliance Committees, p. 2.

<sup>2</sup> Ebbeson, in: Ebbeson (ed.), Access to justice in environmental matters in the EU – Accès à la justice en matière d’environnement dans l’UE, p. 4.

<sup>3</sup> Oliver, in: Fordham international law journal 2013, p. 1431.

<sup>4</sup> Krämer, in: JEEPL 2009, p. 25; Poncelet, in: JEL 2012, p. 289 and Oliver (fn. 3), p. 1431.

<sup>5</sup> Articles 1 and 9(2) (2) AC; Opinion of Advocate-general Sharpston in *Djurgården*, Case C-263/08, ECR, EU:C:2009:421, para. 64 and Schaap, in: AJV Nieuwsbrief 2013, p. 2.

<sup>6</sup> Judgment in *Lesoochránárske zoskupenie*, Case C-240/09, ECR, EU:C:2011:125, para. 30; Sambon (fn.5), p. 376; De Sadeleer (fn. 6), p. 98 and Jendroška, in: JEEPL 2012, p. 76.

<sup>7</sup> Lavrysen, in: Martens (ed.), Liège, Strasbourg, Bruxelles: parcours des droits de l’homme. Liber amicorum Michel Melchior, p. 652.

For this reason national procedural rules on access to court and standing are influenced by EU law provisions, by the case law of the Court of Justice of the European Union (hereafter: CJEU) and by the AC itself. This causes a tension with the EU law principle of national procedural autonomy according to which, in the absence of relevant EU law provisions, it is first and foremost the MS that are in charge of implementing, applying and enforcing EU law within the framework of their national procedural law.<sup>8</sup> This procedural principle is however not absolute. Indeed, even in the absence of EU legislation, the CJEU has subjected national procedural rules to a number of EU principles, namely the principles of equivalence (principle of non-discrimination) & effectiveness (exercising EU law may not be made excessively difficult or impossible)<sup>9</sup>, the principle of effective judicial protection (MS have to grant individuals sufficient remedies in order to ensure the effective enforcement of the rights they derive from EU law)<sup>10</sup> and the principle of a complete system of legal remedies and procedures (Union acts have to be made subject to judicial control, either via direct actions before the Union courts, or through preliminary references from national courts. This principle has to be guaranteed in the first place by the national legal orders that have to open up their rules on access to judicial relief if necessary)<sup>11</sup>.

Thus, the EU grants MS autonomy regarding their procedural framework, but at the same time frames this autonomy. The question therefore rises to which extent EU law in practice influences the national procedural frameworks. In order to examine this, we will analyse the extent of the EU law influence on the concrete example of the rules on access to court and standing for ENGOs in Belgium and

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<sup>8</sup> *Audit*, in: *Dutheil de la Rochère* (ed.), *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, p. 253.

<sup>9</sup> *Timmermans*, in: *REA Law* 2014, p. 40.

<sup>10</sup> *Wennerås*, *The Enforcement of EC Environmental Law*, p. 82 and *Lenaerts*, *Effective judicial protection in the EU*, 2013, pp. 1-2, available at <http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf> (3 March 2015).

<sup>11</sup> *Wennerås* (fn.10), pp. 83-84, 112.



Germany. The research question reads: “What is the extent to which EU law influences the Belgian and German procedural frameworks with regard to the rules on access to court and standing for ENGOs?”

The choice to focus the research on the procedural frameworks of Belgium and Germany is based on the basic foundation that underlies the rules on access to court and standing in the two countries. The German legal system aims first and foremost to protect individual public rights (a system of subjective legal protection).<sup>12</sup> Traditionally, the grant of *locus standi* hinged on the condition that the plaintiff could rely on a rule conferring him/her an individual right.<sup>13</sup> The Belgian legal system on the other hand aims at controlling the objective legality of the actions of the administration (a system of objective legal protection) and makes standing conditional upon the demonstration of an interest to bring an action.<sup>14</sup> Whereas the Belgian system holds a middle position in comparison to the rules in other MS, Germany has traditionally one of the most restrictive rules on access to court and standing.<sup>15</sup> It is thus clear that both legal systems restrict access to court and standing in a certain way. This makes it possible to analyse the extent to which the AC, the related EU law provisions and the CJEU’s case-law induce the two systems to relax their rules on standing. On the other hand, the fact that the Belgian and German systems have a different basic structure underlying their procedural framework makes it interesting to compare the difference in influence of the EU legal order on both systems.

In part B I will outline the different EU principles that generally govern national procedural law as a whole, *i.e.* the principles of national procedural autonomy, of equivalence & effectiveness, of

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<sup>12</sup> Schenderlein, *Rechtsschutz und Partizipation im Umweltrecht*, p. 73; Liu, *Europäisierung des deutschen Umweltrechts*, p. 46; Pauliat, in: RFDA 2008, pp. 227-228 and Schlacke, in: Erbguth (ed.), *Effektiver Rechtsschutz im Umweltrecht? – Stand, aktuelle Entwicklungen, Perspektiven –*, p. 121.

<sup>13</sup> Schenderlein (fn. 12), pp. 73-74.

<sup>14</sup> Schenderlein (fn. 12), pp. 73-74 and Pauliat (fn. 12), p. 228.

<sup>15</sup> Darpö, in: Jans/Macrorry/Moreno Molina (eds), *National Courts and EU Environmental Law*, pp. 176-177.

effective judicial protection and of a complete system of legal remedies and procedures. Through this outline, I will be able to demonstrate the exact power play between the autonomy of the MS and the influence of EU law in general. This will allow me to make a preliminary assumption on the extent of the EU law influence on national procedural law.

In Part C I will verify this assumption via an analysis of the influence of EU law on the rules of access to court and standing with regard to ENGOs, as a concrete example of an area of national procedural law. After an introductive Chapter 1, I will discuss the EU legal framework with regard to access to court and standing for ENGOs in Chapter 2. In Section a) I will present the relevant legislation in the EU legal order, *i.e.* the AC and the EU implementing measures. I will concentrate my analysis on article 9 AC. Within this article, I will discuss subparagraphs (2) and (3) which grant access to justice for decisions requiring public participation (article 9(2) AC) and for all other decisions relating to the environment (article 9(3) AC). Section b) is devoted to the relevant case-law of the CJEU, with a focus on three important cases relating to article 9 AC and the related EU implementing measures, namely the judgments *Djurgården*, *Trianel* and *Lesoochranárske zoskupenie* that clarify the meaning and scope of the EU legislation. In Chapter 3 I will analyse the Belgian (Section a)) and German (Section b)) procedural rules on access to court and standing for ENGOs. For each country I will present the procedural framework by examining whether the national legislation and the case-law were influenced by the EU legal order on access to court and standing (subsection a.). In subsection b., that is closely linked to the previous subsection, I will assess the exact influence of the EU legal order on these rules. In Section c) the exact extent of the influence of the EU legal order on both countries is compared.

## B. EU principles governing national procedural law

### 1. Overview

The relation between national procedural law and the EU legal order is regulated by a number of EU principles caught by the settled case-law of the CJEU:

“Applying the principle of cooperation laid down in [article 4(3) Treaty on the European Union], it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [Union] law. Accordingly, in the absence of [Union] rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [Union] law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by [Union] law (principle of effectiveness).”<sup>16</sup>

This passage expresses the interplay between the principle of national procedural autonomy on the one hand, and the principles of equivalence and effectiveness which constrain the former principle, on the other hand.<sup>17</sup>

According to the principle of procedural autonomy, in the absence of EU rules on the subject, MS have the autonomy to organize their procedural legal framework.<sup>18</sup> As the Union does not have a general procedural system of its own, the enforcement of EU law rights is

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<sup>16</sup> See *i.a.* Judgment in *van der Weerd*, Joined Cases C-222/05 to C-225/05, ECR, EU:C:2007:318, para. 28; Judgment in *Impact*, Case C-268/06, ECR, EU:C:2008:223, paras 44, 46 and Judgment in *Allassini and Others*, Case C-320/08, ECR, EU:C:2010:146, para. 47. This settled case-law started with the Judgment in *Rewe-Zentralfinanz*, Case C-33/76, ECR, EU:C:1976:188 and Judgment in *Comet*, Case C-45/76, ECR, EU:C:1976:191 (see *infra*).

<sup>17</sup> *Lenaerts/Maselis/Gutman*, EU Procedural Law, p. 107.

<sup>18</sup> *Ibid.*, p. 107.

essentially realized via these national legal frameworks.<sup>19</sup> At the same time, however, MS are by virtue of article 4(3) Treaty on the European Union (hereafter: TEU) (loyalty principle) under an *obligation de résultat* to ensure the full enforcement and protection of EU law rights. The requirements posed by the principles of equivalence and effectiveness on the national procedural systems are the concrete expression of this duty.<sup>20</sup>

Recently,<sup>21</sup> the CJEU has moreover ruled on issues concerning national procedures in terms of the principle of effective judicial protection.<sup>22</sup> This principle is since the Lisbon Treaty enshrined in article 19(1) TEU and article 47 Charter of Fundamental Rights of the European Union (hereafter: Charter).<sup>23</sup> It obliges MS to ensure that individuals have remedies available to them in order to effectively enforce their EU law rights (article 19(1) TEU) and confers at the same time a right to an effective remedy on individuals (article 47 Charter).<sup>24</sup>

Lastly, the principle of a complete system of legal remedies and procedures, closely related to the principle of effective judicial protection, ensures that natural and legal persons are able to enforce their Union rights either in front of Union courts, or in front of national courts.<sup>25</sup> According to this principle, EU acts have to be made subject to judicial control, either via direct actions before the Union courts, or through preliminary references from national courts.<sup>26</sup> In

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<sup>19</sup> *Lenaerts/Maselis/Gutman* (fn.17), pp. 107 and 108.

<sup>20</sup> *Hedeman-Robinson*, *Enforcement of European Union Environmental Law: Legal Issues and Challenges*, p. 332; *Lenaerts/Maselis/Gutman* (fn.17), pp. 107, 109 and *Prehn*, *Der Einfluss des Gemeinschaftsrechts auf den mitgliedstaatlichen Verwaltungsvollzug im Bereich des Umweltschutzes am Beispiel Deutschlands*, pp. 126-127.

<sup>21</sup> See *inter alia* Judgment in *Impact*, EU:C:2008:223, para. 43-48; Judgment in *DEB*, Case C-279/09, ECR, EU:C:2010:811, paras 29-33; Judgment in *Rosado Santana*, Case-C-177/10, ECR, EU:C:2011:557, paras 87-89 and Judgment in *Alassini*, EU:C:2010:146, para 48.

<sup>22</sup> *Bobek*, in: *Barnard/Peers* (eds.), *European Union Law*, p. 167.

<sup>23</sup> *Bobek* (fn. 22), p. 167.

<sup>24</sup> *Wennerås* (fn.10), p. 82 and *Lenaerts* (fn. 10), pp. 1-2.

<sup>25</sup> *Wennerås* (fn.10), p. 83-84.

<sup>26</sup> *Ibid.*, p. 83-84.

order to ensure this judicial control, it is for the national legal order to make judicial relief available before the national courts.<sup>27</sup>

Hereunder these different principles will be examined in more detail.

## 2. Principle of national procedural autonomy

Unless otherwise provided by EU law, the MS are in charge of implementing, applying and enforcing EU law within the framework of national procedural law.<sup>28</sup> This power of national legal systems to determine and organize the applicable procedures for the enforcement of Union law is referred to as the principle of national procedural autonomy.<sup>29</sup>

The Court articulated this principle for the first time in *Rewe*: “in the absence of [Union] legislation, it is for the [MS] to lay down the procedural rules of legal proceedings intended to protect the rights conferred to individuals by [Union] law”.<sup>30</sup> In *Rewe II* the Court further held that: “it [the Treaty] was not intended to create new remedies in the national courts to ensure observance of [Union] law other than those already laid down by national law”.<sup>31 32</sup>

The principle of national procedural autonomy is an exceptional feature of the Union legal order. Generally, legal systems operate via a procedural framework that serves to safeguard and enforce the application of substantive law provisions.<sup>33</sup> In the Union legal order on the contrary such a procedural legal framework is generally

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<sup>27</sup> *Wennerås* (fn.10), p. 112.

<sup>28</sup> *Audit* (fn. 8), p. 253.

<sup>29</sup> *Jans/de Lange/Prechal/Widdershoven*, *Europeanisation of Public Law*, p. 40 and *Galetta*, *Procedural Autonomy of the Member States: Paradise Lost? A Study on the “Functionalized Procedural Competence” of EU Member States*, p. vii.

<sup>30</sup> See *inter alia* Judgment in *Rewe-Zentralfinanz*, EU:C:1976:188, para. 5; Judgment in *Comet*, EU:C:1976:191, para. 13; Judgment in *Peterbroeck*, Case C-312/93, ECR, EU:C:1995:437, para. 12; Judgment in *Unibet*, Case C-432/05, ECR, EU:C:2007:163, para. 39 and Judgment in *van der Weerd and Others*, EU:C:2007:318, para. 28.

<sup>31</sup> Case C-158/80, ECR, EU:C:1981:163, para. 44.

<sup>32</sup> *Wennerås* (fn.10), p. 76.

<sup>33</sup> *Anagnostaras*, in: ELR 2007, p. 727.

lacking.<sup>34</sup> National procedural rules apply to substantive EU rules, implying a division of functions, with the EU providing the rights and the national legal systems providing the remedies.<sup>35</sup> This situation can be explained by the principle of conferral. According to article 5(2) paragraph 1 TEU, the Union has to act within the limits of the powers conferred upon it by the MS. Thus, the Union needs a legal basis of competence within the Treaties to establish procedural rules. As there is an asymmetric distribution of competences whereby the number of competences allowing the Union to implement and enforce EU law is significantly smaller than the number of its legislative competences, Union law is dominantly applied on a decentralized level by the authorities of the MS.<sup>36</sup>

It is important to note that the principle of national procedural autonomy is not absolute, far from it.<sup>37</sup> First, sometimes EU law strengthens the implementation of its substantive rules via a procedural framework.<sup>38</sup> Union legislation can either unify or harmonize national procedures. Unification proceeds by regulations that cover an entire subject matter and exclude the application of national laws in the same area.<sup>39</sup> Harmonisation ensues via directives that seek to approximate national procedural rules instead of replacing them.<sup>40</sup> Directive 2003/35/EC relating to access to justice in environmental matters is a clear illustration of this practice (see *infra* Chapter C). In this case, the Union legislator is bound by the principle of conferral.<sup>41</sup> Second, even in the absence of EU procedural rules, the case-law of the CJEU has provided common and cross-cutting principles allowing for a convergence of the different national

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<sup>34</sup> *Anagnostaras* (fn. 33), p. 728 and *Dutheil de la Rochère/Auby*, in: *Dutheil de la Rochère* (ed.), *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux*, p. x.

<sup>35</sup> *Lenaerts* (fn. 10), p. 2.

<sup>36</sup> *Becker*, CMLR 2007, 1036 and *Prehn* (fn. 20), pp. 64-65.

<sup>37</sup> *Audit* (fn. 8), p. 253 and *Jans/Vedder*, *European Environmental Law After Lisbon*, p. 231.

<sup>38</sup> *Audit* (fn. 8), p. 253.

<sup>39</sup> *Bobek* (fn. 22), p. 165.

<sup>40</sup> *Ibid.*, p. 165.

<sup>41</sup> *Ibid.*, p. 166.

procedural laws.<sup>42</sup> The principle of national procedural autonomy is thus framed by the principles of equivalence & effectiveness, of effective judicial protection and of the complete system of legal remedies and procedures.<sup>43</sup> The case-law of the Court is unlike EU legislation not subject to the principle of conferral and can touch upon any aspect of national procedure, provided that EU law is involved.<sup>44</sup> However, also the CJEU cannot go beyond its competences, *i.e.* it cannot act *ultra vires*. The German Constitutional Court (*Bundesverfassungsgericht*) (hereafter: BVerfG) rules e.g. that it will review the CJEU's decisions in case of an obvious lack of competence that leads to a serious shift of the power balance between the EU and its MS.<sup>45</sup>

### 3. Principle of effective judicial protection

#### a) Introduction

We have seen that the national procedural autonomy of the MS is far from absolute as EU procedural rules and the CJEU's case-law impose important constraints on the national legal systems.<sup>46</sup> The *rationale* behind these restrictions is that EU rights could be seriously weakened in the absence of any degree of harmonization of national procedures.<sup>47</sup> First, the effective application of Union law could be impeded which would in turn affect EU law's primacy<sup>48</sup> and direct

<sup>42</sup> *Audit* (fn. 8), p. 254 and *Bertrand/Sirinelli*, in: *Auby/Dutheil de la Rochère*, *Traité de droit administratif européen*, p. 567.

<sup>43</sup> *Audit* (fn. 8), p. 254.

<sup>44</sup> *Bobek* (fn. 22), p. 166.

<sup>45</sup> BVerfG, 6 July 2010, *Honeywell*, 2 BvR 2661/06 and *Möllers*, in: ECLR 2011, p. 165.

<sup>46</sup> *Adinolfi*, in: *Micklitz/De Witte* (ed.), *The European Court of Justice and the Autonomy of the Member States*, p. 282.

<sup>47</sup> *Lenaerts* (fn. 10), p. 2.

<sup>48</sup> Judgment in *Costa v E.N.E.L.*, Case C-6/64, ECR, EU:C:1964:66: "The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question."; Judgment in *Simmenthal*, Case C-106/77, ECR, EU:C:1978:49, para. 21: "every national court must, in a case within its jurisdiction, apply [Union] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to

effect<sup>49</sup>.<sup>50</sup> For example, very short limitation periods under national law could make it almost impossible to rely on Union law.<sup>51</sup> Second, diverging national laws could jeopardize the uniform application of Union law.<sup>52</sup> Considerable variations in the national procedural rules such as differences in applicable time limits, standing requirements, access to legal aid, etc. could cause comparable proceedings to lead to very different outcomes.<sup>53</sup>

These difficulties have been mitigated by article 4(3) TEU under which MS are obliged to guarantee the “full effectiveness of Union law” (*effet utile*)<sup>54</sup>.<sup>55</sup> The CJEU has concretized this duty through the development of a number of EU constraints with which national procedural rules need to comply, *i.e.* the requirements of equivalence, effectiveness and effective judicial protection.<sup>56</sup> These principles are the concrete expression of the principles of primacy and direct effect of EU law and ensure the full enforcement and protection of the rights

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the [Union] rule.” Primacy thus implies that EU law is supreme in the event of a conflict with national law. *Craig*, *The ECJ, National Courts and the Supremacy of Community Law*, 2002, p. 1, available at: <http://www.ecln.net/rome2002/craig.pdf> (9 May 2015).

<sup>49</sup> Judgment in *Van Gend en Loos*, Case C-26/62, ECR, EU:C:1963:1. Relevant passages: “Independently of the legislation of member states, [Union] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the [Union]. (...) It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.” Direct effect thus means that an EU provision is directly applicable within the national legal order without any further implementing act being necessary. *Bobek* (fn. 22), p. 143.

<sup>50</sup> *Lenaerts/Maselis/Gutman*, (fn. 17), p. 109.

<sup>51</sup> *Ibid.*, p. 109.

<sup>52</sup> *Ibid.*, (fn. 17), p. 109 and *Galetta* (fn. 29), p. vii.

<sup>53</sup> *Jans/Vedder* (fn. 37), p. 228.

<sup>54</sup> See e.g. Judgment in *Factortame and Others*, Case C-213/89, ECR, EU:C:1990:257, para. 21 and Opinion 1/09 *Draft Agreement on the European and Community Patents Court*, ECR, EU:C:2011:123, para. 68.

<sup>55</sup> *Lenaerts/Maselis/Gutman*, (fn. 17), p. 109 and *da Cruz Vilaça*, in: *Rosas/Levits/Bot* (eds), *The Court of Justice and the Construction of Europe: Analysis and Perspectives on Sixty Years of Case-Law*, p. 280.

<sup>56</sup> *Lenaerts/Maselis/Gutman* (fn.17), p. 109 and *Wennerås* (fn.10), p. 77.



that individuals derive from EU law.<sup>57</sup> These principles moreover ground the system of judicial protection of the Union as a whole that is underscored by the principle of the complete system of legal remedies and procedures.<sup>58</sup>

### **b) Principles of equivalence and effectiveness**

The Court balances the need to respect MS' procedural autonomy with the requirement to effectively enforce EU law by conditioning the lawfulness of these national rules on compliance with the principles of equivalence and effectiveness.<sup>59</sup>

Under these principles national procedural rules governing actions for safeguarding individual rights under Union law must be “*no less favourable* than those governing similar domestic actions and must *not render practically impossible or excessively difficult* the exercise of rights conferred by [Union] law”.<sup>60</sup>

The principle of equivalence articulates the general principle of non-discrimination through which EU law-based claims cannot be treated less favourably than purely national claims.<sup>61</sup> It ensures that EU rights receive the same protection as domestic ones.<sup>62</sup> For instance a national rule cannot provide that an individual has no standing to bring a claim allowing him/her to enforce a right derived from EU law, whereas he/she would have standing to enforce a similar right derived from national law.<sup>63</sup>

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<sup>57</sup> Lenaerts, CMLR 2007, p. 1645; Lenaerts/Maselis/Gutman, (fn. 17), p. 109 and Tridimas, The General Principles of EU Law, pp. 418-419.

<sup>58</sup> Lenaerts/Maselis/Gutman, (fn. 17), p. 110.

<sup>59</sup> Adinolfi (fn. 46), p. 283 and Lenaerts (fn. 10), p. 3.

<sup>60</sup> See *inter alia* Judgment in *Impact*, Case C-268/06, ECR, EU:C:2008:223, para. 46; Judgment in *Rewe-Zentralfinanz*, Case C-33/76, ECR, EU:C:1976:188, ECR, para. 5, Judgment in *Comet*, Case C-45/76, ECR, EU:C:1976:191, para. 13; Judgment in *Unibet*, Case C-432/05, ECR, EU:C:2007:163, para. 39; Judgment in *Asturcom*, Case C-40/08, ECR, EU:C:2009:615, para. 38 and Judgment in *Alassini*, Joined Cases C-317–320/08, ECR, EU:C:2010:146, para 48.

<sup>61</sup> Bobek (fn. 22), p. 167 and Prehn (fn. 20), p. 131.

<sup>62</sup> Tridimas (fn. 57), p. 423.

<sup>63</sup> *Ibid.*, p. 423.

The principle of effectiveness requires that the enforcement of EU law-based claims cannot be rendered practically impossible or excessively difficult. Practically, this means that there will be a breach of the principle if no appropriate remedy is available for EU law-based claims or if the difficulty a plaintiff faces when upholding his/her EU law rights is excessive.<sup>64</sup> This principle goes further than the principle of equivalence as it imposes standards that are higher than those applicable under national law. It is thus not sufficient that Union claims are dealt with in the same way as national claims.<sup>65</sup>

It is important to note that the CJEU only scarcely carries out an in-depth review of a national rule in the light of the principle of equivalence.<sup>66</sup> The difficulty of controlling this principle lies in the comparative element that it implies: it requires an assessment of whether claims based on Union law are dealt with in the same way as similar national claims.<sup>67</sup> It is not always clear with which claim the Union claim should be compared, or how it should be determined whether the procedure for the Union claim is equivalent to the procedure for national claims.<sup>68</sup> The CJEU therefore usually leaves the MS a wide margin of appreciation as to what must be regarded as an equivalent claim and what must not.<sup>69</sup> The principle of effectiveness on the other hand is a fundamental requirement that demands national procedural rules to reach a basic threshold of judicial protection and as such takes precedence over the principle of equivalence.<sup>70</sup> The CJEU thus often carries out a rather firm control in the light of this principle.<sup>71</sup> Accordingly, the principle of procedural autonomy is mainly restricted via the principle of effectiveness. This development

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<sup>64</sup> Bobek (fn. 22), p. 167.

<sup>65</sup> Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 43.

<sup>66</sup> Bobek, in: Micklitz/De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, p. 315.

<sup>67</sup> Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 46.

<sup>68</sup> *Ibid.*, p. 46.

<sup>69</sup> Adinolfi (fn. 46), p. 283-284 and Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 47.

<sup>70</sup> Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 43 and Lenaerts (fn. 10), p. 3.

<sup>71</sup> Adinolfi (fn. 46), p. 284-285.

already shows the close link between the effective protection of EU rights (see *infra* Section c)) and the effective enforcement of EU law: the limit intended to ensure the effectiveness of EU law indirectly grants judicial protection to natural and legal persons as well.<sup>72</sup>

### c) Principle of effective judicial protection

Recently,<sup>73</sup> the Court has discussed issues concerning national procedures in terms of the principle of effective judicial protection, next to the principles of equivalence and effectiveness<sup>74</sup>.<sup>75</sup> It in essence requires MS to provide natural and legal persons with adequate procedural tools to secure all the rights they derive from Union law before the national courts.<sup>76</sup> It thus serves as a source of a fundamental right that is protected by the EU legal order.<sup>77</sup> The CJEU accepted this principle as a general principle of Union law<sup>78</sup> that has been derived from the constitutional traditions common to the MS and from articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention of Human Rights (hereafter: ECHR).<sup>79</sup>

The principle of effective judicial protection can generally be defined as a principle that further elaborates upon the principle of

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<sup>72</sup> *Ravo*, The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions, 2012, p. 110, available at: <https://www.openstarts.units.it/dspace/bitstream/10077/8192/1/ravo.pdf> (10 June 2015).

<sup>73</sup> See *inter alia* Judgment in *Impact*, Case C-268/06, ECR, EU:C:2008:223, para. 43-48; Judgment in *DEB*, Case C-279/09, ECR, EU:C:2010:811, paras 29-33; Judgment in *Rosado Santana*, Case-C-177/10, ECR, EU:C:2011:557, paras 87-89 and Judgment in *Alassini*, Joined Cases C-317–320/08, ECR, EU:C:2010:146, para 48.

<sup>74</sup> The principles of equivalence and effectiveness still need to be complied with, as they “embody the general obligation on the MS to ensure judicial protection of an individual’s rights under EU law”. Judgment in *Alassini and Others*, Joined Cases C-317/08 – C-320/08, ECR, EU:C:2010:146, para. 49 and *Bobek* (fn. 22), p. 167.

<sup>75</sup> *Bobek* (fn. 22), p. 167.

<sup>76</sup> *Ravo* (fn. 72), p. 102 and *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 49.

<sup>77</sup> *Ravo* (fn. 72), p. 102.

<sup>78</sup> Judgment in *Johnston*, Case C-222/84, ECR, EU:C:1986:206, paras 18-19. Later reiterated in e.g. Judgment in *Impact*, C-268/06, ECR, EU:C:2008:223, para. 43; Judgment in *Unibet*, C-432/05, ECR, EU:C:2007:163, para. 37 and Judgment in *UPA* Case C-50/00, ECR, EU:C:2002:462, *UPA*, para. 39.

<sup>79</sup> *Wennerås* (fn.10), p. 82.

effectiveness, which thus impacts national law in a more far-reaching manner than before.<sup>80</sup> The principle of effective judicial protection – often combined with article 4(3) TEU and the requirement that national legal systems ensure the full effectiveness of Union law – has indeed restricted national procedural autonomy far beyond the common limits of equivalence and effectiveness.<sup>81</sup> This development in the Court’s case-law implies not only a negative obligation, but also a positive one.<sup>82</sup> National provisions which do not comply with the principle of effective judicial protection must not only be set aside (negative obligation), but must also be replaced by new national powers and remedies (positive obligation).<sup>83</sup> This difference in impact can be explained by the different scope: whereas the former principles intend to ensure the correct enforcement of EU law entrusting a wide margin of discretion to MS, the latter is intended to ensure respect of a general rule of law requiring a more stringent control based on a human-rights based approach.<sup>84</sup>

This shift of focus to the principle of effective judicial protection corresponds to the changes brought about by the Treaty of Lisbon according the principle of effective judicial protection a treaty basis of its own.<sup>85</sup>

First, new article 19(1) (2) TEU reads “MS shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.<sup>86</sup> This provision gives expression to the more general principle of sincere cooperation in article 4(3) TEU.<sup>87</sup> It fulfils a two-fold purpose. First, the article underlines the important role national courts play in the application and enforcement of Union rights and

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<sup>80</sup> *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 51.

<sup>81</sup> *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 51 and *Ravo* (fn. 72), p. 111.

<sup>82</sup> *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 52.

<sup>83</sup> *Ibid.*, p. 52.

<sup>84</sup> *Ravo* (fn. 72), p. 112.

<sup>85</sup> *Bobek* (fn. 22), p. 167 and *Engström*, in: REA Law 2011, p. 53.

<sup>86</sup> *Bobek* (fn. 22), p. 167.

<sup>87</sup> *Adinolfi* (fn. 46), p. 282-283 and *Neuhäuser*, *Die Zulassung der Berufung im Verwaltungsprozess unter den Einwirkungen des Verfassungs- und des Unionrechts*, pp. 362-363.

provides the legal basis for further influencing the national procedural rules. Having regard to its wording, this article gives a higher regard to the principle of effectiveness than to the principle of equivalence.<sup>88</sup> Second, it rectifies the restrictive *locus standi* under article 263(4) Treaty on the Functioning of the European Union (hereafter: TFEU) caused by a strict interpretation of direct and individual concern by requiring the national legal systems to fill the remedial gap (see *infra* Chapter 4).<sup>89</sup>

A second legal foundation is article 47 Charter. The article became binding primary law after Lisbon by virtue of article 6(1) TEU and guarantees the “right to an effective remedy and to a fair trial”.<sup>90</sup> It is the mirror image of article 19 TFEU formulated from the perspective of natural and legal persons who can rely on this right to protect the substantive rights which EU law confers upon them.<sup>91</sup> This provision makes it clear that the right to effective judicial protection is an essential element of the rule of law within the EU.<sup>92</sup>

Article 47 applies to MS when they are implementing EU law (article 51 Charter). This means that when national legislation falls within the scope of EU law, the fundamental rights guaranteed by the Charter are also applicable.<sup>93</sup> In other words, “applicability of [EU] law entails applicability of the fundamental rights guaranteed by the Charter”.<sup>94</sup>

Article 47(1) Charter goes moreover further than article 13 ECHR as it guarantees a right to an effective remedy before a court and not

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<sup>88</sup> *Tridimas* (fn. 57), p. 419-420.

<sup>89</sup> *Tridimas* (fn. 57), p. 420 and European Network of Environmental Law Organizations, Access to Justice in Environmental Matters, 2010, p. 19, available at: [http://www.justiceandenvironment.org/\\_files/file/2010/05/JE-Aarhus-AtJ\\_Report\\_10-05-24.pdf](http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf) (accessed on 10 March 2015).

<sup>90</sup> *Bobek* (fn. 22), p. 167; *Neuhäuser*, Die Zulassung der Berufung im Verwaltungsprozess unter den Einwirkungen des Verfassungs- und des Unionrechts, pp. 365 and *Engström* (fn. 86), p. 53.

<sup>91</sup> *Lenaerts* (fn. 10), p. 1.

<sup>92</sup> *Ibid.*, p. 1.

<sup>93</sup> *Ibid.*, p. 1.

<sup>94</sup> Judgment in *Åkerberg Fransson*, Case C-617/10, ECR, EU:C:2013:105, para. 21.

merely before a national authority.<sup>95</sup> The same goes for article 47(2) Charter which corresponds to article 6(1) ECHR, but is wider as it is not confined to disputes relating to civil law rights and obligations.<sup>96</sup> Furthermore, according to article 52(3) Charter, the guarantees provided by articles 6 and 13 ECHR apply also to article 47 Charter which implies that the case-law of the European Court of Human Rights (hereafter: ECtHR) is relevant for the interpretation of the Charter.<sup>97</sup> Finally, according to article 53 Charter, the level of protection granted by article 47 cannot be lower than that ensured by the ECHR.<sup>98</sup>

#### **4. Principle of a complete system of legal remedies and procedures**

According to the principle of a complete system of legal remedies and procedures, Union acts have to be made subject to judicial control, either via direct actions before the Union courts, or through preliminary references from national courts.<sup>99</sup> This principle is closely related to the principle of effective judicial protection as the establishment of procedural rules strengthening the judicial protection of natural and legal persons renders the EU system of legal remedies overall complete and effective.<sup>100</sup>

In the words of the Court:

“By [Articles 263 and 277 TFEU], on the one hand, and by [Article 267 TFEU], on the other, the Treaty has established a *complete system of legal remedies and procedures* designed to ensure judicial

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<sup>95</sup> *Lenaerts* (fn. 10), p. 2 and *Tridimas* (fn. 57), p. 455.

<sup>96</sup> *Lenaerts* (fn. 10), p. 2.

<sup>97</sup> *Lenaerts* (fn. 10), p. 2 and *Tridimas* (fn. 57), p. 456.

<sup>98</sup> *Lenaerts* (fn. 10), p. 2.

<sup>99</sup> *Wennerås* (fn.10), pp. 83-84.

<sup>100</sup> *Wennerås* (fn.10), p. 83 and *Ravo* (fn. 72), p. 105.

review of the legality of acts of the institutions, and has entrusted such review to the [Union] Courts (...).”<sup>101</sup>

However, as regards to practically ensuring effective judicial control, the CJEU requires more efforts from national courts than from Union courts.<sup>102</sup> It is important to recall that Union law has itself no general procedural framework to enforce EU law. Therefore the national courts are as *juges du droit commun* responsible for ensuring that Union law is given proper effect in the national legal order.<sup>103</sup> Hence, next to the CJEU, also the national courts are the guardians of the EU legal order and the judicial system of the EU.<sup>104</sup>

In this respect, the CJEU has ruled that it did not need to liberalize its own strict standing rules under article 263(4) TFEU, in particular its interpretation of the requirements of direct and individual concern as the plaintiffs could go to the national courts to obtain judicial relief and, if need be, could request a preliminary reference.<sup>105</sup> It thus held that it was up to the national legal systems to fill the remedial gap.<sup>106</sup>

Accordingly, by virtue of the principle of the complete system of legal remedies and procedures the Court mandates MS to provide *locus standi* to natural and legal persons before national courts so as to enable them to challenge the validity of Union acts indirectly through the preliminary ruling procedure.<sup>107</sup>

## 5. Assessment

It is clear that there exists a tension between the principle of national procedural autonomy allowing the MS, in the absence of EU rules, to

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<sup>101</sup> See e.g. Judgment in *Les Verts*, Case C-294/83, ECR, EU:C:1986:166, para. 23 and Judgment in *UPA*, Case C-50/00, ECR, EU:C:2002:462, para. 40, Judgment in *Jégo-Quéré*, Case C-263/02, ECR, EU:C:2004:210, para. 30.

<sup>102</sup> *Wennerås* (fn.10), p. 84.

<sup>103</sup> *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 241-242.

<sup>104</sup> Opinion 1/09, ECR, EU:C:2011:123, para. 66.

<sup>105</sup> Judgment in *Greenpeace and Others v Commission*, Case C-321/95, ECR, EU:C:1998:153, paras 32-33 and *Wennerås* (fn.10), p. 84.

<sup>106</sup> *Tridimas* (fn. 57), p. 420.

<sup>107</sup> Judgment in *UPA*, Case C-50/00, ECR, EU:C:2002:462, para. 42; *Wennerås* (fn.10), p. 84 and *Tridimas* (fn. 57), p. 420.

organise their own procedural rules and the general principles of the EU that frame this procedural autonomy, on the other hand. Having dealt with the various principles in more detail above, I conclude that the principle of national procedural autonomy is being limited to such an extent that the autonomy of the MS rather amounts to the discretion left to the MS after having fulfilled the obligations posed by the constraining principles which constitute the starting point.<sup>108</sup>

The EU legal order thus has the capacity to influence the national procedural framework in an extensive way. This allows me to make the assumption that the same goes for the specific procedural field of the rules on access to court and standing for ENGOs.

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<sup>108</sup> *Tridimas* (fn. 57), p. 424.



## C. A concrete example: the influence of the EU legal order on the rules on access to court and standing for ENGOs in the Belgian and German legal orders

### 1. Background

As already mentioned, article 19(1) TEU requires MS to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. One such field is environmental law (article 4(2) (e) TFEU *juncto* articles 191 to 193 TFEU).<sup>109</sup> Substantive environmental rules have been harmonised to a major extent in the EU, generally via directives.<sup>110</sup> However, as we have seen things are different when it comes to procedural rules. Following the principle of national procedural autonomy, the way in which a provision of EU environmental law can be appealed to and the form in which this takes place depends principally on national law.<sup>111</sup>

The national procedural rules of the MS on access to court and standing vary considerably.<sup>112</sup> Some national legal systems adopt a very extensive approach allowing ‘any person’ to challenge administrative decisions and omissions on environmental matters via a so-called *actio popularis*, granting the right to file genuine public interest law-suits.<sup>113</sup> More often, rules on access to court and standing restrict, in one way or another, the possibility for judicial review, whereby the most restrictive approach requires the impairment of an individual legally granted right<sup>114</sup>.<sup>115</sup> In many MS standing

<sup>109</sup> Jans, in: *Jans/Macrory/Moreno Molina* (eds), *National Courts and EU Environmental Law*, p. 145.

<sup>110</sup> Jans (fn. 109), p. 145.

<sup>111</sup> *Ibid.*, p. 145.

<sup>112</sup> Poncelet (fn.4), p. 295; De Sadeleer (fn. 6), p. 97; Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 288; Jans (fn. 109), p. 145; Darpö (fn. 15), p. 176 and Pirotte, *Aménagement-Environnement* 2010, p. 15.

<sup>113</sup> Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 288; De Sadeleer (fn. 6), p. 97; Darpö (fn. 15), p. 176 and Lavrysen (fn. 7), p. 670.

<sup>114</sup> In Germany, for example, article 42(2) of the Code of Administrative Court Procedure (VwGO) requires a ‘subjective-public right’ (*Subjektiv-öffentliches Recht*) (see *infra*).

<sup>115</sup> De Sadeleer (fn. 6), p. 97; Lavrysen (fn. 7), p. 670; Darpö (fn. 15), p. 176 and Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 288-289.

requirements still constitute a considerable procedural hurdle, especially for public interest litigants such as ENGOs.<sup>116</sup>

Next, although the Union legislature does not have a general competence to harmonize national legal proceedings in the MS, it can harmonise national legislation in a certain area if it considers that the differences have become too great.<sup>117</sup> The main legal instrument concerning access to justice for ENGOs is the Aarhus Convention.<sup>118</sup> In this respect, the EU has taken measures to implement the AC within the Union. These rules complement the AC and constitute together with it a complex whole with which the MS need to comply.<sup>119</sup>

Thus, access to justice and standing for ENGOs is governed by a transnational body of interconnected environmental law consisting of international environmental law (the AC), EU environmental law (directives implementing the AC in the EU) and national environmental law (national rules on access to court).<sup>120</sup>

The AC and the EU implementing measures confer a special role and corresponding rights on ENGOs that establishes an exceptionally strong and effective mechanism for the prevention of environmental damage.<sup>121</sup> The question thus arises how far ENGOs should have access to the courts under EU law. Whereas the CJEU is restrictive when it comes to access to the European courts, it obliges national courts to ensure access to justice to natural and legal persons that rely on an infringement of EU environmental law.<sup>122</sup>

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<sup>116</sup> *De Sadeleer* (fn. 6), p. 97 and *Pirotte* (fn. 112), p. 15.

<sup>117</sup> *Jans* (fn. 109), p. 146.

<sup>118</sup> *Ibid.*, p. 146.

<sup>119</sup> *Lavrysen* (fn. 7), p. 651-652 and *Larssen/Jadot*, in: *Larssen/Pallemmaerts* (eds), *L'accès à la justice en matière d'environnement – Toegang tot de rechter in milieuzaken*, p. 196.

<sup>120</sup> *Jans* (fn. 109), p. 146 and *Mangold*, in: *IJGLS* 2014, p. 224.

<sup>121</sup> *Sambon* (fn.5), p. 379.

<sup>122</sup> *Müller*, *JEL* 2011, p. 506.

In this Part we will examine the extent to which the AC and the EU implementation measures (Chapter 2, Section a) and the CJEU's case-law (Chapter 2, Section b) affect the national rules on access to court and standing of ENGOs and impinge upon the principle of national procedural autonomy (Chapter 3).

## **2. Access to court and standing for ENGOs in the EU legal order**

### **a) Aarhus Convention and related EU law**

#### **a. Overview**

The AC was adopted on 25 June 1998 at the Fourth “Environment for Europe” Ministerial Conference in the Danish city of Aarhus.<sup>123</sup> It entered into force on 30 October 2001.<sup>124</sup>

The EU has approved the AC by decision of the Council on 17 February 2005<sup>125</sup>.<sup>126</sup> As environmental policy is a shared competence (articles 4(2) (e) and 191(4) TFEU), the AC falls partly under the competence of the EU and partly under the competence of the MS.<sup>127</sup> For this reason, the AC has taken on the form of a mixed agreement, *i.e.* an agreement to which both the EU and the MS are parties and of which the provisions form an integral part of the EU legal order.<sup>128</sup> The AC is thus part of EU law and as such subject to applicable rules concerning interpretation, implementation and enforcement of the *acquis*.<sup>129</sup> Next to the EU, MS have ratified the AC as well.<sup>130</sup>

<sup>123</sup> *Lavrysen* (fn. 7), p. 651 and *Epiney*, *Umweltrecht in der Europäischen Union*, p. 175.

<sup>124</sup> *Lavrysen* (fn. 7), p. 651.

<sup>125</sup> Council Decision 2005/370/EC of 17 February 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.

<sup>126</sup> *Pirotte* (fn. 112), p. 27.

<sup>127</sup> *Sambon* (fn.5), p. 376 and *Jans* (fn. 109), p. 147.

<sup>128</sup> Judgment in *Lesoochránárske zoskupenie*, Case C-240/09, ECR, EU:C:2011:125, para. 30; *Sambon* (fn.5), p. 376 and *De Sadeleer* (fn. 6), p. 98.

<sup>129</sup> *Jendroška* (fn. 6), p. 76.

<sup>130</sup> In Belgium three regions as well as the federal level have ratified the AC in 2002. Germany became a party to the AC on 15 January 2007. Before this date, the AC was already indirectly binding upon Germany, because of the ratification by the EU

The AC obliges the parties to implement its provisions into national law (article 3 AC). According to article 216(2) TFEU agreements concluded by the EU are binding on the EU institutions and on its MS. For this reason the EU has taken implementing measures as well. This in turn obliges the MS to transpose these EU measures into their national law.<sup>131</sup>

#### b. Article 9 AC and related EU law

The objective of the Convention is to “contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”. In this regard it requires each Party “to guarantee the rights of access to information<sup>132</sup>, public participation in decision-making<sup>133</sup>, and access to justice in environmental matters<sup>134</sup> in accordance with the provisions of this Convention” (article 1 AC). The AC is thus based on three pillars – the first on access to information, the second relating to public participation and the third pertaining to access to justice – provided for under its articles 4 to 9.<sup>135</sup>

The third pillar on access to justice (article 9 AC) is on the one hand linked to the two other pillars as it strengthens the respect for certain provisions of the Convention by jurisdictional guarantees (namely in article 9(1) on access to information requests and article 9(2) on public participation in decision-making).<sup>136</sup> On the other hand, the article ensures the access to administrative or judicial review

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in 2005 and the implementing measures by the EU. *Schwerdtfeger*, *Der deutsche Verwaltungsrechtsschutz unter dem Einfluss der Aarhus-Konvention*, p. 17.

<sup>131</sup> *Mangold* (fn. 120), p. 238.

<sup>132</sup> Articles 4 and 5 AC.

<sup>133</sup> Articles 6, 7 and 8 AC.

<sup>134</sup> Article 9 AC.

<sup>135</sup> *Epiney* (fn. 123), p. 175; United Nations Economic Commission for Europe, *The Aarhus Convention: an implementation guide*, 2nd edition, 2014, p. 19, available at: [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) (accessed on 6 March 2015) and *Lavrysen*, *Access to Justice in environmental matters. Perspectives from the European Union Forum of Judges for the Environment*, June 2014, p. 3, available at: [http://www.unep.org/unea/docs/EU\\_%20Forum\\_Judges\\_Environment\\_Access\\_Justice.pdf](http://www.unep.org/unea/docs/EU_%20Forum_Judges_Environment_Access_Justice.pdf) (16 May 2015).

<sup>136</sup> *Müller* (fn. 122), p. 506 and *De Sadeleer* (fn. 6) p. 98.

procedures in case of violations of national provisions relating to the environment (article 9(3) AC).<sup>137</sup>

In this thesis, I will limit the analysis to subparagraphs (2) and (3) of article 9 AC.

As for the MS the AC and the related EU legislation constitute a complex whole, article 9(2) and (3) AC will be discussed along with the related EU provisions.<sup>138</sup>

i. Article 9(2) AC and related EU law

Article 9(2) AC regulates access to justice regarding environmental decision-making relating to activities that may have a significant effect on the environment.<sup>139</sup> The article *in concreto* confers a right to seek a review in connection with decision-making on projects and activities covered by article 6<sup>140</sup>.<sup>141</sup> This right is granted to “members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining the impairment of a right” (article 9(2) (1) AC).

Article 9(2) AC should be read together with article 2(5) AC which defines “the public concerned” as:

“the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition [*ENGOS*] meeting any requirements under national law shall be deemed to have an interest”.

Thus, although these provisions read together clearly grant Parties a considerable margin of appreciation, the room for manoeuvre is not unlimited and cannot divest article 9 of all its effect.<sup>142</sup> Article 9(2) (2) AC indeed continues that, while national law determines what

<sup>137</sup> *Pirotte* (fn. 112), p. 22 and *Larssen/Jadot* (fn. 119), p. 203.

<sup>138</sup> *Lavrysen* (fn. 7), p. 652.

<sup>139</sup> *Ibid.*, p. 662.

<sup>140</sup> Article 6 concerns public participation in decisions on specific activities.

<sup>141</sup> *Lavrysen* (fn. 7), p. 662.

<sup>142</sup> *Müller* (fn. 122), p. 508 and *Pirotte* (fn. 112), p. 24.

constitutes “a sufficient interest and an impairment of a right”, this has to be determined “consistently with the objective of giving the public concerned wide access to justice”. This teleological criterion has been confirmed by the interpretations<sup>143</sup> of the AC Compliance Committee (hereafter: ACCC)<sup>144</sup> and puts a clear constraint on States’ margin of appreciation.<sup>145</sup>

Moreover, the Convention has established a privileged regime for ENGOs as it irrefutably presumes them to have an interest.<sup>146</sup> According to article 9(2) (2) AC<sup>147</sup>, as long as ENGOs meet the requirement of “public concerned” in article 2(5) AC, they are granted an *automatic* access to justice.<sup>148</sup>

States remain however free to determine certain conditions that ENGOs have to meet to be able to be recognized as “public concerned”.<sup>149</sup> A state could, among others, require the ENGO to have legal personality and to pursue its activities in an effective manner, during a certain minimum period of time and in conformity with its statutory objective.<sup>150</sup> Also in this case MS enjoy a considerable margin of appreciation, which is however not absolute as it is again

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<sup>143</sup> The ACCC has held that: “Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided “with the objective of giving the public concerned wide access to justice” within the scope of the Convention.” ACCC, Findings and Recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, June 2006, ECE/MP.PP/C.1/2006/4/Add.2, in case ACCC/C/2005/11, submission by Bond Beter Leefmilieu Vlaanderen VZW, para. 33, available at: [http://www.unece.org/fileadmin/DAM/env/documents/2006/pp/ECE\\_MP.PP\\_C.1\\_2\\_006\\_4\\_Add.2\\_e.pdf](http://www.unece.org/fileadmin/DAM/env/documents/2006/pp/ECE_MP.PP_C.1_2_006_4_Add.2_e.pdf) (25 May 2015).

<sup>144</sup> The ACCC has its origins in article 15 AC. The main focus of the ACCC is to strengthen compliance by making recommendations to the Meeting of the Parties. The Meeting of the Parties will be the final arbiter as to whether there is a case of non-compliance or not. *Jans* (fn. 109), pp. 149-150.

<sup>145</sup> *Pirotte*, (fn. 112), p. 24.

<sup>146</sup> *Ibid.*, p. 24.

<sup>147</sup> Article 9(2) (2) AC provides that “the interest of any [ENGO] meeting the requirements of article 2(5) AC shall be deemed sufficient for the purpose of subparagraph a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph b) above (article 9 (2) subparagraph 2 AC).”

<sup>148</sup> *Sambon* (fn. 5), p. 380.

<sup>149</sup> *Pirotte* (fn. 112), p. 24 and *Pedersen*, in: *Geo. Int’l Envtl. L. Rev.* 2008, p. 97.

<sup>150</sup> *Jadot*, in: *Dumont/Jadoul/van Drooghenbroeck* (eds), *La protection juridictionnelle du citoyen face à l’administration*, p. 412.

limited by the overall obligation to ensure the effectiveness of the AC.<sup>151</sup>

Directive 2003/35/EC<sup>152</sup> transposed article 9(2) AC into the EU legal order by amending the EIA Directive on the assessment of the effects of certain public and private projects on the environment<sup>153</sup> and the IPPC Directive on integrated pollution prevention and control<sup>154</sup>.<sup>155</sup> Directive 2003/35/EC inserted article 10a to the EIA Directive and article 15a to the IPPC Directive. Paragraph 1 of both new articles is almost identical to article 9(2) (1) AC. Paragraph 3 corresponds in both cases to article 9(2) (2) AC. The definition of “the public concerned” in article 1(2) EIA Directive and article 2(14) IPPC Directive matches the one in article 2(5) AC.<sup>156</sup> ENGOs have in this regard thus always the status of “the public concerned” provided that they comply with “any requirements under national law” in which case they are deemed to have “an automatic right of access to justice”<sup>157</sup>.<sup>158</sup> Thus, also under EU law, MS can in principle uphold

<sup>151</sup> Hedeman-Robinson (fn. 20), p. 332 and Pirotte (fn. 112), p. 24.

<sup>152</sup> 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.

<sup>153</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EEC of 3 March 1997 and Directive 2003/35/EEC of 26 May 2003 and Directive 2008/1/EC of 15 January 2008.

<sup>154</sup> Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control as amended by Directive 2003/35/EC of 26 May 2003.

<sup>155</sup> Lavrysen, The Right to the Protection of a Healthy Environment at the World Congress on Justice, Governance and Law for Environmental Sustainability, June 2012, pp. 26-27, available at: <https://biblio.ugent.be/input/download?func=downloadFile&recordId=2917157&fileId=2917161> (29 May 2015); Lavrysen (fn. 7), p. 28; De Sadeleer (fn. 6), p. 99; Pedersen (fn. 149), p. 106 and European Network of Environmental Law Organizations (fn. 89), p. 5.

<sup>156</sup> German Advisory Council on the Environment, Access to Justice in Environmental Matters: The crucial Role of Legal Standing for Non-Governmental Organisations, February 2005, p. 13, available at: [http://www.unece.org/fileadmin/DAM/env/pp/Media/Stellung\\_A\\_to\\_J\\_Feb\\_2005.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Media/Stellung_A_to_J_Feb_2005.pdf) (3 June 2015).

<sup>157</sup> This was expressed with regard to article 10a in Opinion of AG Sharpston in *Djurgården*, EU:C:2009:421, paras. 42-43.

<sup>158</sup> De Sadeleer, Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases, NJIL 2012, p. 58 and De Sadeleer (fn. 6), p. 99.

their differing legal systems.<sup>159</sup> The only difference with article 9(2) AC is that the EU provisions provide that MS shall determine at what stage the decisions, acts or omissions may be challenged (article 10a(2) EIA Directive and article 15a(2) IPPC Directive).<sup>160</sup> The importance of the EU implementation of article 9(2) AC is that MS are not solely under an international law obligation to guarantee a wide access to court, but also under a – much more powerful – EU law obligation.<sup>161</sup>

## ii. Article 9(3) Aarhus Convention and related EU law

Article 9(3) AC complements the specific rules in paragraphs 1 and 2 with a clause concerning general violations of environmental law.<sup>162</sup> It aims to ensure the effectiveness of national (substantive) environmental law.<sup>163</sup>

Article 9(3) AC has a much broader scope than article 9(2) because the review procedure is not limited to a number of administrative acts related to specific activities but covers all material acts and omissions.<sup>164</sup> In so doing the AC introduces a form of direct citizen enforcement.<sup>165</sup> The public concerned can thus challenge “acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”. In this context, “national law” not only refers to domestic law, but also to

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<sup>159</sup> German Advisory Council on the Environment, Access to Justice in Environmental Matters (fn. 156), p. 13.

<sup>160</sup> *Jans/Vedder* (fn. 37), p. 233; *Lavrysen* (fn. 155), pp. 26-27 and *Lavrysen* (fn. 7), p. 663.

<sup>161</sup> *Groß*, in: JURA 2012, p. 387 and German Advisory Council on the Environment, Access to Justice in Environmental Matters (fn. 156), p. 13.

<sup>162</sup> *Lavrysen* (fn. 135), p. 4; *Pirotte* (fn. 112), p. 24; *Lavrysen* (fn. 7), p. 662 and *Müller* (fn. 122), p. 665.

<sup>163</sup> *Larssen/Jadot* (fn. 119), pp. 203-204.

<sup>164</sup> *De Sadeleer* (fn. 6), p. 100 and *Lavrysen* (fn. 155), p. 28.

<sup>165</sup> *Lavrysen* (fn. 155), p. 28; *Lavrysen* (fn. 7), p. 662 and *Müller* (fn. 122), p. 665 and *Pedersen* (fn. 149), p. 97.



European and international law binding on the Parties, in particular those provisions that have direct effect.<sup>166</sup>

At the same time, the article accords States more flexibility in implementation.<sup>167</sup> It requires them to ensure standing for “members of the public that meet the criteria, if any, that may exist in national law”. In contrast to article 9(2), article 9(3) does not explicitly limit the potential criteria that national law may set and thus allows the Parties a broader margin of appreciation.<sup>168</sup> This is reinforced by the lack of mentioning the objective of giving the public concerned wide access to justice, in contrast to article 9 (2) (2) AC.<sup>169</sup> At the same time, however, also in this case the criteria have to allow a broad access to the review procedures in order to comply with the general objective of the Convention.<sup>170</sup> The ACCC held in this regard that:

“The Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment. (...) The phrase ‘the criteria, if any, in national law’ indicates a self-restraint on the Parties not to set too

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<sup>166</sup> *Lavrysen* (fn. 155), p. 28; *Lavrysen* (fn. 7), p. 665 and *Larssen/Jadot* (fn. 119), p. 220.

<sup>167</sup> The Aarhus Convention: an implementation guide (fn. 135), p. 197.

<sup>168</sup> *Schmidt/Schrader/Zschiesche*, *Die Verbandsklage im Umwelt- und Naturschutzrecht*, p. 15; *Pedersen* (fn. 149), p. 98; *Jendroska*, in: JEEPL 2005, p. 19 and *Jendroska*, in: Macrory (ed.), *Reflections on 30 years of EU environmental law: a high level of protection?*, p. 81.

<sup>169</sup> *Larssen/Jadot* (fn. 119), p. 224.

<sup>170</sup> *Larssen/Jadot* (fn. 119), pp. 225 and 248; European Network of Environmental Law Organizations (fn. 91), p. 5 and The Aarhus Convention: an implementation guide (fn. 135), p. 198.

strict criteria. Access to such procedures should thus be the presumption, not the exception.”<sup>171</sup>

With regard to the implementation of article 9(3) AC, the European Commission drafted a proposal for a directive on access to justice in environmental matters.<sup>172</sup> The aim of this proposal was to set up a framework of minimum requirements for access to judicial and administrative proceedings in environmental matters that would cover the double objective of contributing to the implementation of article 9(3) AC and fulfilling some shortcomings in controlling the application of environmental law in the EU.<sup>173</sup> Certain members of the public would be granted legal standing to file proceedings against the actions and omissions of public authorities contravening environmental law. However, different MS opposed the proposal foreclosing a qualified majority to be met in the Council despite the fact that the European Parliament had approved the proposal in first reading.<sup>174</sup> The European legislator has until now not taken any measures to implement article 9(3) AC.<sup>175</sup>

In this regard, the second paragraph of the declaration that the EU has adopted in accordance with article 19 AC<sup>176</sup> states that:

“the legal instruments in force do not cover fully the implementation of the obligations resulting from art 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by art 2(2)(d) of the Convention and that, consequently, its Member States are

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<sup>171</sup> ACCC, Findings and Recommendations with regard to compliance by Belgium (fn. 148), paras 35-36.

<sup>172</sup> Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM/2003/0624

<sup>173</sup> Paragraph 1 of the Proposal and *Lavrysen* (fn. 7), p. 666.

<sup>174</sup> *Lavrysen* (fn. 7), p. 666.

<sup>175</sup> *Jans* (fn. 109), p. 148.

<sup>176</sup> Article 19 (5) AC provides: “In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.”

responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.”

In this way the Union made it clear that the MS are responsible for the implementation of this article. On the basis of this Declaration, one assumed that Union implementation was not necessary and that article 9(3) remained outside the scope of EU law and fully within the national legal framework of the MS that had to implement article 9(3) pursuant to the AC as international law, not as EU law.<sup>177</sup> The CJEU has however taken a different view in the *Lesoochranské zoskupenie* case<sup>178</sup> (see *infra* Section b) subsection c.).<sup>179</sup>

#### **b) Case-law of the CJEU interpreting the AC and related EU law**

As the AC is a mixed agreement of which the provisions form an integral part of the EU legal order, the CJEU is competent to indicate the line of demarcation between the obligations that the Union takes upon itself and those with which the MS remain charged, and to interpret the provisions of the AC together with the EU implementing measures.<sup>180</sup>

It is clear that under the impulse of the AC and the principles of effective judicial protection and effectiveness, the CJEU has developed a line of case-law that allows ENGOs access to court under more relaxed standing conditions than those traditionally applicable in the MS.<sup>181</sup>

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<sup>177</sup> *Jendroska* (fn. 173), p. 82; *Müller* (fn. 122), p. 515 and *Pedersen* (fn. 149), pp. 105-107.

<sup>178</sup> Judgment in *Lesoochranské zoskupenie*, Case C-240/09, ECR, EU:C:2011:125.

<sup>179</sup> *Müller* (fn. 122), p. 515.

<sup>180</sup> *Sambon* (fn.5), p. 376.

<sup>181</sup> *Lenaerts/Maselis/Gutman*, (fn. 17), p. 120.

i. *Djurgården*

In the case of *Djurgården*<sup>182</sup> the CJEU responds to questions of a Swedish court concerning the implementation of the AC via the EIA Directive. The relevant questions raised were first, whether access to court could be limited in case the persons concerned had already had the opportunity to express their views in the public participation phase, and, second, whether national legislation could allow access to a court only to ENGOs with at least 2,000 members.

With regard to the first issue, the CJEU held that members of the public concerned must be able to have access to review procedures, regardless of whether they participated in the prior administrative process of decision-making or not.<sup>183</sup> The CJEU emphasized that participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making has no effect on the conditions for access to the review procedure.<sup>184</sup>

This ruling has serious consequences for the procedural environmental law of the MS. German administrative procedural law e.g. contains a provision holding that a party may not rely on a breach of a legal rule before a court of law, unless this was first raised during the preceding public participation procedure (*materielle Präklusion*).<sup>185</sup> One can infer from the *Djugården* decision that the German rule is incompatible with the AC and that as far as access to justice is

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<sup>182</sup> Judgment in *Djurgården*, Case C-263/08, ECR, EU:C:2009:631.

<sup>183</sup> Judgment in *Djurgården*, EU:C:2009:631, para. 39 and The Aarhus Convention: an implementation guide (fn. 135), p. 195.

<sup>184</sup> Judgment in *Djurgården*, EU:C:2009:631, para. 38.

<sup>185</sup> *Jans* (fn. 109), p. 157; *Schlacke* (fn.12), pp. 123-124; *Oliver* (fn. 3), p. 1455 and *Niedzwicki*, Präklusionsvorschriften des öffentlichen Rechts im Spannungsfeld zwischen Verfahrensbeschleunigung, Einzelfallgerechtigkeit und Rechtsstaatlichkeit. Zur Vereinbarkeit der Präklusion mit dem Grundgesetz und mit dem Europarecht, pp. 38-43, 219-220.

concerned, the question whether or not an organisation has taken part in the decision-making procedure should be irrelevant.<sup>186</sup>

Furthermore, the Court ruled that article 10a EIA Directive precludes a provision of national law that reserves the right to bring an appeal against a decision on projects, falling within the scope of the directive, solely to ENGOs with at least 2,000 members.<sup>187</sup> The Court is indeed of the opinion that although article 10a EIA Directive leaves it to the national legislatures to determine the conditions under which an ENGO is entitled to a right of appeal, national rules must, first, ensure 'wide access to justice' and, secondly, render effective the provisions of the EIA Directive.<sup>188</sup> Accordingly, those national rules must not be liable to nullify EU provisions which provide that parties who have a sufficient interest or whose rights are impaired, which include ENGOs, are entitled to file legal proceedings.<sup>189</sup> The CJEU ruled that it is within the MS' margin of appreciation to require that an ENGO has as its object the protection of nature and the environment.<sup>190</sup> It furthermore admitted that it is conceivable that the condition that an ENGO must have a minimum number of members may be relevant in order to ensure that it does in fact exist and is active. However the number of members required cannot be fixed at such a level that it runs counter to the objectives of the EIA Directive, in particular the objective to facilitate judicial review of projects which fall within its scope.<sup>191</sup> The CJEU concluded that the EIA Directive precludes a rule that reserves the right to bring an action to ENGOs which have at least 2,000 members.<sup>192</sup>

In general, this decision made it clear for the first time that the CJEU interprets the AC and the implementing EIA Directive broadly in order to render effective the overall objective of giving the public

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<sup>186</sup> *Jans* (fn. 109), p. 157.

<sup>187</sup> Judgment in *Djurgården*, EU:C:2009:631, para. 52.

<sup>188</sup> *Ibid.*, para. 45.

<sup>189</sup> *Ibid.*, para. 45.

<sup>190</sup> Judgment in *Djurgården*, EU:C:2009:631, para. 46 and *Jans* (fn. 109), p. 158.

<sup>191</sup> Judgment in *Djurgården*, EU:C:2009:631, para. 47.

<sup>192</sup> *Ibid.*, para. 52.

concerned a wide access to justice.<sup>193</sup> The judgment moreover made it clear that it is up to the CJEU to decide whether national provisions on access to justice are compatible with both the AC and EU law, at least concerning the implementation of article 9 (2) AC.<sup>194</sup>

## ii. *Trianel*

In the *Trianel* case<sup>195</sup> the CJEU ruled in similar vein on restrictions in German administrative procedural law while interpreting article 10a EIA Directive.<sup>196</sup> The question posed to the Court was whether that article precludes legislation that does not permit ENGOs to rely on infringements of rules of law that protect only the interests of the general public and not the interests of individuals.<sup>197</sup> Indeed, according to the German legislation, the *locus standi* of ENGOs depended on conditions that only other physical or legal persons can fulfill.<sup>198</sup>

The CJEU ruled that the German approach was incompatible with EU law. It first applied a teleological approach by interpreting article 10a EIA Directive in the light of, and having regard to, the objectives AC which is to provide wide access to justice to the public concerned.<sup>199</sup> Moreover, both article 10a and article 9(2) grant ENGOs special treatment, providing them with an ‘automatic’ *locus standi* before national courts.<sup>200</sup>

The CJEU further developed this line of argumentation via the principle of effectiveness.<sup>201</sup> It reiterated its settled case-law that according to the principle of national procedural autonomy, it is for

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<sup>193</sup> Müller (fn. 122), p. 509.

<sup>194</sup> Jans, in: REALaw 2011, p. 85.

<sup>195</sup> Judgment in *Trianel*, Case C-115/09, ECR, EU:C:2011:289.

<sup>196</sup> Jans/Vedder (fn. 37), p. 235.

<sup>197</sup> Judgment in *Trianel*, EU:C:2011:289, para. 35.

<sup>198</sup> Müller (fn. 122), p. 510.

<sup>199</sup> Judgment in *Trianel*, EU:C:2011:289, paras 41-42 and Müller (fn. 122), p. 510.

<sup>200</sup> Opinion of Advocate-General Sharpston in *Djurgården*, EU:C:2009:421, para. 42-43 and Opinion of Advocate General Sharpston in *Trianel*, EU:C:2010:773, paras 50, 54, 74 and 93.

<sup>201</sup> Judgment in *Trianel*, EU:C:2011:289, para. 46; Lenaerts/Maselis/Gutman, (fn. 17), p. 120; Appel, in: NuR 2011, p. 414 and Müller (fn. 122), p. 511.

the MS to lay down the procedural framework to safeguard the rights that individuals derive from EU law, but that these rules must comply with the principles of equivalence and effectiveness.<sup>202</sup> In this regard the German rule deprives ENGOS of the opportunity to play the role granted to them by both the EIA Directive and the AC.<sup>203</sup> Indeed, if ENGOS were not allowed to rely on the impairment of rules of EU environmental law that protect the public interest, this would largely deprive those ENGOS of the possibility to have access to court since the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such.<sup>204</sup> The condition of an “impairment of an individual right” in matters governed by EU law is thus not compatible with EU law and “rights capable of being impaired” must necessarily include the rules of national law implementing EU law as well as EU law having direct effect.<sup>205</sup> Thus, even though these rules only have an objective character and do not confer individual rights, ENGOS must be able to rely on them.<sup>206</sup>

Next, the Court expressly held that article 10a EIA Directive may be directly relied upon before the national courts.<sup>207</sup> Although the article leaves MS a significant discretion, this is not true with regard to the last two sentences of the article 10a(3) that provides for a special treatment for ENGOS.<sup>208</sup> Such NGOs thus have the right to rely before the courts on the infringement of the rules of national law that flow from the Habitats Directive<sup>209</sup> even where national law does not permit this.<sup>210</sup>

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<sup>202</sup> Judgment in *Trianel*, EU:C:2011:289, para. 43.

<sup>203</sup> *Ibid.*, para. 44.

<sup>204</sup> *Ibid.*, para. 46.

<sup>205</sup> Judgment in *Trianel*, EU:C:2011:289, paras 47-48 and *Müller* (fn. 122), p. 511.

<sup>206</sup> *Appel* (fn. 206), pp. 414-415.

<sup>207</sup> *Appel* (fn. 206), p. 415 and *Müller* (fn. 122), p. 511.

<sup>208</sup> Judgment in *Trianel*, EU:C:2011:289, paras 55-56.

<sup>209</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

<sup>210</sup> Judgment in *Trianel*, EU:C:2011:289, para. 59.

As in *Djurgården*, the Court emphasized the objectives of the AC and the right to access to justice of ENGOs. The Court gave a broad interpretation to article 9(2) AC and the implementing EIA. It also clearly held that ENGOs are in a privileged position<sup>211</sup> and that their *locus standi* is to be assumed<sup>212, 213</sup>.

### iii. *Lesoochránárske zoskupenie*

In the *Lesoochránárske zoskupenie* case<sup>214</sup>, the referring court asked whether an ENGO could derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of article 9(3) AC, in order to be able to challenge a decision to derogate from a system put in place by the Habitats Directive for the protection of the brown bear, a species of Union interest.<sup>215</sup>

The CJEU first held that as article 9(3) AC applies both to situations falling within the scope of national law and to situations falling within the scope of Union law, it has jurisdiction to interpret this provision in order to ensure its uniform application, and to give a ruling on whether or not it has direct effect.<sup>216</sup>

Next, the CJEU ruled that article 9(3) AC is not sufficiently precise and unconditional to have direct effect as it leaves it to the national legislator to set certain conditions that have to be met by the applicant.<sup>217</sup>

The Court continued that given the principle of national procedural autonomy, in the absence of EU rules, it is for the MS to lay down the

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<sup>211</sup> The Court took thereby the side of the majority of German scholars such as: *Schlacke*, in: NuR 2007, p. 14; *Müller-Terpitz*, in: Archiv des Völkerrechts 2005, pp. 487-488; *Koch*, in: NVwZ 2007, p. 377; *Radespiel*, in: EurUP 2007, p. 122.

<sup>212</sup> *Scheyli*, in: Archiv des Völkerrechts 2000, p. 245; *Müller*, Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionsschutzrechts, pp. 115 and 233-234; *Ziekow*, in: NVwZ 2007, p. 260; *Gassner*, in: NuR 2007, p. 147.

<sup>213</sup> *Müller* (fn. 122), p. 512.

<sup>214</sup> Judgment in *Lesoochránárske zoskupenie*, Case C-240/09, ECR, EU:C:2011:125.

<sup>215</sup> *Ibid*, para. 28.

<sup>216</sup> *Ibid*, paras 42-43.

<sup>217</sup> *Ibid*, paras 44-45.



procedural rules governing actions as they are responsible to ensure that the rights which individuals derive from EU law are effectively protected. They furthermore need to comply with the principles of equivalence and effectiveness.<sup>218</sup> While relying on the principle of effectiveness, the CJEU held that, if the effective protection of EU environmental law is not to be undermined, it is inconceivable to interpret article 9(3) in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law.<sup>219</sup> Therefore, the CJEU concluded that in order to ensure the effective judicial protection in the fields covered by EU environmental law, it is for the national courts to interpret national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) AC.<sup>220</sup>

Thus, national courts are under an obligation to grant a wide access to justice to complainants wishing to challenge decisions that allegedly infringe national environmental law. If EU environmental rules are at the basis of the national rules, MS have to give full effect to access to justice as an obligation stemming from EU law.<sup>221</sup>

### c) Assessment

In this Chapter it became clear that the EU legal order grants an important role to ENGOs when it comes to filing legal proceedings for the environmental public interest. Using the words of advocate-general Sharpston:

“(...) the [AC] and (...) Directive 2003/35/EC, have deliberately chosen to reinforce the role of [ENGOs]. They have done so in the belief that such organisations’ involvement in both the administrative and the judicial stages not only strengthens the

<sup>218</sup> Judgment in *Lesoochranárske zoskupenie*, EU:C:2011:125, paras 47-48.

<sup>219</sup> Judgment in *Lesoochranárske zoskupenie*, EU:C:2011:125, para. 49 and *Mangold* (fn. 120), p. 254.

<sup>220</sup> Judgment in *Lesoochranárske zoskupenie*, EU:C:2011:125, para. 50 and *Mangold* (fn. 120), p. 254.

<sup>221</sup> *Müller* (fn. 122), p. 516.

decisions taken by the authorities but also makes procedures designed to prevent environmental damage work better.”<sup>222</sup>

The rules in the AC and the EU implementing measures therefore clearly require MS to grant these organisations a wide access to justice.

In the next Chapter, we will look at how MS are in practice influenced by these obligations, having regard to the Belgian and German legal systems.

### **3. Access to court and standing for ENGOs in the Belgian and German legal orders**

As already mentioned, the rules on access to court and standing vary considerably among the different MS. Legal systems range from those that allow anyone to challenge administrative decisions and omissions on environmental matters (*actio popularis*) to those that restrict the possibility for judicial review only to those members of the public whose individual rights have been affected.<sup>223</sup>

The Belgian procedural legal system takes on a middle position in terms of restrictiveness. *Locus standi* is determined via an interest-based criterion.<sup>224</sup> If a claimant can prove this, the legal proceedings serve the function of an objective legality control of the administration.<sup>225</sup>

Germany’s procedural system on the other hand is one of the strictest. By virtue of the protective norm theory (*Schutznormtheorie*) it conditions access to the court to those applicants that have an

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<sup>222</sup> Opinion of Advocate-general Sharpston in *Djurgården*, Case C-263/08, ECR, EU:C:2009:421, para. 64.

<sup>223</sup> *Darpö* (fn. 15), p. 176.

<sup>224</sup> *Darpö* (fn. 15), p. 177.

<sup>225</sup> *Elia Antonio/Backes/van Rhee/Spronken/Berlee* (eds), *Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States’ Courts*, p. 69 and *Jans*, in: *Bulterman/Hancher/McDonnell/Sevenster*, *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot*, p. 275.

individual or subjective public right.<sup>226</sup> Administrative legal proceedings indeed have as exclusive function the legal protection of the citizen towards the administration. Control of the administration is seen as a matter for the legislature and not for the courts.<sup>227</sup>

First, I will present the rules on access to court and standing with regard to ENGOs for the Belgian (Section a)) and the German system (Section b)) (subsections a. under both Sections a) and b)). In addition the extent to which EU law has lead to an opening up of those rules will be analysed (subsections b.). Second, having regard to the different basic foundation on which Belgium and Germany have construed their rules, I will compare the extent of the influence of the EU legal order on both systems (Section c)).

### **a) Belgium**

#### **a. Procedural framework**

##### **i. Institutional structure**

Belgium is a federal state consisting of a federal level, three Regions<sup>228</sup> and three Communities<sup>229</sup>. The Regions and the Communities enjoy a wide measure of autonomy.<sup>230</sup> With regard to environmental policy, the Regions are competent for most of the legislative and executive functions as a result of which the substantive environmental law provisions vary from Region to Region.<sup>231</sup> However, as the organisation of the judicial system and the

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<sup>226</sup> *Darpö* (fn. 15), p. 176 and *Darpö*, Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union, October 2013, p. 13, available at: <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf> (3 June 2015).

<sup>227</sup> *Jans* (fn. 230), p. 275.

<sup>228</sup> The three Regions are: the Flemish Region, the Walloon Region and the Brussels-Capital Region.

<sup>229</sup> The three Communities are: the Flemish Community, the French Community and the German-speaking Community.

<sup>230</sup> *Milieu Ltd.*, Measures on access to justice in environmental matters (Article 9 (3) – Country Report for Belgium, July 2007, p. 7, available at: [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm) (accessed on 26 May 2015).

<sup>231</sup> *Ibid.*, p. 7.

administration of justice remains under the exclusive jurisdiction of the federal state, there is only one, federally organised judicial system with uniform procedures throughout the country.<sup>232</sup>

Actions of ENGOs in the collective interest of environmental protection may be brought before the Ordinary Courts and Tribunals, the Council of State (*Raad van State/Conseil d'État*) (hereafter: RvS) and the Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*) (hereafter: GwH).<sup>233</sup> The conditions for access to court and standing for ENGOs before these courts are essentially determined by three laws and their interpretation in the case-law. The three laws are the Judicial Code, that applies to ordinary civil actions and summary proceedings before the civil courts; the law of 12 January 1993 establishing a right of action in the field of environmental protection, that applies to the special environmental action for injunctive relief before the President of the Court of first instance and, finally, the consolidated laws on the Council of State, that apply to all actions before the RvS.<sup>234</sup>

Hereunder, the standing requirements before the ordinary courts, the RvS and the GwH as determined by the applicable laws and case-law are examined.

## ii. Ordinary judiciary

Disputes involving natural and legal persons or disputes between such persons and public authorities are usually dealt with by the ordinary judiciary.<sup>235</sup> Article 9(3) AC applies to the actions brought by ENGOs before these Courts and Tribunals.<sup>236</sup>

<sup>232</sup> Milieu Ltd., Country Report for Belgium (fn. 230), p. 7.

<sup>233</sup> *De Sadeleer/Roller/Dross*, Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal, p. 9.

<sup>234</sup> Milieu Ltd. (fn. 235), p. 10.

<sup>235</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 9 and *Larssen/Jadot* (fn. 119), p. 236.

<sup>236</sup> Article 9(2) AC principally concerns administrative decisions under article 6 AC for which the RvS is competent. See *Larssen/Jadot* (fn. 119), p. 248.

Article 17 of the Judicial Code provides in this context that “no action may be brought where the petitioner does not have a title and interest to sue”. Article 18 continues that an action will only be admissible if the petitioner has “an acquired and immediate interest”.

It is thus clear that an *actio popularis* is not permitted.<sup>237</sup> In the case-law we find further clarifications as to what ‘interest’ precisely means and whether ENGOs can invoke a collective interest in order to take action to protect the environment.<sup>238</sup>

Whereas in the 1970s civil and criminal courts increasingly acknowledged that environmental groups could rely on a collective interest, this lenient case-law was changed in the 1980s as a consequence of the *Eikendael*-judgment<sup>239</sup> of the supreme court of Belgium, the Court of Cassation (*Hof van Cassatie/Cour de Cassation*) (hereafter: Cass).<sup>240</sup> In this judgment the Cass held that, additionally, a petitioner must demonstrate a violation of one of his own rights (*i.e.* a subjective right).<sup>241</sup>

With regard to ENGOs, the Cass drew a distinction between the ENGO’s own interest and the collective interest.<sup>242</sup> On the one hand, an ENGO has patrimonial and extra-patrimonial interests of its own and obviously has the capacity to seek legal redress in respect of the protection of its existence, its own assets and its reputation.<sup>243</sup> The capacity of the ENGO to bring an action in the collective interest for

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<sup>237</sup> Lavrysen, in: Kotzé/Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives*, p. 106

<sup>238</sup> Lavrysen (fn. 237), p. 106

<sup>239</sup> Cass, 19 November 1982, *Eikendael*, Arr. Cass. 1982-1983.

<sup>240</sup> Lavrysen (fn. 237), p. 106

<sup>241</sup> Cass, 19 November 1982, *Eikendael*, Arr. Cass. 1982-1983, p. 372, conclusion Krings, Pas. 1983, I, p. 338; Legislative proposal of 21 October 2014 on amending the Judicial Code in order to grant associations a right of action for the defense of collective interests, Parl. St. Chamber of Representatives, 2014-2015, no. 0466/001, p. 4 and *De Sadeleer/Roller/Dross* (fn. 233), p. 9.

<sup>242</sup> Sambon (fn.5), p. 384 and *De Sadeleer/Roller/Dross* (fn. 233), p. 9.

<sup>243</sup> Cass, 19 November 1982, Pas. 1983, p. 338; *De Sadeleer/Roller/Dross* (fn. 233), p. 9; Lavrysen (fn. 237), p. 106 and *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 11.

which the ENGO was established was less self-evident.<sup>244</sup> Indeed, according to the Cass, an ENGO could – until recently – only seek legal redress in the collective interest where such an action is governed by a legal provision, such as the law of 12 January 1993 (see *infra*).<sup>245</sup>

Thus, in the absence of such a legal provision, there was no possibility to bring actions in the defense of the collective interest.<sup>246</sup> The Cass *in concreto* held that:

“the particular interest of a person only encompasses its moral personality, legal patrimony and moral rights, in particular his patrimony, honour and reputation. The mere fact that a legal or natural person pursues an aim – even a statutory aim – does not entail the creation of a particular interest, as any person can purport to pursue any aim.”<sup>247</sup>

This line of case-law that dates from before the ratification of the AC by Belgium was incompatible with article 9(3) AC read together with article 1 AC stating the overall objective of the AC to guarantee the right of access to justice.<sup>248</sup> Indeed, by preventing as a rule the possibility to bring an action in the collective environmental interest, the Cass effectively blocked the access to justice for ENGOs.<sup>249</sup> Moreover, it should be noted that the Cass holds that the fact that a person has an admissible annulment action before the RvS does not

<sup>244</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 9.

<sup>245</sup> *Ibid.*, (fn. 238), p. 9.

<sup>246</sup> *Bloch*, in: TMR 2012, p. 638; *Delnoy*, in: *Pallemmaerts* (ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, p. 347; *De Sadeleer/Roller/Dross* (fn. 233), p. 10; *Larssen/Jadot* (fn. 119), p. 248; *Elia Antonio/Backes/van Rhee/Spronken/Berlee* (fn. 230), p. 159; *Lavrysen* (fn. 237), p. 106; *Lavrysen*, *Study on factual aspects of access to justice in relation to EU environmental law*, April 2012, p. 18, available at: <https://biblio.ugent.be/publication/2950390/file/2950391.pdf> (29 May 2015). and *Milieu Ltd.*, *Country Report for Belgium* (fn. 230), p. 11.

<sup>247</sup> Cass, 19 November 1982, *Eikendael*, Pas. 1983, I, p. 338. This judgment has been followed by more recent judgments: Cass, 19 September 1996, RCJB 1997, p. 105 and Cass, 28 September 2001, AR C990568F.

<sup>248</sup> *Lefranc*, in: TMR 2013, p. 395; *Larssen/Jadot* (fn. 119), p. 249 and *Milieu Ltd.*, *Country Report for Belgium* (fn. 230), p. 18.

<sup>249</sup> *Larssen/Jadot* (fn. 119), p. 249.

mean that this person *ipso facto* has a sufficient interest to bring an action to the ordinary judiciary, even in summary proceedings.<sup>250</sup> Thus, even if an ENGO had an interest recognized by the RvS, it could not bring an action before the ordinary judiciary, not even to safeguard its interest in the procedure before the RvS.<sup>251</sup> As the ENGO could not rely on summary proceedings before the ordinary judiciary, the annulment action was meant to fail as the environment that needed protection was often already irrevocably destroyed causing the interest of the NGO to disappear.<sup>252</sup>

It was exactly this restrictive jurisprudence that led the Belgian legislator to pass the law of 12 January 1993 establishing a *sui generis* right of action in the field of environmental protection. This law enhances the standing of ENGOS before the civil courts and thus better conciliates Belgian law with the AC.<sup>253</sup>

The law grants ENGOS that fulfill certain conditions an exceptional right of action in the context of an expedited judicial review procedure.<sup>254</sup> ENGOS are *in concreto* entitled to bring an action before the President of the Court of first instance in the case of a manifest violation of a legislative or regulatory provision on environmental protection or a serious threat to such a violation (article 1(1) law of 12 January 1993). This so-called ‘suspension action’ is dealt with in accordance with the procedural rules that apply to summary proceedings in urgent civil cases, except that article 17 Judicial Code

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<sup>250</sup> Cass, 19 November 1982, Pas. 1983, I, p. 338 and *Bogaerts*, in: *Larssen/Pallemaerts* (eds), *L'accès à la justice en matière d'environnement – Toegang tot de rechter in milieuzaken*, p. 19.

<sup>251</sup> *Bogaerts* (fn. 250), p. 19.

<sup>252</sup> *Ibid.*, p. 19.

<sup>253</sup> Legislative proposal of 7 February 1991 on a right of action for environmental associations, *Parl.St.* Senate, 1990-1991, no. 1232/1, p. 2; *Sambon* (fn.5), p. 384; *De Sadeleer/Roller/Dross* (fn. 233), p. 17; *Moërynck/Nicolas*, in: *Ebbeson* (ed.), *Access to justice in environmental matters in the EU – Accès à la justice en matière d'environnement dans l'UE*, p. 137 and *Larssen/Jadot* (fn. 119), p. 250.

<sup>254</sup> *Larssen/Jadot* (fn. 119), p. 250; *De Sadeleer/Roller/Dross* (fn. 233), p. 10 and *Tulkens*, in: *Larssen/Pallemaerts* (eds), *L'Accès à la justice en matière d'environnement – Toegang tot de rechter in milieuzaken*, p. 183.

does not apply in this case.<sup>255</sup> If the President holds that an act constitutes a manifest violation or a serious risk to such a violation of an environmental provision, he/she may order the cessation of this act and impose an injunction to stop the performance of the act or measures aimed at avoiding harm to the environment (article 1(2) law of 12 January 1993). Via this action ENGOs are thus able to challenge unlawful material behavior on the part of a private person or a public authority.<sup>256</sup>

The ENGOs have to fulfill certain conditions in order to be able to benefit from this specific right of action. These requirements are rooted in the concern that without these there would be an excessive increase in actions and that fictitious associations would be established.<sup>257</sup> First, the ENGO needs to be validly constituted as a non-profit organization and to have legal personality in conformity with the law of 27 June 1921<sup>258</sup>. Next, the protection of the environment needs to constitute the statutory objective (article 2(1)). Moreover, the ENGO needs to show that its actual activity genuinely conforms to the objective laid down in its statutes and that this activity pertains to the collective interest of the environment that it aims to protect via the suspension action (article 2(3)). It is thus not enough that an ENGO generally has environmental protection as objective. There has to be a relation between the environmental interest that the ENGO wants to protect via the action on the one hand, and its statutory objective and activity on the other.<sup>259</sup> In addition, the association must specify the territory within which it exercises its activities in the statutes (article 2(1)) and must, on the date of the lodging of the action, have legal personality of at least three years

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<sup>255</sup> *De Sadeleer/Roller/Dross* (fn. 233), pp. 10-11 and *Milieu Ltd.*, Country Report for Belgium (fn. 230), pp. 8, 11.

<sup>256</sup> *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 5.

<sup>257</sup> Legislative proposal of 7 February 1991 on a right of action for environmental associations, *Parl.St.* Senate, 1990-1991, no. 1232/1, p. 4.

<sup>258</sup> Law of 27 June 1921 on non-profit associations, international non-profit associations and foundations.

<sup>259</sup> *Bogaerts* (fn. 250), p. 57.



(article 2, (2)). Although the law does not specify it, also in this case the action has to relate to an event that happened within the territory described by the statutes or that has consequences for the statutory territory.<sup>260</sup>

Also this legislative response is according to some commentators insufficient to ensure compliance with the AC.<sup>261</sup> Especially the requirement for applicant ENGOs to have been incorporated for at least three years prior to the date on which the action is brought<sup>262</sup> as well as the limitation of the law's scope of application to cases of manifest violations or a serious risk to such violations may be too restrictive to ensure full compliance with article 9(3) AC read together with article 1 AC.<sup>263</sup> Moreover, the Cass added another condition to the law requiring the existence of environmental damage in order for an action to be admissible.<sup>264</sup> This new condition is not explicitly provided for in the law itself and is clearly contrary to article 9(3) AC.<sup>265</sup> Finally, the object of the litigation under the law of 12 January 1993 is not an administrative decision, but the material behavior on the part of the defendant, although often the legality of an administrative decision, such as a permit, will be relevant to determine whether the defendant's acts are a manifest violation of environmental law. In accordance with article 159 of the Belgian Constitution, the President of the Court of first instance has the power to set aside the administrative act *inter partes*, but does not have the power to invalidate or even suspend it *erga omnes* as this falls under the exclusive competence of the RvS (see *infra*).<sup>266</sup>

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<sup>260</sup> *Ibid.*, p. 58.

<sup>261</sup> *Delnoy* (fn. 246), p. 347.

<sup>262</sup> This condition is not appropriate for environmental protection: the urgent necessity to protect a natural site could justify the establishment of an association for the collective interest to protect the site. *Sambon* (fn.5), p. 387.

<sup>263</sup> *Delnoy* (fn. 246), p. 347.

<sup>264</sup> Cass., 2 March 2006, Aménagement-Environnement 2007, p. 13; *Bogaerts* (fn. 250), p. 31; *Delnoy* (fn. 246), p. 347 and *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 12

<sup>265</sup> *Delnoy* (fn. 246), p. 347.

<sup>266</sup> *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 12.

The Cass's jurisprudence dated from before the entry into force of the AC. Although the Court did not pronounce itself in environmental cases where the *Eikendael*-doctrine could be applied, this doctrine did remain in force.<sup>267</sup> The first opportunity for the Court to reconsider its case-law in the light of the AC was in its judgment of 11 June 2013<sup>268</sup>. This judgment brought a radical change in its approach towards standing of ENGOs.<sup>269</sup> The Court mentioned article 3(4)<sup>270</sup>, 9(3) and 2(4)<sup>271</sup> AC to conclude that Belgium engaged itself to secure access to justice for ENGOs when they want to challenge acts or omissions which contravene domestic environmental law, provided they meet the criteria laid down in national law.<sup>272</sup> According to the Cass, those criteria may not be construed or interpreted in such a way as to deny ENGOs access to justice. Judges should thus interpret the national criteria in conformity with the objectives of article 9(3) AC.<sup>273</sup>

The Cass applied this interpretation to the interest-requirement for an ENGO in article 3 of the Preliminary Title of the Criminal Procedure Code to conclude that an ENGO has a sufficient interest if it introduces a civil action before the criminal court with the aim to protect its statutory (collective) interest.<sup>274 275</sup>

In sum, the violation of the collective interest constitutes from now on an 'own' interest for the ENGO, the violation of which may constitute

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<sup>267</sup> *Lefranc* (fn. 248), pp. 395-396 and *Lavrysen* (fn. 246), p. 18.

<sup>268</sup> Cass, 11 June 2013, no. P.12.1389.N.

<sup>269</sup> *Lavrysen*, Recent Developments in Environmental Law in Belgium, May 2014, p. 5, available at: [http://www-user.uni-bremen.de/avosetta/belgium\\_rd\\_maribor.pdf](http://www-user.uni-bremen.de/avosetta/belgium_rd_maribor.pdf) (28 May 2015).

<sup>270</sup> Article 3 (4) provides that each Party "shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation".

<sup>271</sup> Article 2 (4) defines "the public" as "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups".

<sup>272</sup> Cass, 11 June 2013, no. P.12.1389.N., para. 4 and *Lavrysen* (fn. 135), p. 12.

<sup>273</sup> Cass, 11 June 2013, no. P.12.1389.N., para. 4 and *Lavrysen* (fn. 135), p. 12.

<sup>274</sup> *Lavrysen* (fn. 269), p. 5.

<sup>275</sup> Cass, 11 June 2013, no. P.12.1389.N.; *Lavrysen* (fn. 135), p. 12 and *Lavrysen* (fn. 269), p. 5.

personal damage. The collective interest does not merge with the general interest.<sup>276</sup>

Thus even without a legislative amendment, the national court can interpret and apply the interest-requirement in conformity with article 9(3) AC.<sup>277</sup>

### iii. Council of State (RvS)

The RvS is the supreme administrative court of Belgium (article 160 Belgian Constitution). It adjudicates mainly on actions challenging unilateral, final, legally binding acts of an administrative authority, whether individual or regulatory in nature.<sup>278</sup> The action before the RvS is the only review procedure available in order to have an administrative act declared unlawful and invalidated *erga omnes* and its execution suspended pending a decision on the merits.<sup>279</sup>

Actions before the RvS can fall both under article 9(2) and 9(3) AC.<sup>280</sup> In comparison to article 9(3), article 9(2) AC is more restrictive for States as it imposes two specific obligations next to the general obligation to respect the other articles of the Convention, *i.e.* to conform to the objective of granting a wide access to justice and to accept the interest of an ENGO that complies with the conditions of article 2(5) AC.<sup>281</sup>

By virtue of article 19 of the consolidated laws on the Council of State, an action for annulment of an administrative act can be brought by any party which has been ‘harmed’ or has an ‘interest’ at stake.

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<sup>276</sup> *Lefranc* (fn. 248), p. 396.

<sup>277</sup> *Ibid.*, p. 396.

<sup>278</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 11 and *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 13.

<sup>279</sup> *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 5.

<sup>280</sup> *Larssen/Jadot* (fn. 119), p. 251.

<sup>281</sup> *Ibid.*, p. 251.

According to settled case-law, this interest has to be personal and direct.<sup>282</sup>

Thus although an ENGO does not need to assert the violation of a subjective right (since the action for annulment is an objective dispute on the legality of an administrative act or regulation), the interest to act before the RvS still needs to be individualized and to be distinct from the interest of any citizen in respect of an act's legality. The action is not an *actio popularis*.<sup>283</sup> It was moreover the aim of the legislator when drafting article 19 of the consolidated laws to exclude an action in the general interest.<sup>284</sup>

According to the RvS's case-law, ENGOs indeed have to fulfill certain conditions in order to bring an action before the RvS.<sup>285</sup> First, the association must have legal personality and must be validly constituted as a non-profit organization in conformity with the law of 27 June 1921.<sup>286</sup> Second, the association must act within the limits set by its articles of association.<sup>287</sup> An ENGO's interest to bring an action is evaluated in the light of its aims. The association's objectives have to be sufficiently precise in order to distinguish them from the simple general interest, without which an *actio popularis* would be brought.<sup>288</sup> At the same time, however, the objectives may not be reducible to the defense of the particular interests of the members of the association as this is not tantamount to the collective interest.<sup>289</sup>

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<sup>282</sup> Larssen/Jadot (fn. 119), p. 251; De Sadeleer/Roller/Dross (fn. 233), p. 11; Lavrysen (fn. 237), p. 108 and Milieu Ltd., Country Report for Belgium (fn. 230), p. 13.

<sup>283</sup> De Sadeleer/Roller/Dross (fn. 233), pp. 11-12.

<sup>284</sup> Legislative proposal of 8 February 1938 on the establishment of the Council of State, Parl.St. Chamber of Representatives, 1937-1938, no. 110, p. 11; Legislative proposal of 15 June 1939 on the establishment of the Council of State, Parl.St. Senate, BZ 1939, no. 80, p. 49; Sambon, in: Larssen/Pallemaerts (eds), L'accès à la justice en matière d'environnement – Toegang tot de rechter in milieuzaken, p. 103 and Lefranc (fn. 248), p. 638.

<sup>285</sup> Larssen/Jadot (fn. 119), p. 252 and De Sadeleer/Roller/Dross (fn. 233), p. 12.

<sup>286</sup> De Sadeleer/Roller/Dross (fn. 233), p. 12.

<sup>287</sup> Ibid., p. 12.

<sup>288</sup> De Sadeleer/Roller/Dross (fn. 233), p. 12.

<sup>289</sup> Sambon, in: Larssen/Pallemaerts (eds), L'accès à la justice en matière d'environnement – Toegang tot de rechter in milieuzaken, p. 124 and De Sadeleer/Roller/Dross (fn. 233), p. 12.

Third, there must be a sufficiently direct link between the objectives of the ENGO and the prejudice resulting from the contested act.<sup>290</sup> In order to evaluate this link the nature of the contested act and the geographical extent of its impact are taken into account.<sup>291</sup> With regard to the nature of the contested act, the RvS ruled e.g. that ENGOs do not have a direct interest to request the annulment of fiscal provisions that are deemed unfavourable to the protection of the environment.<sup>292</sup> With regard to the geographical extent of the effects of the contested act, the RvS rules that ENGOs that covers a wide geographical territory generally do not have a specific interest to request the annulment of a decision of local interest which can only be challenged by local associations.<sup>293</sup> However, this has to be nuanced. On the one hand, a geographically localized project can have consequences that go beyond the local area allowing regional ENGOs to bring an action.<sup>294</sup> On the other hand, ENGOs with very specific objectives are entitled to act over a large territory as a result of the strict specificity in their articles.<sup>295</sup> Furthermore, some judgments<sup>296</sup> of the RvS add a requirement of ‘representativeness’ of the ENGO only allowing an ENGO to defend the collective interests of a group if it can be considered as a representative of this group. It should therefore be reasonable to assume that the positions adopted by the organization coincide with those of the interested parties themselves

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<sup>290</sup> *Sambon* (fn. 289), p. 124 and *De Sadeleer/Roller/Dross* (fn. 233), p. 12.

<sup>291</sup> *Sambon* (fn. 289), p. 136 and *De Sadeleer/Roller/Dross* (fn. 233), p. 12-13.

<sup>292</sup> RvS 29 May 1996, *Inter-Environnement Wallonie and others*, no. 59.917 and *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

<sup>293</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

<sup>294</sup> E.g. RvS, 13 June 1989, *Brysse, Cadec and Inter-Environnement Wallonie*, no. 107.820: the concession of an authorization was held to be capable of damaging the integrity of aquifers of regional importance.

<sup>295</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

<sup>296</sup> E.g. RvS, 11 August 1989, *Wellens and others*, no. 32.953 concerning an ENGO with the protection of certain animal species as objective.

<sup>297</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

<sup>298</sup> This last condition is imposed mainly by Dutch language divisions, the French language divisions do not go this far. See *Larssen/Jadot* (fn. 119), p. 252 and *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

which is assessed by the members' register and elements of durability and effectiveness of the activities of the ENGO.<sup>299</sup>

The RvS finally does not regard the ENGO's seniority as an admissibility requirement anymore. It holds in this regard that an organization cannot be blamed for having been created on the occasion of the disputed project at the risk of infringing the freedom of association.<sup>300</sup>

The jurisprudence of the RvS is at the moment subject to evolution.<sup>301</sup> For a long time, the emphasis of the RvS on the fact that the collective interest should be distinguishable from the 'general interest' seriously restricted access to judicial review for ENGOs and was contrary to the requirements of article 9(2) and (3) AC.<sup>302</sup> So much so, that some commentators asked whether ENGOs were not doomed to become an endangered species themselves.<sup>303</sup> In practice only ENGOs whose aim was environmental protection in a specific, geographically delimited region in which the effects of the challenged act could be localized, or ENGOs specialized in a very precise aspect of environmental protection could meet the standing requirements.<sup>304</sup> The ACCC

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<sup>299</sup> RvS, 21 October 1986, *Vzw Bond Beter Leefmilieu Tessenderlo and Pals CS*, no. 27.042; *Lavrysen* (fn. 237), p. 108; *Sambon* (fn. 296), p. 134; *Larssen/Jadot* (fn. 119), p. 252; *Moërynck/Nicolas* (fn. 259), p. 127 and *De Sadeleer/Roller/Dross* (fn. 233), p. 13.

<sup>300</sup> RvS, 29 August 2011, *asbl Association Inter-Quartiers de Waterloo "Dans ma rue"*, no. 214.888; RvS, 15 January 2008, *asbl Collectif des Grands Prés*, no. 178.585; *Sambon* (fn.5), p. 387 and *Delnoy* (fn. 246), p. 348.

<sup>301</sup> *Lavrysen*, EU National Judges and the Aarhus Convention – How the Judiciary can further the Implementation of the Third Pillar, OSCE UNECE Regional Workshop on Access to Justice in Environmental Matters for South Caucasus and Eastern Europe Countries, Proceedings, February 2015, p. 4, available at: <https://biblio.ugent.be/input/download?func=downloadFile&recordId=5861775&fileId=5861892> (31 May 2015).

<sup>302</sup> *Larssen/Jadot* (fn. 119), p. 254 and *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 5.

<sup>303</sup> *Jadot*, in: JT 2005, pp. 120-122; *Lefranc*, in: TMR 2012, p. 640 and *Sambon* (fn.5), p. 386.

<sup>304</sup> *Milieu Ltd.*, Country Report for Belgium (fn. 230), p. 5.

criticized this jurisprudence as “effectively blocking most, if not all ENGOs from access to justice”.<sup>305</sup>

Under pressure from the CJEU, the ACCC, the GwH (see *infra*) and the ECtHR<sup>306</sup> the jurisprudence of the RvS regarding standing for ENGOs seems to become more lenient in some instances.<sup>307</sup> In other instances however, the RvS is of the opinion that its stricter approach is consistent with article 9 AC.<sup>308</sup> In one case it referred to the *Lesoochranárske zoskupenie* case<sup>309</sup> to hold that article 9(3) AC does not establish an unconditional right to bring an action and that the requirement to demonstrate a lawful personal interest is compatible with the AC.<sup>310</sup> Although the picture is not at all clear, it is to be expected that the Council will become more lenient again under pressure from the abovementioned courts and because the case-load in front of the RvS is diminishing.<sup>312</sup>

<sup>305</sup> ACCC, Findings and Recommendations with regard to compliance by Belgium (fn. 148), p. 11.

<sup>306</sup> In paras 29-30 of the judgment of ECtHR, 24 February 2009, *L'Eralbière A.S.B.L. v. Belgium*, the ECtHR concluded to a violation of article 6(1) ECHR: “29. (...) in view of the circumstances of the present case, and in particular the nature of the impugned measure, the status of the applicant association and its founders and the fact that the aim it pursued was limited in space and in substance, that the general interest defended by the applicant association in its application for judicial review cannot be regarded as an *actio popularis*. 30. The Court concludes that the “dispute” raised by the applicant association had a sufficient link to a “right” to which it could claim to be entitled as a legal entity for Article 6 of the Convention to be applicable.”

<sup>307</sup> The RvS sometimes states that a non-profit organization that has legal personality has standing if its statutory objective is of a particular nature, and thus different from that of the general interest, that it is defending a collective interest, that the statutory objective can be affected by the challenged act and that it is actively pursuing its statutory objective. E.g. RvS, 17 November 2008, *Coomans et. al.*, no. 187.998, para. 28.2.3.2 and Judgment of the Council of State of 24 February 2011, *vzw Milieufront Omer Wattez*, no. 211.533, para. 7.

<sup>308</sup> E.g. RvS, 3 November 2009, *vzw Milieufront Omer Wattez*, no. 197.509 and more than 20 judgments in the same sense and *Eliantonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 168.

<sup>309</sup> More specifically it referred to paras 47 and 48 mentioning the principle of procedural autonomy and the principles of equivalence and effectiveness.

<sup>310</sup> RvS, 13 June 2013, no. 223.882, *asbl Terre Wallonne*.

<sup>311</sup> *Lavrysen*, EUFJE 2013 Vienna Conference – Report on Belgium, 2013, p. 5, November 2013, available at: <http://www.eufje.org/images/docConf/vie2013/BE%20vie2013.pdf> (29 May 2015).

<sup>312</sup> *Eliantonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 173.

#### iv. Constitutional Court (GwH)

The GwH has the competence to control in a limited way the constitutionality of laws, decrees<sup>313</sup> and ordinances<sup>314</sup> adopted by the federal state, the Regions and the Communities (article 142 Belgian Constitution and article 1 Special act on the Constitutional Court of 6 January 1989). Legislative acts can *inter alia* be censured if they disregard Title II of the Constitution on the rights and freedoms of the Belgians. A case may be brought before the GwH in the form of an action for annulment or via a preliminary reference from other courts and tribunals.<sup>315</sup>

The jurisprudence of the GwH is important with regard to the rules on access to court and standing for ENGOs. Although the Court is not competent to directly control the compatibility of legislative acts with article 9 AC, it can combine relevant constitutional provisions with binding international and EU provisions, such as the AC and Directive 2003/35/EC, to review next to the constitutionality of the legislative acts also their conformity with these international and EU provisions.<sup>316</sup> The AC and Directive 2003/35/EC are in practice often invoked together with articles 10 and 11 (the principle of equality and non-discrimination) and article 23, 4° (the right to a healthy environment) of the Constitution.<sup>317</sup>

An important illustration of the control of the GwH is the case in which the Court annulled and declared unconstitutional the main part of a Walloon Decree<sup>318</sup> together with different parliamentary

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<sup>313</sup> Decrees are the laws adopted by the communities and regions (except for the Brussels-Capital Region).

<sup>314</sup> Ordinances are the laws adopted by the region Brussels-Capital. They have the same hierarchy as federal laws.

<sup>315</sup> Lavrysen, in: elni review 2007, p. 5

<sup>316</sup> GwH, 30 March 2010, no. 30/2010, p. 41; Lavrysen (fn. 7), p. 669 and Bombois, in TMR 2013, pp. 4, 14.

<sup>317</sup> Bombois (fn. 316), p. 4 and Bombois, in Aménagement-Environnement 2013, p. 61.

<sup>318</sup> Decree of the Walloon Region of 17 July 2008 on certain permits for which there exist overriding reasons in the public interest.



ratifications of specific permits done on the basis of this Decree.<sup>319</sup> The GwH thereby applied the findings of the CJEU in the preliminary ruling procedures in *Boxus*<sup>320</sup>, *Solvay*<sup>321</sup> and *Le Poumon Vert de La Hulpe*<sup>322 323</sup>. *In casu*, the Walloon Decree regulated the ratification of building permits for various works in view of overriding reasons in the public interest. The permits could be granted by the Walloon Government after which they had to be ratified by the Walloon Parliament.<sup>324</sup> Normally, only the RvS is competent to rule on actions for annulment against administrative acts. However, via the ratification by decree the RvS ceased to have jurisdiction.<sup>325</sup> As a rule, only the GwH can rule on legislative acts, but only on certain grounds.<sup>326</sup> As the GwH is not competent to examine the procedural legality of the permits (such as observance of the EIA Directive, public participation...) the judicial review is more restricted than the review of normal administrative permits by the RvS.<sup>327</sup> The GwH had actions for annulment of the Decree and questions referred by the RvS on the lawfulness of the Decree before it and asked the CJEU if the AC and the EIA Directive were applicable to such a decree and, if so, if the constitutional review satisfied the requirements of article 9(2) AC.<sup>328</sup>

The CJEU held that only projects that have been adopted by a specific legislative act, in such a way that the objectives of the AC and the EIA Directive have been achieved by the legislative process, are excluded from the scope of these instruments.<sup>329</sup>

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<sup>319</sup> GwH, 22 November 2012, *M.-N. Solvay v. Walloon Region*, no. 144/2012.

<sup>320</sup> Judgment in *Boxus c.s.*, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, ECR, EU:C:2011:667.

<sup>321</sup> Judgment in *Solvay c.s.*, Case C-182/10, ECR, EU:C:2012:82.

<sup>322</sup> Judgment in *Le Poumon Vert de La Hulpe*, Joined Cases C-177/09 to C-179/09, ECR, EU:C:2011:738.

<sup>323</sup> *Lavrysen* (fn. 269), p. 7.

<sup>324</sup> *Lavrysen* (fn. 311), p. 3.

<sup>325</sup> *Ibid.*, p. 3.

<sup>326</sup> *Ibid.*, p. 3.

<sup>327</sup> *Ibid.*, p. 3.

<sup>328</sup> *Ibid.*, p. 3.

<sup>329</sup> Judgment in *Solvay c.s.*, Case C-182/10, ECR, EU:C:2012:82, para. 80.

Based on the CJEU's answer, the GwH concluded that the Decree did not satisfy the conditions to be considered a 'specific legislative act' that can be exempted from full judicial review.<sup>330</sup> For this reason, the Court annulled parts of the Decree for violation of the articles 10, 11 and 23 of the Constitution, in combination with the AC and the EIA Directive. The Court furthermore declared that the parts of the Decree that were not challenged by an action for annulment were equally violating the same provisions so that they must also be set aside by the courts.<sup>331</sup>

Furthermore, the GwH has pronounced itself on the standing requirements for ENGOs before the GwH itself and before the ordinary judiciary and the RvS.

First, with regard to standing before the GwH itself, article 2, 2° of the Special act on the Constitutional Court provides that a petition for annulment of a law, decree or ordinance may be introduced by "any natural and legal person that demonstrates an interest". The GwH has clarified this provision by ruling that only persons directly and unfavourably affected by the relevant norm have the required interest. For ENGOs this means that the relevant norm has to affect their – potentially very broad – statutory purpose.<sup>332</sup>

The GwH thus applies a broad definition of standing for ENGOs which are granted access to court in so far as they effectively pursue a collective interest that is spelled out sufficiently in their statutes and that their collective interest is challenged by legislative acts.<sup>333334</sup> In

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<sup>330</sup> GwH, 22 November 2012, *M.-N. Solvay v. Walloon Region*, no. 144/2012 and *Lavrysen* (fn. 311), p. 3.

<sup>331</sup> GwH, 21 February 2013, *Ville de Charleroi v. Walloon Region*, no. 11/2013.

<sup>332</sup> GwH, 30 March 2010, no. 30/2010, B.6.2; *Bombois* (fn. 316), p. 14 and *Bombois* (fn. 317), p. 70.

<sup>333</sup> *Elia Antonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 172.

<sup>334</sup> See e.g. GwH, 22 December 1999, no. 141/99, para. 1 subpara. 3: "when a non-profit organization invokes a collective interest, it is required that its statutory objective is of a particular nature and, thus different from that of the general interest; that it is defending a collective interest, that is not limited to the individual interests of its members; that the statutory objective is genuinely pursued, which has to be

practice, the Court has nearly never declined an ENGO access to court due to lack of standing.<sup>335</sup>

In general the GwH has emphasized that the actions that can be brought before it make it possible to guarantee the right of effective judicial protection in environmental matters.<sup>336</sup>

On the other hand, unlike the RvS, as we have seen earlier, the GwH is not competent to undertake an exhaustive material and formal control of the preparatory actions of the legislative confirmation of a constructional permit, not even with regard to the international and EU rules enshrined in the AC or in the EIA Directive.<sup>337</sup> The GwH's power of review is therefore insufficient to comply with the requirements of judicial control in article 9(2) AC.<sup>338</sup>

Second, the GwH has pronounced itself on the standing requirements applied by the RvS to ENGOs. In this regard, the Court referred to the case-law of the ECtHR<sup>339</sup> on the compatibility of the RvS's admissibility requirements with article 6 ECHR.<sup>340</sup> The GwH stated that even though it is for the RvS to determine whether a petitioner has the required interest to bring an action and that the interest-requirement is motivated by the concern not to allow the *actio popularis*, the judge still needs to make sure that the interest-requirement is not applied in an excessively restrictive or formalistic manner.<sup>341</sup> The GwH recently again invited the RvS to restrain from a

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shown by the concrete and durable activity of the association, in the past as well as in the present."

<sup>335</sup> Lavrysen (fn. 309), p. 2.

<sup>336</sup> GwH, 19 April 2006, no. 56/2006; *Bombois* (fn. 316), p. 14 and *Bombois* (fn. 317), p. 70.

<sup>337</sup> GwH, 22 November 2012, no. 144/2012, B.9.3.

<sup>338</sup> GwH, 22 November 2012, no. 144/2012, B.9.4 and *Bombois* (fn. 316), p. 16.

<sup>339</sup> More specifically the case: ECtHR, 24 February 2009, *L'Eralbière A.S.B.L. v. Belgium*. See also *supra*.

<sup>340</sup> *Bombois* (fn. 316), p. 7 and *Bombois* (fn. 317), p. 64.

<sup>341</sup> GwH, 30 September 2010, no. 109/2010, B.4.1-B.4.3; *Bombois* (fn. 316), p. 7 and *Bombois* (fn. 317), p. 64.

too formalistic application of its standing requirements towards ENGOs.<sup>342</sup>

Third, in the *DAR*-case<sup>343</sup>, the GwH examined the compatibility of the (traditional) standing requirements before the ordinary judiciary in the light of the requirements of the AC.<sup>344</sup> It first referred to the (traditional) case-law of the Cass which precluded an ENGO from bringing a collective action in the defense of the environment.<sup>345</sup> The Court furthermore emphasized that the action for injunction in the law of 12 January 1993 can only be brought by a non-profit organization that is established for at least three years and that is genuinely active in the area of the environment. Furthermore, this association has to have a statutorily defined territory in which it exercises its activities.<sup>346</sup> Under these conditions, the GwH found that the right of ENGOs to access to the ordinary courts and tribunals is too restrictive and thus inconsistent with the articles 3(9) and 9 AC.<sup>347</sup> Referring to *Djurgården*, the Court furthermore held that the legal conditions for bringing an action may not undermine the EU provisions according to which those who have a sufficient interest have to be able to bring an action before the competent judicial authorities.<sup>348</sup> It moreover stressed, like the CJEU, that the EIA Directive, which aims to enforce the AC, opposes itself to a system that in nature would lead to a filtering of the actions.<sup>349</sup>

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<sup>342</sup> GwH, 28 March 2013, *cvba Association Intercommunale pour la Protection et la Valorisation de l'Environnement pour la province de Luxembourg*, no. 44/2013 and *Lavrysen* (fn. 311), p. 4.

<sup>343</sup> GwH, 30 March 2010, *DAR*, no. 30/2010.

<sup>344</sup> *Bombois* (fn. 316), p. 9 and *Bombois* (fn. 317), p. 65.

<sup>345</sup> GwH, 30 March 2010, *DAR*, no. 30/2010, B.7.1, para. 2.

<sup>346</sup> *Ibid.*, B.7.2.

<sup>347</sup> *Ibid.*, B.12.

<sup>348</sup> *Ibid.*, B.13.3.

<sup>349</sup> *Ibid.*, B.13.3.

b. Influence of the EU legal order on the procedural framework

Hereunder, the concrete influence of the AC, the EU implementing directives and the CJEU's case-law on the Belgian procedural framework is examined.

First, it has to be noted that environmental and procedural laws have not yet been amended under the influence of EU law.<sup>350</sup> At the same time however, different proposals to amend procedural law concerning the ordinary judiciary and the RvS have been introduced.<sup>351</sup> With regard to the RvS there are legislative proposals to amend article 19 of the consolidated laws on the Council of State in order to allow ENGOs with legal personality to bring actions for the defence of the collective interest.<sup>352</sup> The aim of these proposals is to better implement the AC that is ratified by the EU and its MS and therefore engages the EU community as a whole.<sup>353</sup> Other legislative proposals aim at amending article 18 of the Judicial Code while also referring to the AC and the engagement of the EU.<sup>354</sup> These proposals are not yet adopted. Another proposal was introduced in the Senate in 2007 and aims to amend the law of 12 January 1993 in order to strengthen the action for injunctive relief and to make the access to it

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<sup>350</sup> *Lavrysen* (fn. 311), p. 1.

<sup>351</sup> *Elia Antonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 180 and *Lavrysen* (fn. 311), p. 1.

<sup>352</sup> Legislative proposal of 19 July 2011 on amending the consolidated laws of the Council of State in order to grant associations a right of action for the defense of collective interest, no. 1693/001, Parl. St. Chamber of Representatives, 2010-2011, and Legislative proposal of 16 November 2011 on amending the consolidated laws of the Council of State in order to grant associations a right of action for the defense of collective interest, no. 5-1330/1, Parl. St. Senate, 2011-2012.

<sup>353</sup> Legislative proposal of 19 July 2011 on amending the consolidated laws of the Council of State in order to grant associations a right of action for the defense of collective interest, no. 1693/001, Parl. St. Chamber of Representatives, 2010-2011, p. 5 and Legislative proposal of 16 November 2011 on amending the consolidated laws of the Council of State in order to grant associations a right of action for the defense of collective interest, no. 5-1330/1, Parl. St. Senate, 2011-2012, p. 3.

<sup>354</sup> Legislative proposal of 14 July 2011 amending the Judicial Code in order to grant associations a right of action for the defense of collective interest, no. 1680/001, Parl. St. Chamber of Representatives, 2010-2011, p. 6 and Legislative proposal of 2 November 2011 amending the Judicial Code in order to grant associations a right of action for the defense of collective interest, no. 5-1293/1, Parl. St. Senate, 2011-2012, p. 3.

easier for ENGOs. It was reintroduced after the general elections of 2007 and is pending in the current legislature.<sup>355</sup>

Furthermore, the EU legal order has had a certain impact on some of the Belgian courts' case-law.

The Cass has until now not referred to any of the cases of the CJEU relating to the AC. Nevertheless, the AC itself has had a great influence on the jurisprudence of the Court on standing of ENGOs. Indeed, in its judgment of 11 June 2013<sup>356</sup>, the Cass found that the national criteria on standing had to be interpreted in conformity with the objectives in article 9(3) AC on the basis of which it concluded that ENGOs should be granted standing if they bring an action in the collective interest of environmental protection.<sup>357</sup>

With regard to the case-law of the RvS, the exact influence of the EU legal order is not so clear. Its case-law is still subject to evolution. Although the RvS sometimes refers to the case-law of the CJEU, it has not broadened its standing requirements for ENGOs on the basis of this case-law. Indeed, in one case it referred to the findings in *Lesoochranàrske zoskupenie* to underscore its stricter approach on standing for ENGOs. However, it is to be expected that the RvS will become more lenient under pressure of the case-law of the CJEU together with pressure from the ACCC, the GwH and the ECtHR and because of the diminishing case-load in front of it.

The GwH always granted a broad right of standing to ENGOs and is thus spontaneously in line with EU law and the case-law of the CJEU, without there being question of a real influence of the court in that regard. That being said, the EU legal order has had an influence on the case-law of the GwH. The GwH indeed refers to the *Djurgården* case in order to encourage the Cass to change its restrictive stance regarding standing requirements for ENGOs. On the other hand, it

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<sup>355</sup> *Eliantonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 180.

<sup>356</sup> Cass, 11 June 2013, no. P.12.1389.N.

<sup>357</sup> Cass, 11 June 2013, no. P.12.1389.N., para. 4 and *Lavrysen* (fn. 135), p. 12.

questioned the strict standing requirements of the RvS referring to the case-law of the ECtHR and article 6 ECHR and not to EU law.

The GwH took account of the case-law of the CJEU on the requirements of the AC and the EU implementing measures in its review of national legislative acts. In the judgment that annulled a Walloon Decree because of its incompatibility with the AC and the EU implementing measures, the Court referred to *Djurgården* and followed the reasoning of the CJEU's preliminary rulings in *Boxus*, *Solvay* and *Le Poumon Vert de La Hulpe*.

In general, one can state that EU law has had a considerable influence on the Belgian procedural framework with regard to the rules granting access to justice to ENGOs. EU law did not yet lead to radical changes in the Belgian legal system, but it did influence the legislator when it adopted legislative proposals to change the standing requirements in front of the administrative and ordinary courts. The GwH also takes EU law into account in its judgments and it is to be expected that in the future the RvS will change its case-law under the pressure of *i.a.* the CJEU.

## **b) Germany**

### **a. Procedural framework**

#### **i. Institutional structure**

Germany is a federal state with two state levels: the Federation and 16 Federal states (*Länder*)<sup>358</sup>. Both state levels have legislative and judicial competencies. The German Constitution, *i.e.* the Basic Law (*Grundgesetz*), establishes which issues fall within the federal jurisdiction and which within the jurisdiction of the *Länder*.<sup>359</sup> With

<sup>358</sup> The 16 *Länder* are: Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg-West Pomerania, Saarland, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saxony, Saxony-Anhalt, Schleswig-Holstein, Berlin, and Thuringia.

<sup>359</sup> Milieu Ltd., Measures on access to justice in environmental matters (Article 9 (3) – Country Report for Germany, Milieu 2007, p. 7, available at:

regard to environmental law, the legislative competencies are not clearly defined. In general, they are however subject to concurrent legislative power, implying that most environmental legislation is adopted at the national level<sup>360</sup>.<sup>361</sup> By the same token, most EU environmental legislation is implemented at the national level.<sup>362</sup> Furthermore, all legislation concerning the establishment of the judicial system and legal proceedings falls under the concurrent competence of the federal level and the *Länder* as well. In this regard, the federal level adopted the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) (hereafter: VwGO) regulating access to justice against acts of the administration.<sup>363</sup> The VwGO applies to environmental law in so far as there are no special procedural provisions applicable.<sup>364</sup>

With regard to the judicial system, in Germany, the general administrative jurisdiction is competent for non-constitutional public matters such as the protection of the environment.<sup>365</sup>

## ii. Traditional *Schutznormtheorie*

As already mentioned the legal system of Germany has as its primary aim to ensure subjective legal protection and requires for the admissibility of an action that the applicant can claim a violation of its

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[http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm) (accessed on 26 May 2015) and Volkéry/Tilche/Hjerpp/Mudgal/Mitsios/André/Wisniewska/Lucha/Homann/Tedsen, Study on environmental complaint-handling and mediation mechanisms at national level, December 2012, p. 95, available at: [http://ec.europa.eu/environment/aarhus/pdf/mediation\\_and\\_complaint-handling.pdf](http://ec.europa.eu/environment/aarhus/pdf/mediation_and_complaint-handling.pdf) (3 June 2015).

<sup>360</sup> In areas of concurrent powers the *Länder* may, as a rule, not legislate after the federal government has passed legislation. An exception to this is those areas for which the German Basic Law provides for a framework competence at the federal level only enabling the *Länder* to pass their own legislation. This is the case in *i.a.* the nature protection area and the water sector. Milieu Ltd., Country Report for Germany, (fn. 359), p. 7.

<sup>361</sup>

Volkéry/Tilche/Hjerpp/Mudgal/Mitsios/André/Wisniewska/Lucha/Homann/Tedsen, (fn. 359), pp. 95-96.

<sup>362</sup> *Ibid.*, p. 96.

<sup>363</sup> Milieu Ltd., Country Report for Germany, (fn. 359), p. 7.

<sup>364</sup> Berkemann, in: Kloepfer (ed.), *Rechtsschutz im Umweltrecht*, p. 14.

<sup>365</sup> Milieu Ltd., Country Report for Germany, (fn. 359), p. 8.



individual rights.<sup>366</sup> This is enshrined in article 19(4) of the German Basic Law<sup>367</sup> guaranteeing a constitutional minimum standard for individual legal protection.<sup>368</sup>

This basic principle also found its expression in the German administrative law in which subjective legal protection plays a key role.<sup>369</sup> Indeed, article 42(2) VwGO that regulates *locus standi* states that, unless otherwise provided, an action will only be admissible if the applicant submits that his/her rights have been violated by the administrative act or by the refusal or omission.

The courts have restrictively interpreted article 42(2) VwGO. In order to bring an action to court the plaintiff must, first, be individually affected by an administrative act, refusal or omission as a matter of fact and, second, must show that he is affected in his individual rights as a matter of law. Especially the second condition is difficult to fulfil, as the plaintiff has to be able to rely on a legal provision which serves to confer legal protection to his or her individual interests (*zum Schutz seiner Individualinteressen*), known as the *Schutznorm* or protective norm requirement.<sup>370</sup> The crucial point is thus determining whether a legal provision does not only aim at the protection of the public interest, but, at least also at the protection of individual interests.<sup>371</sup> However, according to jurisprudence, a protective norm only exists if

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<sup>366</sup> Schenderlein (fn. 12), p. 73-74.

<sup>367</sup> Article 19(4) of the German Basic Law states: "Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph."

<sup>368</sup> Schlacke (fn. 12), p. 132 and Schlacke/Schrader/Bunge, Informationsrechte, Öffentlichkeitsbeteiligung und Rechtsschutz im Umweltrecht – Aarhus-Handbuch, p. 439.

<sup>369</sup> Greim, Rechtsschutz bei Verfahrensfehlern im Umweltrecht. Eine Abhandlung am Beispiel des Umwelt-Rechtsbehelfsgesetzes, p. 31.

<sup>370</sup> German Advisory Council on the Environment, Access to Justice in Environmental Matters (fn. 156), p. 7; Roller, in: elni review 2010, p. 31; Roller, in: Sheridan/Lavrysen (eds), Environmental Law Principles in Practice, p. 164; Ormond, in: Führ/Roller, Participation and Litigation Rights of Environmental Associations in Europe, p. 81; Steinberg, in: Tel Aviv University Studies in Law 1992, p. 61 and Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 289.

<sup>371</sup> BVerfG 27, 297 (307), BVerwG 1 83 (83); BVerwG 107, 215 (220); BVerwG 111, 276 (280) and Eliantonio/Backes/van Rhee/Spronken/Berlee (fn. 225), p. 301.

one can delimit a specifically protected group of persons that can be distinguished from the general public.<sup>372</sup> This implies in practice that a legal provision that is enacted for the furtherance of a public interest objective, such as the environment, cannot be relied upon.<sup>373</sup> This interpretation is instigated by the concern to preclude public interest litigations or class actions that would go beyond asserting a violation of individual interests.<sup>374</sup> Following this interpretation, ENGOs are not deemed to be affected in their individual rights in case of infringement of environmental law, not even if their statutory objective is the protection of the environmental issues at stake.<sup>375</sup>

The only exception to this narrow interpretation were the special standing rules for ENGOs in cases of nature conservation law granting them access to court without having to demonstrate a violation of an individual right, the so-called “altruistic public interest action” (*altruistische Verbandsklage*).<sup>376</sup> It was first in numerous *Länder* that in some areas of nature protection ENGOs were granted this type of action.<sup>377</sup> On the federal level, this only happened in 2002<sup>378</sup> in article 61 of the Nature Conservation Act (*Bundesnaturschutzgesetz*) (hereafter: BNatSchG).<sup>379</sup> However, although the characteristic aspect of altruistic public interest actions is the access to court without having to assert a violation of subjective rights, this possibility was

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<sup>372</sup> BVerwG, NVwZ 1987, 409 (409); BVerwG, 2011, 613 (614); BVerwG 78, 40 (43); BVerwG 94, 151 (158); BVerwG 101, 157 (163); 130, 39 (41) and *Eliantonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 301.

<sup>373</sup> *Roller* (fn. 370), p. 31; *Roller* (fn. 370), p. 164; *Ormond* (fn. 370), p. 81; *Steinberg*, in: Tel Aviv University Studies in Law 1992, p. 61; *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 289; *Schwerdtfeger*, in: JEEPL 2007, p. 272 and Justice and Environment, The Aftermath of the Trianel Case, Germany, Case Study, February 2012, p. 2, available at: [http://www.justiceandenvironment.org/files/file/BUND\\_Trianel\\_J&E.pdf](http://www.justiceandenvironment.org/files/file/BUND_Trianel_J&E.pdf) (3 June 2015).

<sup>374</sup> *Roller* (fn. 370), p. 31.

<sup>375</sup> *Ibid.*, p. 31.

<sup>376</sup> *Schlacke/Schrader/Bunge* (fn. 370), p. 398; *De Sadeleer/Roller/Dross* (fn. 233), p. 65 and *Roller* (fn. 370), p. 31.

<sup>377</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 65 and *Roller* (fn. 370), p. 31.

<sup>378</sup> Act to Amend the Law of Nature Conservation and of Landscape Conservation and to Adjust Other Legislation of 25 March 2002 (BnatSchGNeuregG), BGBl. I, p. 2293. The Act came into force on 4 April 2002.

<sup>379</sup> *De Sadeleer/Roller/Dross* (fn. 233), p. 65.

strictly limited by the legislature and, following this tendency, by the judiciary.<sup>380</sup> Article 61 BNatSchG was a very minimalistic provision, only granting ENGOs access to court in limited situations<sup>381 382</sup>.

### iii. Current legislation and case-law

With the coming into force of the AC and the EU implementing measures, the German legislator had to intervene in order to comply with these new rules and to fundamentally revise the traditional procedural framework.<sup>383</sup> As a result, ENGOs now have different possibilities to bring an action before a court although the legal bases are still unclear and the procedural rules still in development. Indeed, judgments of the CJEU on the German implementing measures have obliged the German judiciary and legislature to respectively interpret and amend the laws in such a way as to grant ENGOs a wider access to justice.<sup>384</sup> Hereunder, an oversight of the evolution in Germany is provided.

In general, one can state that for the implementation of article 9(2) AC and the related Directive 2003/35/EC, Germany requires ENGOs to demonstrate the impairment of a right to allow them access to court.<sup>385</sup> For a long time, there was discussion in the German literature as to what this requirement meant for the access to court for ENGOs. A majority of legal scholars argued that the AC and the EU directive obliged Germany to grant *locus standi* to ENGOs under article 9(2), irrespective of whether the impairment of a right is required under the

<sup>380</sup> Schlacke (fn.12), pp. 120-121.

<sup>381</sup> According to article 61 BNatSchG, recognized ENGOs can only bring an action against (1) exemptions from prohibitions and orders relating to the protection of 'nature conservation areas' (*Naturschutzgebiete*), 'national parks' (*Nationalparke*) and other protected areas referred to in Article 33 paragraph 2 BNatSchG; (2) decisions of 'plan establishment procedures' (*Planfeststellungsbeschlüsse*) relating to projects involving intervention in nature and landscape and (3) 'plan approvals' (*Plangenehmigungen*) where the involvement of the general public has been provided for in relevant provisions.

<sup>382</sup> Liu (fn. 12), p. 48; Schmidt/Schrader/Zschesche (fn. 168), p. 9 and Ziehm, in: JEEPL 2005, p. 288.

<sup>383</sup> German Advisory Council on the Environment, Access to Justice in Environmental Matters (fn. 156), p. 3 and Roller (fn. 370), p. 32.

<sup>384</sup> Schmidt/Schrader/Zschesche (fn. 168), p. 19.

<sup>385</sup> Roller (fn. 370), p. 32.

national legal system or not. Other commentators argued that the national legislator had the discretion both to determine what constitutes the impairment of a right and which conditions need to be complied with in order for an action to be admissible.<sup>386</sup> As for article 9(3) AC, as this provision has not yet been implemented by the legislator, the German courts have a responsibility to apply an EU compatible interpretation of the national provisions.

- *With regard to article 9(2) AC and related EU law*

The Environmental Remedy Act (*Umwelt-Rechtsbehelfsgesetz*) (hereafter: UmwRG)<sup>387</sup> is the most important regulation for the transposition of Directive 2003/35/EC and article 9(2) AC into the German legal order.<sup>388</sup> Article 2 UmwRG grants special remedies to recognized ENGOs enabling them to bring actions against decisions relating to the admissibility of projects for which there may be an obligation to conduct an EIA and certain other decisions.<sup>389</sup> According to article 3 UmwRG an ENGO shall be recognized if: it predominantly and not just temporarily encourages the objectives of environmental protection; it has existed for at least three years at the time of recognition and has been active during that period; it offers guarantees of proper performance of its duties, for the purpose of which the type and scope of its previous activity, its membership, and the effectiveness of the association must be taken into account; it promotes public-benefit purposes as defined in Article 52 of the German Tax Code [Abgabenordnung]; and it allows any person who supports the objectives of the association to become a member.

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<sup>386</sup> *Roller* (fn. 370), p. 32-33 and *Müller* (fn. 122), p. 512 and *Jans/de Lange/Prechal/Widdershoven* (fn. 29), p. 293.

<sup>387</sup> Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG, BGBl I, p. 2816, 14 Dezember 2006.

<sup>388</sup> *Bunge*, UmwRG – Umwelt-Rechtsbehelfsgesetz, Kommentar, p. 78.

<sup>389</sup> *Bunge* (fn. 388), p. 78 and *Philipp*, EUFJE 2013 Vienna Conference – Report on Germany, November 2013, p. 2, available at: <http://www.eufje.org/images/docConf/vie2013/DE%20vie2013.pdf> (31 May 2015), p. 2.

The UmwRG underwent changes so as to be better aligned with the obligations under the AC and related EU law and the case-law of the CJEU.

The first draft of the UmwRG was adopted in February 2005. It broadened the traditional German conception of standing by allowing ENGOs access to court without them being obliged to show the impairment of an individual right. However, due to new elections for the German Bundestag in autumn 2005, this draft did not go through the legislative process.<sup>390</sup> The first version of the UmwRG entered into force on 15 December 2006 and was a lot more restrictive.<sup>391</sup>

Under the UmwRG of 2006, ENGOs needed to assert that the contested decision or omission violates environmental provisions that are relevant for the decision and that provide for individual rights (articles 1(1) and 2(1) UmwRG 2006).<sup>392</sup> In this way, the *Schutznorm*-doctrine was implicitly reintroduced allowing ENGOs access to court only insofar as the violated provisions upon which they rely confer subjective rights on individuals.<sup>393</sup> This was clearly incompatible with the *rationale* of the AC and of Directive 2003/35/EC to guarantee a wide access to court.<sup>394</sup> The UmwRG 2006 overlooked the actual purpose of granting wider access to court in environmental matters as this law was exactly adopted to allow ENGOs to bring actions in those cases where no subjective rights complaints were possible.<sup>395</sup>

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<sup>390</sup> Schmidt/Schrader/Zschesche (fn. 168), pp. 17-18 and Roller (fn. 370), p. 33.

<sup>391</sup> Schmidt/Schrader/Zschesche (fn. 168), p. 17 and Roller (fn. 370), p. 33.

<sup>392</sup> Roller (fn. 370), p. 33.

<sup>393</sup> *Ibid.*, p. 33.

<sup>394</sup> Roller (fn. 370), p. 33; Jans/de Lange/Prechal/Widdershoven (fn. 29), p. 293; Meitz, in: NuR 2011, p. 420; Schlacke, überindividueller Rechtsschutz: Phänomenologie und Systematik überindividueller Klagebefugnisse im Verwaltungs- und Gemeinschaftsrecht, insbesondere am Beispiel des Umweltrechts, pp. 300-301 and Association of European Administrative Judges (AEAJ), Statement on Access to Administrative Justice in Environmental Matters – A Comment on the Milieu Study issued by the European Commission, May 2008, p. 3, available at: [http://ec.europa.eu/environment/aarhus/pdf/aeaj\\_comments.pdf](http://ec.europa.eu/environment/aarhus/pdf/aeaj_comments.pdf) (1 June 2015).

<sup>395</sup> Schmidt/Schrader/Zschesche (fn. 168), p. 18.

Following the case-law of the CJEU in *Trianel*, the UmwRG was amended in 2013.<sup>396</sup> The Court ruled that the UmwRG was contrary to Directive 2003/35/EC while it limited the standing of ENGOs to the situation where protective norms granting subjective rights to individuals were allegedly violated.<sup>397</sup> The UmwRG now states that an ENGO has standing if it challenges a decision that contravenes legislative provisions which seek to protect the environment and which may be relevant for the decision (article 2(1) UmwRG). Whether this environmental protection provision flows from EU law or national law is irrelevant.<sup>398</sup>

However, under the UmwRG 2013 ENGOs can still only bring proceedings if a legal provision ‘serving the environment’ is violated. It is now established – contrary to the holdings of the BVerwG<sup>399</sup> – that this restriction of standing violates article 9(2) AC and the related EU law provisions. Indeed, the ACCC recommended Germany to take the necessary measures to guarantee ENGOs access to justice without limitation to challenge the procedural and substantive legality of administrative decisions that fall under the scope of article 6 AC.<sup>400</sup> The fifth Meeting of the Parties to the AC in July 2014 followed the ACCC in its Decision V/9h recommending Germany to widen ENGOs’ standing by dropping the requirement of having to assert a violation of a legal provision ‘serving the environment’.<sup>401</sup> Although the decision only contains non-binding recommendations, it is of far-reaching significance.<sup>402</sup> The decision has not only been adopted by consensus, it also marks the end of a review of compliance on the

<sup>396</sup> Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften vom 21.1.2013, BGBl. I 95.

<sup>397</sup> Judgment in *Trianel*, EU:C:2011:289, para. 50; *Schmidt/Schrader/Zschiesche* (fn. 168), p. 18; *Bunge* (fn. 389), p. 78 and *Elia Antonio/Backes/van Rhee/Spronken/Berlee* (fn. 225), p. 301.

<sup>398</sup> *Philipp* (fn. 389), p. 3.

<sup>399</sup> The BVerwG found the limitation that ENGOs could only bring an action against the violation of provisions serving the environment to be compatible with international and European law: BVerwG 24 October 2013, 7 C 6.11, paras 23 ff. and *Bunge*, in: NuR 2014, p. 612.

<sup>400</sup> Communication ACCC/C/2008/31.

<sup>401</sup> Decision V/9h on compliance by Germany (ECE/MP.PP/2014/2/Add.1).

<sup>402</sup> *Bunge* (fn. 399), p. 606.

basis of article 15 AC, establishing “optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention”.<sup>403</sup> As the EU is a party to the AC and article 9(2) AC is almost identically implemented in EU law via Directive 2003/35/EC, it follows from the Decision that this restriction of standing in article 2(1) (1) UmwRG contradicts EU law as well.<sup>404</sup> Because of the direct effect of the last two sentences of article 10a(3) EIA Directive<sup>405</sup> it has to be accepted that, at least from July 2014 onwards, ENGOs benefit from an extensive standing before the court.<sup>406</sup>

Another legal basis for the standing of ENGOs is to be found in article 64 BNatSchG 2009. Via this provision ENGOs that are recognized by virtue of article 3 UmwRG may file appeals against certain decisions relating to nature protection independently of whether their inherent rights are violated or not.<sup>407</sup> This provision complements the UmwRG allowing ENGOs to bring an action if e.g. exemptions from requirements and prohibitions for the protection of natural sites are granted.<sup>408</sup> The abovementioned Decision V/9h is also applicable to this provision.<sup>409</sup> Even though the procedure of the ACCC only related to the UmwRG, its results can be transferred to article 64(1) BNatSchG of which the restriction to legal provisions ‘relating to the environment’ has to be deleted.<sup>410</sup> Thus, in so far as this provision can be regarded as an implementation of article 9(2) AC, this restriction should be deleted. That is the case to the extent that there are specific remedies available against the decisions (*i.e.* against the approval projects in administrative procedures that entail public participation).<sup>411</sup> To the extent that article 64 BNatSchG enables

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<sup>403</sup> *Ibid.*, p. 606.

<sup>404</sup> *Schmidt/Schrader/Zschiesche* (fn. 168), p. 54 and *Alge*, in: RdU 2011, p. 140.

<sup>405</sup> *Trianel*, EU:C:2011:289, paras 55-56.

<sup>406</sup> *Schmidt/Schrader/Zschiesche* (fn. 168), p. 54.

<sup>407</sup> *Philipp* (fn. 389), p. 3.

<sup>408</sup> *Schmidt/Schrader/Zschiesche* (fn. 168), pp. 20-21 and *Philipp* (fn. 389), p. 3.

<sup>409</sup> *Bunge* (fn. 399), p. 612.

<sup>410</sup> *Ibid.*, p. 612.

<sup>411</sup> *Ibid.*, p. 612.

ENGOS to bring actions against other administrative decisions, it is a matter of national law and has to meet the requirements of article 9(3) AC. However, the latter article allows Parties to limit the standing of ENGOS to violations of provisions ‘relating to the environment’ (see *infra*).<sup>412</sup>

- *With regard to article 9(3) AC and related EU law*

Article 9(3) AC carries great weight in Germany. A lot of legal actions against violations of environmental law failed because of the applicable *Schutznormtheorie* in article 42(2) VwGO as there are often not many concerned individual plaintiffs in the area of the environment.<sup>413</sup> The applicable German laws only grant ENGOS access to justice in limited circumstances, namely only for issues falling under article 9(2) AC and Directive 2003/35/EC. In all other cases it was until recently impossible for ENGOS to bring proceedings against environmental violations.<sup>414</sup>

Indeed, Germany has not yet legally transposed article 9(3) AC into its legal order. Moreover, for a long time, the German legislator was of the opinion that there was no need to specifically grant ENGOS access to court in the field of article 9(3) AC as it considered the implementation measures taken so far to be sufficient to guarantee the full implementation of the AC, including article 9(3). The legislator referred in this regard to the fact that the AC leaves certain discretion to the national legal systems concerning the scope and the content of access to justice.<sup>415</sup>

However, based on the case-law of the CJEU, in particular on the *Lesoochránárske zoskupenie* case, the Federal Administrative Court (*Bundesverwaltungsgericht*) (hereafter: BVerwG) took a different stance. In its judgment of 5 September 2013 the BVerwG recognized

<sup>412</sup> *Bunge* (fn. 399), p. 612.

<sup>413</sup> *Schmidt/Schrader/Zschesche* (fn. 168), p. 155.

<sup>414</sup> *Ibid.*, (fn. 173), pp. 155-156.

<sup>415</sup> *Philipp* (fn. 389), p. 4 and *Milieu Ltd.*, Country Report for Germany, (fn. 359), pp. 5, 17.



that ENGOs have standing to appeal an air quality plan having regard to article 23 of directive 2008/50/EC<sup>416</sup> and article 9(3) AC.<sup>417</sup> In this case, there was no legal provision allowing ENGOs to bring an action without having to maintain that their rights have been impaired as the BNatSchG was not applicable to air quality plans nor the UmwRG as air quality plans can be drawn up without implementing an environmental impact assessment.<sup>418</sup> The BVerwG held that the view of the German legislator that there is no need to grant ENGOs access to court in the field of article 9(3) AC is not consistent with the AC.<sup>419</sup> It referred to the findings and recommendation of the ACCC that held that national law may lay down criteria for granting access to court, but that these criteria cannot be so strict as to effectively bar all or almost all ENGOs from bringing actions against acts or omissions contravening national environmental law.<sup>420</sup> Having regard to the findings of the CJEU in *Lesoochranárske zoskupenie*, the BVerwG ruled that the *Schutznormtheorie* in article 42(2) (2) VwGO did not need to be repealed, but that this standing provision had to be interpreted widely in the light of the findings of the CJEU in *lesoochranárske zoskupenie* and *Janecek*.<sup>421</sup> In *Lesoochranárske zoskupenie* the CJEU held that in proceedings that fall within the ambit of EU law ENGOs should be allowed wide access to court.<sup>423</sup> In *Janecek* the Court ruled that ENGOs could bring actions regarding clean air plans if they are ‘directly concerned’.<sup>424</sup> The BVerwG ruled that ENGOs recognized under article 3 UmwRG have to be granted standing by virtue of article 42(2) (2) VwGO as they are the rightful

<sup>416</sup> Directive 2008/50/EC of the European Parliament and the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

<sup>417</sup> *Lavrysen* (fn. 135), pp. 12-13 and *Philipp* (fn. 389), p. 4.

<sup>418</sup> BVerwG, 5 September 2013, 7 C 21/12, paras 29-30 and *Philipp* (fn. 389), p. 4.

<sup>419</sup> BVerwG, 5 September 2013, 7 C 21/12, para. 34 and *Philipp* (fn. 389), p. 4.

<sup>420</sup> BVerwG, 5 September 2013, 7 C 21/12, para. 34 and *Philipp* (fn. 389), p. 4.

<sup>421</sup> Judgment in *Janecek*, Case C-237/07, ECR, EU:C:2008:447.

<sup>422</sup> BVerwG, 5 September 2013, 7 C 21/12, paras 40 ff; *Franzius*, in: *Kloepfer* (ed.), *Rechtsschutz im Umweltrecht*, p. 155 and *Schmidt/Schrader/Zschesche* (fn. 168), p. 155 and *Lavrysen* (fn. 135), p. 13.

<sup>423</sup> Judgment in *Lesoochranárske zoskupenie*, EU:C:2011:125, para. 51; BVerwG 7 C 21.12, para. 48 and *Philipp* (fn. 389), p. 4.

<sup>424</sup> Judgment in *Janecek*, EU:C:2008:447, para. 39.

protectors (*prokuratorische Rechtstellung*) of the subjective rights of citizens in EU environmental law matters.<sup>425</sup> The BVerwG mentioned in this regard that the concept of ‘rights’ is broader in EU law than it used to be in German law as it has never been confined to the protection of individual rights.<sup>426</sup> By virtue of EU law, members of the public concerned have always been considered as stakeholders that enforce environmental law in order to protect the environment as a whole.<sup>427</sup> Thus, in view of ensuring the effectiveness of EU law, the BVerwG interpreted article 42(2) (2) VwGO broadly and held that ENGOs have the subjective right to bring legal proceedings in order to protect the population concerned.<sup>428</sup> It therefore held that article 47 (1) of the Federal Anti-Pollution Law (*Bundesimmissionsschutzgesetz*), that implements article 23 Directive 208/50/EC<sup>429</sup> into national law confers a subjective right on ENGOs that are recognized under article 3 UmwRG.<sup>430</sup>

In sum, this judgment shows that the standing of ENGOs is in principle broader than what the applicable national legal rules provide and that the current legal situation in Germany is contrary to article 9(3) AC and the requirements of EU law.<sup>431</sup>

Of relevance is furthermore that Decision V/9h of the Meeting of the Parties to the AC of July 2014 also contains a recommendation with regard to article 9(3) AC. The Meeting endorsed the findings of the ACCC in ACCC/C/2008/31 acknowledging that Germany does not ensure the standing of ENGOs in many of its laws to challenge acts or omissions which contravene legal provisions relating to the environment, and therefore fails to comply with article 9(3) AC. It

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<sup>425</sup> BVerwG 7 C 21.12, paras 46-48; *Franzius* (fn. 422), p. 155 and *Schmidt/Schrader/Zschesche* (fn. 168), p. 154 and *Lavrysen* (fn. 135), p. 13.

<sup>426</sup> BVerwG 5 September 2013, 7 C 21/12, para. 43 and *Philipp* (fn. 389), p. 4.

<sup>427</sup> BVerwG 5 September 2013, 7 C 21/12, para. 46 and *Philipp* (fn. 389), p. 4.

<sup>428</sup> *Klinger*, in: *Kloepfer* (ed.), *Rechtsschutz im Umweltrecht*, p. 137 and *Schmidt/Schrader/Zschesche* (fn. 168), p. 22.

<sup>429</sup> Directive 2008/50/EC of the European Parliament and the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

<sup>430</sup> BVerwG 5 September 2013, 7 C 21/12, paras 38, 48 and *Philipp* (fn. 389), p. 4.

<sup>431</sup> *Klinger* (fn. 432), p. 138 and *Schmidt/Schrader/Zschesche* (fn. 168), pp. 22-23.

recommended Germany to ensure that the criteria for the standing of ENGOs are revised, in addition to any existing criteria in *i.a.* the UmwRG and the BNatSchG. Having regard to the above-mentioned importance of this Decision, it is clear that the German legislator will have to grant comprehensive rights of action for ENGOs in order to ensure compliance with the AC and with its obligations under EU law.

b. Influence of the EU legal order on the procedural framework

In general, it is clear that EU law has had a major impact on the German legal conception of standing of ENGOs before administrative courts. Germany had indeed one of the most restrictive procedural frameworks characterized by the application of the *Schutznormtheorie* requiring a plaintiff to demonstrate a violation of one of its individual rights. Because this emphasis on subjective legal protection restricted the possibilities of standing for ENGOs, that normally seek to protect public interests, to a significant extent, it comes as no surprise that the German legal system needed to change significantly – and is still evolving – for it to conform to the requirement of ensuring a wide access to justice under the AC as well as under the EU implementing measures and the case-law of the CJEU. *In casu* the EU legal order has had an impact on both the legal framework and the case-law in Germany.

*In concreto*, first, the German legislator has adopted the UmwRG in 2006 under influence of the provisions of the EU Directive 2003/35/EC and article 9(2) AC into the German legal order granting ENGOs a special right of action. Afterwards, in 2013, the legislator has had to amend the UmwRG in order to comply with the judgment of the CJEU in *Trianel* that disapproved of the fact that standing for ENGOs was conditional upon the presence of a norm granting subjective rights to individuals. From that moment on, recognized ENGOs only have to show that the decision violates legal provisions that serve the protection of the environment and are relevant to the decision (article 2 (1) UmwRG 2013). However, the UmwRG might

have to be revised again. The Meeting of the Parties to the AC concluded in Decision V/9h that the condition that the legal provision needs to relate to environmental protection in the UmwRG (and in the BNatSchG) is still too strict to comply with article 9(2) AC and for this reason contradicts the EU implementing measure as well. Having regard to the direct effect of the applicable EU provision, ENGOS will benefit from a wide standing before the court until a legislative amendment occurs.

Furthermore, the BVerwG clarified in its judgment of 5 September 2013 that the standing of ENGOS is broader than what the current national legal rules provide. It granted an ENGO access to court on the basis of article 9(3) AC by interpreting article 42(2) (2) VwGO in conformity with the findings of the CJEU in *Lesoochranárske zoskupenie*. The Court thus ruled that, in the light of EU law the applicable national law had to be interpreted as conferring a subjective right on ENGOS allowing them to have access to justice.

Some questions remain to be answered. First, as the BVerwG rules that article 9(3) AC is not directly applicable<sup>432</sup>, it is not yet clear how the required extension of access to justice for ENGOS has to be implemented.<sup>433</sup> As long as the legislator does not implement article 9(3) AC, it is for the administrative courts to ensure the necessary legal protection following *Lesoochranárske zoskupenie*.<sup>434</sup> Although the CJEU and the BVerwG have clarified the situation of access to court and standing for ENGOS to a certain extent, in the end the legislator will have to implement article 9(3) AC in order to comply with its international and EU law obligations.<sup>435</sup> Even though the legislator has some leeway flowing from the broad formulation of the article, there needs to be a further widening of the standing of ENGOS

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<sup>432</sup> BVerwG 5 September 2013, 7 C 21/12, para. 37.

<sup>433</sup> *Schmidt/Schrader/Zschiesche* (fn. 168), p. 160.

<sup>434</sup> *Ibid.*, p. 160.

<sup>435</sup> *Ibid.*, p. 161.

which cannot be subject to a lot of requirements.<sup>436</sup> The requirement that the ENGO has to be recognized in conformity with article 3 UmwRG – which is already applied by the BVerwG and anchored in the applicable laws – will most likely be inserted. Apart from this, ENGOs will be granted a wide access to court that will extend to all environmental regulations.<sup>437</sup> Having regard to the wording of article 9(3) AC the term environmental law is a broad one encompassing regulations relevant for the environment in other areas of the law.<sup>438</sup> In this way, the authorization of plant protection products or decisions regarding chemical law or genetic engineering law could be reviewed in the future. Article 9(3) AC furthermore applies to omissions allowing the inaction of the authorities to be invoked much more frequently in the future.<sup>439</sup>

In sum, it is clear that EU law in the environmental field has caused an expansion of German administrative procedural law with regard to the rules on access to court and standing of ENGOs.<sup>440</sup>

### **c) Comparison of the influence of the EU legal order on the Belgian and the German procedural framework**

Overall, we can conclude that in Belgium as well as in Germany EU law has had an influence on the respective procedural frameworks regarding the rules on access to court and standing for ENGOs. The assumption I made on the basis of Part B is thus confirmed.

As both legal systems pose restrictions on *locus standi* for ENGOs, Belgian law via an interest-requirement and German law via a individual right-requirement, both systems have had to adapt to the obligation to ensure a wide access to justice posed by the AC, the EU implementing measures and the CJEU's case-law.

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<sup>436</sup> Schmidt/Schrader/Zschesche (fn. 168), p. 161.

<sup>437</sup> *Ibid.*, p. 161.

<sup>438</sup> *Ibid.*, p. 161.

<sup>439</sup> *Ibid.*, p. 161.

<sup>440</sup> Sommermann, in: Schwarze (ed.), L'état actuel et les perspectives du droit administratif européen, p. 195.

However, we can also discern a difference in the extent to which EU law has impacted the respective procedural legal frameworks. It is clear that in Germany the impact has been far greater than in Belgium. Indeed, with regard to the respective legislators we could see that whereas the Belgian legislator has until now only drafted legislative proposals on widening the *locus standi* of ENGOs that have not led to any amendment of the laws so far, the German legislator has adopted the UmwRG exactly in order to transpose the EU implementing measures of the AC. It later on moreover amended this law as a consequence of the *Trianel* judgment of the CJEU. It is furthermore very likely that this law will be amended again in order to be once more better aligned with the EU requirements. Also the BNatSchG partly implements the EU measures implementing the AC. The same conclusion can be drawn when comparing the influence on the Belgian and German judiciaries: the influence on the case-law of the Belgian courts has until present been less outspoken than the influence on the German judiciary. Although EU law has had a certain influence on the case-law of the GwH, the influence on the case-law of the Cass and of the RvS has been less clear-cut. In Germany on the contrary, the influence of the EU legal order on the case-law of the BVerwG has been very extensive leading the BVerwG to apply an EU law-conform interpretation to article 42(2) (2) VwGO in order to grant ENGOs a subjective right to bring an action. It thereby relied explicitly on the case-law of the CJEU regarding the AC.

This difference in influence could be explained by the difference in restrictiveness of the traditional rules on access to court and standing regarding ENGOs in Belgium and Germany. Indeed, whereas the Belgian legal system takes on a middle position in terms of restrictiveness and aims to ensure objective legal protection, the German legal system is one of the most restrictive systems based on the *Schutznormtheorie* and structured around the objective to guarantee subjective legal protection. It can be assumed that because

of this restrictive framework the German legal system has had to adapt in a more radical way in order to conform to the EU legal order than the Belgian legal system.

## **D. Conclusion**

In this thesis I have analysed the extent to which the EU legal order influences the national procedural frameworks of the MS. In order to analyse this, I have examined a concrete example, namely the procedural rules on access to court and standing with regard to ENGOs within the Belgian and German legal orders.

In general it can be noted that what had already been indicated in the introduction (Part A) has been confirmed throughout the thesis: the AC, the EU implementing measures and the CJEU's case-law fully recognize the important role ENGOs play in environmental protection. In this respect, they have stimulated the MS to change their traditional notions of standing to broaden the access to court for ENGOs.

In part B, I have outlined the principles that influence national procedural law in general. We have seen that by virtue of the principle of national procedural autonomy MS are granted the autonomy to implement, apply and enforce EU law within their national procedural frameworks in the absence of relevant EU rules. However, this principle is seriously limited as it is framed by the CJEU through the principles of equivalence & effectiveness, the principle of effective judicial protection and the principle of a complete system of legal remedies and procedures. I concluded that the principle of national procedural autonomy is to such an extent framed by the CJEU that the countering EU principles have become the starting point. The principle of national autonomy can rather be defined as the discretion left to the national court after fulfilling the obligation to apply the countering EU principles. The EU legal order therefore has the capacity to influence the national procedural framework to a significant extent. This allowed me to make the assumption that the same would go for the specific field of the rules on access to court and standing for ENGOs.

In part C I verified my preliminary assumption via the analysis of a concrete example of procedural rules, namely the rules on access to



court and standing with regard to ENGOs. After an introductory Chapter 1, I presented the EU legal framework regarding this field of law in Chapter 2. In Section a) I discussed the relevant legislation, *i.e.* article 9(2) and (3) AC together with the EU implementing measures. In Section b) I discussed three important cases of the CJEU, namely *Djurgården*, *Trianel* and *Lesoochranárske zoskupenie*. In this Chapter it became clear that the EU legal order grants an important role to ENGOs when it comes to filing legal proceedings for the environmental public interest and therefore requires MS to grant these organisations a wide access to justice.

Furthermore, in Chapter 3, I analysed the Belgian (Section a)) and the German (Section b)) procedural rules on access to court and standing for ENGOs. For each country I gave a detailed overview of the procedural framework, looking at the legislation and the case-law on access to court and standing (subsection a.). It became clear that the Belgian as well as the German legal system traditionally restricted the access to court and standing of ENGOs, making it difficult for these organisations to bring an action before the court. In subsection b., I assessed the exact influence of the EU legal order on these rules. The EU legal order has had a considerable influence on the legislation and the case-law in both countries, which confirmed the assumption I made at the end of Part B. In section c) I compared the exact extent of the influence of the EU legal order and concluded that whereas both countries have been influenced by the EU legal framework on access to court and standing for ENGOs, in Germany this influence has been much more outspoken than in Belgium, both with regard to the legislation as with regard to the case-law. I have identified the fact that Germany's procedural framework is more restrictive than the Belgian framework as a possible reason for this greater influence.

Having regard to these findings, it has become possible to answer the research question: "What is the extent to which the EU legal order influences the Belgian and German procedural frameworks with

regard to the rules on access to court and standing for ENGOs?” The EU legal order has had a considerable influence on the Belgian and the German procedural framework. As both legal systems pose restrictions on *locus standi* for ENGOs both systems have had to adapt to the EU obligation to ensure a wide access to justice. The exact extent of the influence however differs: in Germany the impact has been greater than in Belgium which could be explained by the difference in restrictiveness of the rules in both countries. As the German procedural system is the most restrictive one, it can be inferred that it has had to adapt in a more extensive way in order to conform to the EU requirements than the Belgian system that takes on a middle position in terms of restrictiveness.

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