

Who is the Referee? Access to Justice in a Globalised Legal Order

ECJ Judgment C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011

Jan H. Jans

Professor of Public Law, Faculty of Law, University of Groningen

Abstract

This article discusses the judgment of the ECJ in Case C-240/09 Lesoochranárske zoskupenie. It argues that, in a globalised legal order, questions like 'who has the right to have access to justice' and 'who decides who has access to justice' are difficult to answer.

I. Introduction

In the 2010/2 issue of this review Jane Reichel – in her analysis of the preliminary judgment given by the Court of Justice in the *Djurgården-Lilla Värtan* case – illustrated that, particularly in the area of environmental law, judicial control in a globalised legal order is a considerably complex area.¹ The *Djurgården-Lilla Värtan* case concerned the Swedish implementation of the Aarhus Convention via an EU Directive, granting the right to access justice for environmental non-government organisations. Even though the Aarhus Convention and in that case relevant Directive 2003/35² both state that the right to access justice is only granted to NGOs 'meeting any requirements under national law', the Court of Justice found that Swedish requirements were too restrictive. On the basis of this judgment it appears that it is up to the ECJ to decide whether national conditions regulating access to justice are compatible with both the Aarhus Convention and EU law, at least as far as it concerns the implementation of Article 9(2) of the Aarhus Convention. The judgment in Case C-240/09 *Lesoochranárske zoskupenie*, illustrates once more that a straight answer to the simple question 'who has the right to have access to justice' is not always possible. Also, *Lesoochranárske zoskupenie* shows that even the question of 'who decides who has access to justice' in environmental matters is a difficult one.

¹ Jane Reichel, 'Judicial Control in a Globalised Legal Order – A One Way Track?', *REALaw* 2010/2, 69-87.

² 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, OJ 2003, L 156/17.

2. The Facts of the Case *Lesoochranárske zoskupenie*

A Slovak NGO (Lesoochranárske zoskupenie VLK (LZV) in English: the WOLF Forest Protection Movement)³ requested that the Slovak ministry for the environment inform it of any administrative decision-making procedures which might potentially affect the protection of nature and the environment, or which concerned granting derogations to the protection of certain species or areas. At the beginning of 2008, LZV was informed of a number of pending administrative proceedings brought by, inter alia, various hunting associations. On the 21st of April 2008 the Ministry took a decision granting a hunting association's application for permission to derogate from the protective conditions accorded to brown bears. In the course of that procedure it notified the Ministry that it wished to participate, seeking recognition of its status as a 'party' to the administrative proceedings under the provisions of Article 14 of the Slovakian Administrative Procedure Code. In particular, LZV asserted that the proceedings in question directly affected its rights and legally protected interests arising from the Aarhus Convention. It also considered that convention to have direct effect. The Ministry however, argued that LZV did not have the status of 'party' but of 'participant' or 'interested party'. Prior to the 30th of November 2007, Slovakian law (the second sentence of Article 83, paragraph 3, of Law No. 543/2002) gave NGOs the status of 'parties to the proceedings' to associations whose objective was the protection of the environment. These associations had the opportunity to contest any decisions taken before the Slovak courts. However, that law was amended with effect from the 1st of December 2007. The effect of that amendment is that environmental associations are now classed as 'interested parties' rather than as 'parties to the proceedings'. In practice, the change of status precludes those associations from directly initiating proceedings themselves to review the legality of decisions. Instead, they must request a public attorney to act on their behalf.

In its decision of 26th of June 2008, the Ministry confirmed that LZV did not have the status of a 'party' to the proceedings. LZV could not, therefore, appeal against the decision of the 21st of April 2008. Moreover, the Ministry considered the Aarhus Convention as an international treaty, which needed to be implemented in national law before it could take effect. The court held that Article 9(2) and (3) of the Aarhus Convention do not contain any unequivocally drafted fundamental rights or freedoms which would be directly applicable to public authorities. LZV lodged an action against the contested decision at the Bratislava Regional Court. That court dismissed LZV's application. LZV appealed to the Slovak Supreme Court, which stayed the proceedings before it and referred preliminary questions on the interpretation of the Aarhus Convention to the

³ See their bilingual website at <http://www.wolf.sk/en/en-home>.

Court of Justice. In particular, it wanted to know whether Art. 9(3) of the Aarhus Convention is directly effective within the meaning of settled case law of the ECJ.

3. Division of Powers: Who is the Referee?

The competences of the EU in the area of environmental protection must be regarded, also in the words of the Article 4(2) TFEU, as a 'shared competence'. A shared competence implies that both the Union and Member States may legislate and adopt legally binding acts in that area. However, the Member States shall exercise their competence only to the extent that the Union has not already exercised, or has decided to cease exercising, its competence. Thus, in the case of external environmental relations, there can be no question of exclusive external Union competence. In that case, competence is found with both the Union and the Member States and the conclusion of such a convention on the environment should be effected in the form of a mixed agreement, in other words, one to which both the Union and the Member States are party. The Aarhus Convention is an example of such a mixed agreement.

It is clear from the case law of the ECJ that when a convention falls partly within the competence of the Member States and partly within that of the Union, it can only be implemented by means of a 'close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.'⁴ The practice of concluding treaties in the field of the environment follows this principle: the Member States have been parties to virtually all the conventions on the environment concluded by the Union.

The conclusion of mixed agreements requires that certain matters must be regulated with regards to the relationship between the Union and its Member States on the one hand, and the other parties to the convention on the other. A problem with mixed environmental agreements concerns the extent to which the Union and its Member States are bound by them vis-à-vis the other contracting parties. After all, mixed agreements are concluded because neither the Union nor the Member States has exclusive competence. To what extent does this internal division of powers affect the legal position of the other parties? Is the Union only bound as far as third countries are concerned in respect of those provisions that fall within its competence? To overcome these problems, most

⁴ Opinion 2/91 [1993] ECR I-1061 (*ILO-convention no. 170*). Cf. also the 'principle of sincere cooperation' mentioned in Article 4(3) TEU.

multilateral treaties on the environment contain specific provisions on the matter. With respect to the Aarhus Convention, the EC declared:

‘[...] that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 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 Article 2(2)(d) of the Convention, and that, consequently, its Member States are 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.’⁵

This declaration of competence also raises the question of the ECJ’s authority to interpret provisions of mixed agreements, in this case Article 9(3) of the Aarhus Convention. Basically the question is, whether the ECJ itself or the competent court of a Member State is best-placed to determine whether Article 9(3) of the Aarhus Convention has direct effect or not? The general rule on this has been laid down by the ECJ in *Merck Genéricos*.⁶ In essence the Court held in that judgment, that the jurisdiction to ascribe direct effect to a provision of a mixed agreement depends on whether that provision is found in a sphere in which the EU had legislated. If so, EU law would apply; if not, the legal order of a Member State was neither required nor forbidden to accord to individuals the right to rely directly on the rule in question.

With regards to the access to justice provisions of the Aarhus Convention (the so-called third pillar), the EU adopted two measures. First, Directive 2003/35 that regulates access to justice in respect of decisions by *Member States* on environmental impact assessment and IPPC installations. The preamble to that directive, however, shows that this directive is intended to implement Art. 9 paragraphs 2 and 4 of the Aarhus Convention. Second, and with respect to Article 9(3), the EU issued Regulation 1367/2006 dealing with access to justice against decisions of the *European institutions*.⁷ In other words, the European legislature has still not taken any measures to implement Art. 9 paragraph 3

⁵ See Decision 2005/370/EC, Council Decision 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. OJ 2005 L 124/1 and OJ 2006, L 164/17.

⁶ Case C-431/05 *Merck Genéricos Productos Farmacéuticos* [2007] ECR I-7001.

⁷ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006, L 264/13.

Aarhus Convention with respect to environmental decisions by the Member States. On the contrary, a proposal from the Commission⁸ to implement the access to justice provisions of Article 9(3) on a full scale via a directive is, politically speaking, 'dead'.

A normal reading of the declaration of competence issued at the conclusion of the Aarhus convention should have led to the conclusion that the EU has not taken any legislative action towards their Member States to implement Art. 9(3) Aarhus Convention. However, in *Lesoochránárske zoskupenie* the ECJ ruled as follows:

'31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *MerckGenéricos – Produtos Farmacêuticos*, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

⁸ COM/2003/0624 final. – COD 2003/0246.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, *MerckGenéricos – Produtos Farmacêuticos*, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission v Ireland*, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, *Case C-239/03 Commission v France* [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a ‘party’ to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that “the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 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 Article 2(2)(d) of the Convention, and that, consequently, its Member States are 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”.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of

this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.’

This is all very remarkable. As I have argued *supra*, the EU has not taken any legislative action with regards to their Member States to implement Art. 9(3) of the Aarhus Convention. Therefore, the ECJ should have abstained from giving a ruling on the possible direct effect in EU law of Article 9(3) Aarhus Convention and should have limited its jurisdiction by stating that it is for the national courts in the Member States to determine whether Article 9(3) should be construed as having direct effect subject to the conditions provided for by national law.

The ECJ, however, took another view and decided ‘that Article 9(3) of the Aarhus Convention does not have direct effect in EU law’. In order to reach this conclusion, the Court started its reasoning by pointing out that the dispute concerns the grant of derogations to the system of protection for brown bears, a species mentioned in Annex IV(a) to the Habitats Directive. It follows, according to the ECJ in para. 38, that the dispute falls within the scope of EU law. Nobody disputes that the brown bear is protected by the Habitats Directive and thus falls within the scope of that directive. But that was not what the dispute in the main proceedings concerned, the dispute was whether or not the LZV had a right to access the Slovak court and to challenge the ministry decisions. As is well known, the Habitats Directive does not have any provision at all on

matters relating to the access to justice.⁹ The statement of the ECJ in para. 40 of the judgment is even less convincing. For almost every environmental dispute one must come to the conclusion that ‘it relates to a field covered in large measure’ by an EU directive (there are more than 200 in all areas of environmental protection). This inevitably means that Article 9(3) of the Aarhus Convention would almost always fall within the scope of EU law. This interpretation makes the declaration of competence to the Aarhus Convention completely obsolete and useless. Therefore, the Court’s assessment is, in the author’s view, not correct. The ECJ’s mistake is that it looked at access to justice in environmental matters as being auxiliary to the substantive standards of the Habitats Directive. The Aarhus Convention shows that access to justice in environmental matters is not just supplementary, but rather has a value of its own.

In its judgment, the ECJ also relied rather heavily on Regulation No 1367/2006. It assumed a competence to interpret Article 9(3) ‘in order to forestall future differences of interpretation’. According to the ECJ ‘it is irrelevant’ that Regulation No 1367/2006 only concerns the institutions of the European Union. With all due respect, that is of course relevant. Advocate General Sharpston rightly argued:

‘It seems to me that the proposal for a directive to implement Article 9(3), which has advanced no further, is particularly significant. I do not think that the Court should ignore the absence of relevant Community legislation and allocate to itself the competence to rule on whether or not Article 9(3) has direct effect. If it does so, the Court will be stepping into the legislature’s shoes. But the legislature has, thus far, intentionally chosen not to act.

Furthermore, the Declaration indicates that the Community considered that “the obligations resulting from Article 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” fell within the competence of the Member States; and that the Member States were, and would remain, responsible for the performance of those obligations unless and until the Community took action. That it has not done so seems to me to be of crucial importance.’

Advocate General Sharpston therefore concluded in her opinion, ‘To my mind a variation of the common law principle *inclusio unius est exclusio alterius* might be applied here. Thus, the presence of a regulation applying Article 9(3) to the institutions serves only to highlight the fact that there is no EU measure

⁹ This triggers the intriguing question of whether the LZV could not claim access to the Slovak court on the basis of the principle of effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. Cf. Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, judgment of 22 December 2010.

incorporating the equivalent obligations into the national legal orders of the Member States.’ In her opinion, Sharpston makes a clear distinction between the jurisdiction of the ECJ to decide whether Art. 9(3) has direct effect in EU law (it has not) and the jurisdiction to decide which court – itself or the competent court of a Member State – is best-placed to determine whether a particular provision has direct effect (it has).

The consistency argument used by the ECJ in para. 42 is, in the author’s view, rather bold and not very convincing either. With this argument the Court establishes a monopoly on interpreting the content of a treaty provision containing obligations for the EU Member States in a situation where the EU legislature itself has not been able to give any substance to those obligations. This is even more remarkable considering that Regulation No 1367/2006 has been seriously criticised in literature on the subject and there have been questions on whether the regulation itself is even in line with Article 9(3) of the Aarhus Convention.¹⁰ Furthermore, it is difficult to see why a ruling on the direct effect of Art. 9(3) is necessary for avoiding ‘future differences of interpretation’ between the ECJ and national courts. If the Court, as suggested by Sharpston, were to have abstained from giving a ruling on its direct effect because the matter falls within the jurisdiction of the Member States, national courts could never argue that the provision would have direct effect as a matter of EU law. Directly effective provisions of international treaty provisions, as a matter of EU law, would require that the matter does fall within the EU part of the declaration of competence. Which is, as far as it concerns Art. 9(3) Aarhus Convention, not the case.

4. Direct Effect of Provisions in Environmental Treaties Concluded by the Union

The Court has acknowledged that provisions of international treaties concluded by the Union could be directly effective, when these provisions contain clear and precise obligations which are not subject, in their implementation or effects, to the adoption of any subsequent measures. This doctrine has been applied with respect to environmental treaties for the first time in *the*

¹⁰ See G.J. Harryvan and Jan H. Jans, ‘Internal Review of EU Environmental Measures. It’s True: Baron van Munchausen Doesn’t Exist! Some Remarks on the Application of the So-Called Aarhus Regulation’, *REALaw* 2010/2, 53-65. Cf. M. Pallemarts, ‘Access to Environmental Justice at EU Level. Has the ‘Aarhus Regulation’ Improved the Situation? in: *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (M. Pallemarts ed.), Groningen 2011, chapter 10.

Pêcheurs de l'étang de Berre case.¹¹ The case involved, *inter alia*, Article 6(3) of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources. Under Article 6(1) and (3) of the Protocol, '1. The Parties shall strictly limit pollution from land-based sources in the Protocol Area by substances or sources listed in Annex II to this Protocol. [...] 3. Discharges shall be strictly subject to the issue, by the competent national authorities, of an authorisation taking due account of the provisions of Annex III [...].' The Court ruled that that provision clearly, precisely and unconditionally lays down the obligation for Member States to subject discharges of the substances listed in Annex II to the Protocol to the issue by the competent national authorities of an authorisation taking due account of the provisions of Annex III. In the Court's view, the fact that the national authorities have discretion in issuing authorisations under the criteria set out in Annex III in no way diminishes the clear, precise and unconditional nature of the prohibition on discharges without prior authorisation and that finding is also supported by the purpose and nature of the Protocol. In conclusion, the Court ruled that in that case the provision has direct effect, and therefore any interested party is entitled to rely on it before the national courts.

In *Lesoochranské zoskupenie* the ECJ denied any direct effect, as a matter of EU law, of Article 9(3) Aarhus Convention and ruled as follows:

'44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.'

In my view, this conclusion of the ECJ is correct and not that remarkable at all. Article 9(3) of the Aarhus Convention provides that 'each Party shall ensure [...], where they meet the criteria, if any, laid down in its national law, members

¹¹ Case C-239/03 *Commission v France* [2004] ECR I-9325 ('Étang de Berre').

of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.’ Compared to the much more detailed and precise obligations under Article 9(2) of the Aarhus Convention, it is indeed hard to see that Article 9(3) is directly effective.¹² However the Court did not stop there. It continued by stating:

‘46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 Impact [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (Impact, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental

¹² In the same vein Sharpston, opinion, para. 93.

protection organisation, such as the *zozkupenie*, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 44, and Impact, paragraph 54).’

Although Article 9 paragraph 3 of the Aarhus Convention does not itself create a right of access for LZV, the provision is certainly not irrelevant. According to para. 47 and following, Slovak courts have a duty to interpret ‘to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as *zozkupenie*, to challenge a decision before a court following administrative proceedings liable to be contrary to EU environmental law.’ In other words, the Court is not only authorised to interpret Art. 9(3) of the Aarhus Convention, but as a matter of Union law there also seems to be an obligation on the Member States to interpret their laws in the light of the Aarhus Convention. I really do not understand this. I thought that in the absence of EU legislation the implementation of Art. 9(3) Aarhus Convention was for the Member States to decide? Regulation No 1367/2006 cannot help the ECJ here to bridge the gap. So where does this duty of consistent interpretation come from: out of thin air? The ECJ’s ruling makes declarations of competence like the one declared at the conclusion of the Aarhus Convention, more or less irrelevant. Once again, I would like to refer to the opinion of Advocate General Sharpston where she stressed the importance of the absence of relevant EU legislation in implementing Article 9(3) vis-à-vis the Member States. It could be argued that the ECJ ignores the fact the Union legislature did not enact a directive implementing Article 9(3) of the Aarhus Convention. It seems to me that by creating this duty of ‘Aarhus-proof interpretation’ the ECJ might be stepping into the EU legislature’s shoes, a legislature who has, thus far, intentionally chosen not to act.

Furthermore, the distinction between direct effect and consistent interpretation becomes somewhat blurred. On the one hand, the ECJ argues that Art. 9(3) of the Aarhus Convention is too insufficiently clear and precise an obligation to have direct effect, but apparently, it is precise and clear enough to require the Slovak to court to interpret its laws so as to enable an environmental protection organisation, such as the LZV, to challenge the Slovak ministry’s decisions. If this analysis is correct, this can only mean that through the use of consistent interpretation Art. 9(3) of the Aarhus Convention is applicable across the full

breadth of European (environmental) law.¹³ Furthermore, those environmental groups should be allowed access to a court to challenge decisions that might conflict with the environmental law of the Union. This would not only improve access to justice for NGOs at national level, but given the consistency argument in para. 42, would inevitably enhance the legal position of NGOs environmental organisations at the level of the European court (s).¹⁴ There is no reason why the ECJ itself would not be subject to the requirement ‘Article 9(3) Aarhus-proof interpretation’ of Article 263(4) TFEU. But whether the Court of Justice wants to draw that conclusion and is ready to adjust its *Plaumann* doctrine¹⁵ remains to be seen!

¹³ Cf. J. Ebbeson, ‘Access to Justice at the National Level. Impact of the Aarhus Convention and European Union Law’ in: *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (M. Pallemmaerts ed.), Groningen 2011, p. 267 in particular.

¹⁴ Cf. M. Pallemmaerts, ‘Access to Environmental Justice at EU Level. Has the “Aarhus Regulation” Improved the Situation?’, in: (M. Pallemmaerts ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, Groningen 2011, p. 311 in particular. Cf. also the Aarhus Compliance Committee Findings and Recommendations of the Compliance Committee with regard to Communication Accc/C/2008/32 (Part I) Concerning Compliance by the European Union, adopted on 14 April 2011. The AAC held that the case law of the ECJ regarding the standing requirements under the ‘old’ Article 234(4) EC Treaty ‘is too strict to meet the criteria of the Convention’. And that ‘the Committee is also convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraph 3, of the Convention.’

¹⁵ Case 25/62 *Plaumann v Commission* ECR 1963, 205. Cf. on this case law extensively Hans Roland Schwensfeier, *Individuals’ Access to Justice Under Community Law* (diss. Groningen University 2009).