

The Different Roads to Judicial Coherence in Public Environmental Law

The Case of Access to Justice in England, Germany and the Netherlands

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Abstract

This paper deals with the development of procedural judicial coherence in environmental matters in the European Union with a special focus on recent reforms in England, Germany and the Netherlands. On the one side, this development was triggered by the implementation of procedural obligations arising from the Aarhus Convention and the interpretation of these obligations by the Court of Justice and national courts. This is exemplified in the liberalisation of German rules on standing for environmental organisations. On the other side, the creation of procedural judicial coherence is triggered by national legislators. An example of this is the process of restricting Dutch rules on access to justice in environmental matters. Both processes led to an approximation of litigation rules between these Member States. Other alignment processes concern rules on costs and time limits in the three legal systems selected, which are subject to reforms leading to further procedural judicial coherence in public environmental law.

I Introduction

In the European Union system of composite administration, it is in principle for the Member States to designate the rules governing the enforcement of supranational law.¹ This implies that national rules on administrative procedures can differ considerably between the Member States. As far as rules of administrative litigation in environmental matters are concerned,

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¹ Case 33/76, *Rewe-Zentralfinanz eG und Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

differences in the Union have been significant.² For example in the 1990s, environmental organisations were hardly able to challenge administrative decisions concerning environmental law in German courts, whereas at the same time in the Netherlands, environmental organisations could successfully challenge administrative decisions infringing rules of environmental law.³ Thus, regarding the enforcement of environmental law in the Union, there was a great incoherence in national administrative litigation systems. Since these times, developments in international and European law have triggered reform processes at the national level. At the same time, national law developed independently from international and European influences. Considering the various complex reforms that took effect in the last twenty years in the area of environmental litigation at the national level, it seems worth examining whether and to what extent, and by which means, procedural judicial coherence has developed.

Before analysing these developments, some brief remarks about the utilisation of the concept of ‘coherence’ in this paper have to be made. According to the Oxford Dictionary, ‘coherence’ is defined as ‘the action or fact of cleaving or sticking together’, but it is also used in the sense of congruity and consistency. For the purpose of the following analysis, coherence is referred to as a situation where there is congruity or consistency between (national) litigation systems in the Union. The process in which coherence is achieved will be referred to as ‘convergence’. Procedural judicial coherence refers to the alignment of national litigation rules governing court proceedings involving the application of Union law, as opposed to substantive judicial coherence, meaning the coherent interpretation and application of Union law by national courts.⁴

In the Union, there are various mechanisms by which processes of convergence can be triggered and by which procedural judicial coherence between different litigation systems can be established.⁵ To begin with, processes of convergence between legal systems can be the side effect of internal national reforms. The constant repetition of the ‘principle of national procedural autonomy’ by the Court of Justice emphasises the general freedom of Member States to create and reform their own rules for the enforcement of Union law. This freedom is however not unlimited; the Member States have to ensure that their litigation systems do not make the enforcement of Union impossible or excessively difficult (principle of effectiveness) and the same procedural rules

² J. Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (The Hague 2002).

³ N. de Sadeleer, G. Roller & M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal* (Groningen 2005).

⁴ See on this latter concept the contribution by Sim Haket.

⁵ J.G.M. Widdershoven, ‘Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity?’ [2014/2] *REALaw* 5-17.

have to be applied to claims based on an infringement of Union law and to claims alleging the infringement of national law (principle of equivalence).⁶ Moreover, in a few areas of the law, there are Union wide legislative rules which delimit the ‘autonomy’ of the national legal systems.⁷ Within these limits, the principle is that Member States are free to determine the rules governing the enforcement of Union law. In this context, it should be noted that by creating or by reforming national litigation rules, legal systems may draw inspiration from the rules of other legal systems.⁸ The use of comparative law in such reforms can lead to further convergences between the legal systems.

Next, convergences between the litigation systems of the Union can take place by ‘Union intervention’. There is no Union legislation on general administrative litigation rules for the national legal systems, but, as mentioned above, there are sector specific legislative instruments which contain some rules on litigation, which the Member States have to comply with. Moreover, the Court of Justice may ‘interfere’ with the national litigation systems, basing its argumentation on the *effet utile* of Union law, the principle of equivalence and the requirement of effective judicial protection.⁹ The rulings of the Court lead to the vertical top-down ‘Europeanisation’ of national litigation rules, meaning national reforms of litigation rules which may eventually trigger horizontal convergences between the national legal systems.

Furthermore, convergences between national rules are the result of the conclusion and implementation of international treaties. In environmental matters, the situation of great incoherence between national legal systems started to change with the adoption of the international Aarhus Convention in

⁶ Case 33/76, *Rewe-Zentralfinanz eG und Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5; T. von Danwitz, *Europäisches Verwaltungsrecht* (Berlin 2008) 279 ff.

⁷ In the context of this paper especially 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 L* 156, 25.6.2003, p. 17-25.

⁸ Ch.W. Backes, ‘Inspiratie uit het buitenland? – Enkele praktische ervaringen over de betekenis van rechtsvergelijking voor de wetgever’ [2011/3] *Regelmaat* 125-145.

⁹ J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 35 ff.

1998,¹⁰ to which the European Union¹¹ and its Member States¹² are parties. The Aarhus Convention created three sets of rules which are commonly referred to as the three Aarhus pillars.¹³ The first pillar aims at guaranteeing public access to information on the environment,¹⁴ the second pillar consists of rules on public participation in public decision making affecting the environment¹⁵ and the third pillar sets common standards for environmental litigation in the contracting states.¹⁶ The creation of an international standard for environmental litigation has as a consequence that the contracting states are obliged to align their national litigation rules with this standard. The effect of this is – insofar as contracting states comply with their obligation¹⁷ – that between the litigation rules of different contracting states procedural judicial coherence is established.

The question of this paper is to what extent the Aarhus Convention and its implementing legislation at the Union level have contributed to rising procedural judicial coherence and how far reforms at the national level are causal for an approximation of litigation rules in the Union. For the purpose of tracing the development of rising procedural judicial coherence in environmental matters, rules on *locus standi* (section 1), time limits (section 2) and costs (section 3) will be taken as examples and the focus shall be on the legal systems of England, Germany and the Netherlands. These three legal systems are of particular interest as they represent different traditions of administrative litigation.¹⁸ With regard to each set of rules, the legal situation in the three legal systems will be described briefly as it was before reforms took place. This description will be followed by an illustration of the factors inducing reforms which finally lead to rising procedural judicial coherence in environmental matters.

¹⁰ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998.

¹¹ 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, *OJ L* 124/1.

¹² For the state of signatures and ratifications, refer to: www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (last visited: 20.06.2015).

¹³ J. Ebbesson, H. Gaugitsch, J. Jendroska, F. Marshall & S. Stec, *The Aarhus Convention: An Implementation Guide* (2014) 19, available at: www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf (last visited 20.06.2015).

¹⁴ Art. 4 of the Aarhus Convention.

¹⁵ Art. 6 to 8 of the Aarhus Convention.

¹⁶ Art. 9 of the Aarhus Convention.

¹⁷ On the actual state of implementation of article 9 (3) of the Aarhus Convention see: Darpö (ed.), *Effective Justice?, Synthesis Report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union*, 2012.

¹⁸ R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Cambridge 2012).

2 Rules on *Locus Standi* for Environmental Organisations

2.1 The Legal Situation before the Adoption of the Aarhus Convention

Before the adoption of the Aarhus Convention, differences in national rules on *locus standi* were substantial, ranging from legal systems in which standing rules were very liberal and thus in practice giving everyone the possibility to access courts, to legal systems in which rules on access were extremely restrictive, barring in practice numerous claimants from challenging wrongful administrative decisions in courts.¹⁹ Whereas the starting point for the German legal system is that access to administrative courts is made dependent on the possible infringement of a right of the claimant, the general Dutch and English rules on access to courts require that claimants have an interest in the administrative decision.²⁰

The rights-based approach as enshrined in the German constitution²¹ and the federal statute on judicial review²² requires that any claimant who wants to challenge an administrative decision in court has to allege the possible infringement of an individual right under public law. If such an infringement cannot be claimed, standing is denied and the claim is inadmissible. According to the traditional German interpretation of legal provisions, most rules of environmental law do not at least also aim at the protection of individual rights. They do not constitute a *Schutznorm* (rule of protection for individuals). For example, rules of national nature protection law primarily aim at the protection of nature and they are not considered to provide for individual rights under public law.²³ Therefore, it has been very difficult for individuals to receive standing in German courts in environmental matters. Moreover, because of the focus on the protection of individual rights in administrative litigation, altruistic environmental organisations have for a long time been practically unable to access courts in many environmental cases.²⁴

¹⁹ For the situation of environmental NGOs: N. de Sadeleer, G. Roller & M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs, Empirical Findings and Legal Appraisal* (Groningen 2005).

²⁰ M. Eliantonio, Ch.W. Backes, Ch.H van Rhee, T.N.B.M. Spronken & A. Berlee, *Standing up for Your Right(s) in Europe* (Cambridge 2013) 66 ff.

²¹ Article 19 (4) Grundgesetz (GG).

²² § 42 (2) Verwaltungsgerichtsordnung (VwGO).

²³ W. Erbguth & S. Schlacke, *Umweltrecht* (Baden-Baden 2014) 138.

²⁴ H.J. Koch, 'Die Verbandsklage im Umweltrecht' [2007/4] *NVwZ* 369-488.

Contrary to this, environmental organisations in the Netherlands have been recognised as interested parties under the national general statute on administrative law and have been able to bring cases to administrative courts on that basis.²⁵ Furthermore, the Dutch enforcement system in the 1990s and early 2000s provided for a special form of *actio popularis*.²⁶ In administrative procedures with public participation, anyone – not only an interested party – was entitled to submit comments on an envisaged project.²⁷ Any participant in this procedure was subsequently granted standing in administrative courts.²⁸

Under English law, applicants have been granted standing in courts if they could prove that they have a sufficient interest.²⁹ Through this test, the claims of ‘busy-bodies, cranks and other mischief makers’ are filtered out.³⁰ If sufficient interest is established, individuals have standing in environmental matters.³¹ Environmental organisations or other public interest groups can also have a sufficient interest in environmental cases and they can be granted standing in courts.³² For example in the case of Greenpeace bringing an action against the grant of authorisations for operations on a nuclear site, the judge held that the question of standing is a matter of discretion and he considered ‘the nature of the applicant and the extent of the applicant’s interest in the issues raised, the remedy Greenpeace seeks to achieve and the nature of that relief sought’.³³ On this basis, the environmental organisation was granted standing.

This brief description of rules on standing in the three different legal systems of Union in the 1990s and early 2000s shows that individuals and environmental organisations had different possibilities to enforce environmental law in the three legal systems. In Germany, any claim in which it was not possible to allege the infringement of a subjective right under public law was declared inadmissible, whereas in the Netherlands, factually anyone could institute litigations in environmental matters. Hence, there was significant procedural judicial inco-

²⁵ Article 1:2 (3) Algemene wet bestuursrecht (Awb).

²⁶ Ch.W. Backes, The Netherlands, in: J. Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (The Hague 2002) 379.

²⁷ Before the reform in 2005, article 3:24(1) Awb stated that ‘een ieder’ (everyone) can object to a draft decision.

²⁸ Before the reform in 2005, article 20.6 (2) Wm enumerated the requirements for accessing courts after having participated in the administrative preparation procedure.

²⁹ *R (National Federation of Self-Employed and Small Business Ltd) v. Inland Revenue Commissioners* [1982] AC 617.

³⁰ W. Wade & C. Forsyth, *Administrative Law* (Oxford 2014) 585.

³¹ S. Bell, D. McGillivray & O.W. Pedersen, *Environmental law* (Oxford 2013) 338.

³² *Ibid.*

³³ *R (Greenpeace Ltd) v. Her Majesty’s Inspectorate of Pollution and the Minister of Agriculture Fisheries and Food* [1994] 2 CMLR 569.

herence in the Union. In the following section, it will be examined how and to what extent this incoherence has changed.

2.2 The Aarhus Convention Inducing National Reforms

To begin with, the Aarhus Convention is one instrument by which procedural judicial coherence in environmental matters can be established. The central provision on environmental litigation is article 9 of the Aarhus Convention. According to article 9 (1), *any person* whose right to access information as prescribed by the Convention is infringed, shall have the ability to institute judicial proceedings. This rule requires a wide access to courts in litigations concerning the first pillar of the Aarhus Convention (access to information). Next, article 9 (2) Aarhus Convention recognizes, that in principle, there are different concepts of access to court in the contracting states. This article requires that *members of the public concerned* 'having a sufficient interest, or, alternatively, maintaining impairment of a right (...) have access to a review procedure before a court of law' in actions concerning activities named in article 6. These activities concern procedures in which public participation is required such as the environmental impact assessment procedure. Finally, article 9 (3) requires that *members of the public* have access to courts with regard to acts and omissions infringing rules of environmental law.

As mentioned in the introduction, the Union and its Member States are contracting parties to this international treaty, meaning that it is a mixed agreement. As a consequence, both, the Union and the Member States are under an obligation to implement the rules of the Aarhus Convention in their legal systems. The Union has so far only partially complied with its obligation to implement the third pillar of the Aarhus Convention.³⁴ As far as article 9 (1) is concerned, directive 2003/4/EC on public access to information was adopted including provisions on judicial protection.³⁵ Moreover, the requirements of articles 9 (2) and (4) were inserted in directive 2003/35/EC on public participation and access to justice in environmental matters.³⁶ This directive however only concerns access to justice with regard to the administrative procedures

³⁴ M. Eliantonio, 'Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?' [2014/3] *LIEI* 257-273.

³⁵ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, 14.2.2003, *OJ L* 41/26.

³⁶ 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 L* 156, 25.6.2003, p. 17-25.

prescribed in the IPPC³⁷ and the EIA directive.³⁸ Next to directive 2003/35/EC, a proposal for a directive on access to justice for the implementation of article 9 (3) was made in 2003³⁹ but the bill was withdrawn in 2014.⁴⁰ The Court of Justice has ruled that article 9 (3) cannot be relied upon directly by claimants for the purpose of accessing courts in the European Union, as the provision of the international treaty is not unconditional and as it is not sufficiently precise.⁴¹ Despite this lack of complete implementation, the Union rules on access to justice which were adopted under the Aarhus Convention have formed the basis for triggering national reforms, as will be seen in the following paragraph.

In order to implement the requirements of Directive 2003/35/EC, the German legislator has adopted a separate statute on judicial protection in environmental matters.⁴² This statute provides for special rules on access to courts for recognised environmental organisations.⁴³ It should be noted that the rules on standing only concerned environmental organisations, meaning that any other claimant had to fulfil the requirements as set out in the general statute on access to administrative courts, implying that the infringement of a subjective right under public law had to be alleged. According to the original version of the newly created statute on judicial protection in environmental matters, the condition for standing in German courts was that the environmental organisation had to claim the infringement of a rule which at least also protects the rights of individuals.⁴⁴ This meant that the organisation did not have to claim the infringement of a right of their own, but of a rule that protects rights of individuals. A specific problem arose with regard to the procedural rules of the European environmental impact assessment (EIA) procedure.⁴⁵ Pursuant to German jurisprudence, these procedural rules did not provide for individual rights under

³⁷ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ L257/26.

³⁸ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40 (EIA Directive).

³⁹ Proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters, COM (2003) 624.

⁴⁰ Withdrawal of Obsolete Commission Proposals, OJ C 153, 21.05.2014, p. 3-7.

⁴¹ In the context of litigations before a national court: C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255, para. 45; in the context of litigations before the Union courts: Joined Cases C-404/12 P and 505/12 P, *Council of the European Union, European Commission v. Stichting Natuur en Milieu, Pesticide Action Network Europe* [2015] not yet reported in the ECR, para. 47.

⁴² Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG Richtlinie 2003/35/EG vom 7. Dezember 2006, BGBl. I, p. 2816 (UmwRG (2006)).

⁴³ The recognition is regulated in § 3 UmwRG (2006).

⁴⁴ § 2 (1) nr. 1 UmwRG (2006).

⁴⁵ A. Scheidler, 'Rechtsschutz Dritter bei fehlerhafter oder unterbliebener Umweltverträglichkeitsprüfung' [2005/8] NVwZ 863.

public law.⁴⁶ Therefore, it was practically impossible for environmental organisations to receive standing in EIA cases. The issue was referred to the Court of Justice in the case of *Trianel*.⁴⁷ With regard to the newly created German rule on *locus standi* for environmental organisations aiming at the implementation of the Aarhus requirements, the Court of Justice held that

‘it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environmental law solely on the ground that those rules protect the public interest.’⁴⁸

Therefore, the German rule was in breach of Union law. Since this judgment, recognised environmental organisations can access German courts in EIA cases without alleging the infringement of a norm which at least also protects individual rights.⁴⁹ The German legislator redrafted the statute implementing the requirements of the Aarhus Convention, granting recognised environmental organisations standing in environmental matters.⁵⁰ Compared to the situation described in the beginning of this section, German rules on standing for environmental organisations were broadened and thereby cautiously moved towards the standard adopted in the Netherlands and England. It should however be noted, that the ruling of *Trianel* only had a direct impact on *locus standi* for environmental organisations. Other claimants still have to claim the possible infringement of a subjective right.⁵¹

In conclusion, the reform of German rules on *locus standi* was triggered under international law and by European pressure. This reform resulted in convergences between the three legal systems. As far as the national rules on standing for environmental organisations are concerned, procedural judicial coherence has been established to the extent, that environmental organisations now have the (general) possibility to access courts in environmental matters.

⁴⁶ See for example: VGH München, Judgment of 26 January 1993, NVwZ 1993, 906.

⁴⁷ C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* [2011] ECR I-3673.

⁴⁸ *Ibid.*, para. 46.

⁴⁹ OVG Münster, Judgment of 1 December 2011, Az.: 8 D 58/08.AK- juris.

⁵⁰ Gesetz zur Änderung des Umweltrechtsbehelfsgesetzes und anderer Umweltrechtlicher Vorschriften vom 21. Januar 2013, BGBl. I, p. 95.

⁵¹ § 42 (2) VwGO. The narrow possibility for individuals to receive standing in these cases is however subject to criticism by some national courts: OVG NRW, Decision of 23 July 2014, Az.: 8 B 356/14, NuR 2014, 663-668; OVG NRW, Judgment of 25 February 2015, Az.: 8 A 959/10, NuR 2015 491-500; VG Aachen, Decision of 28 November 2014, Az.: 3 L 224/13, EurUP 2015, 70-73.

2.3 National Reforms Inducing Procedural Judicial Coherence

Parallel to the process of broadening rules on standing in Germany under the Aarhus Convention, access rules in the Netherlands have been in a process of restriction. This ‘fall of access to justice’⁵² in the Netherlands was caused by different national developments. To begin with, the *actio popularis* was abolished in a national legislative reform in 2005.⁵³ A reason for this was the aim to reduce the number of environmental litigations.⁵⁴ Since this reform, claimants need to qualify as interested parties under the rules of the general administrative law statute in order to receive standing in courts.⁵⁵ This reform was the first little step in moving away from a very liberal system of standing towards a more restrictive system of standing. A next step towards restricting rules on access was triggered by a judgment of the Council of State in a case in which an environmental organisation brought a claim against a permit for a poultry farm.⁵⁶ The court held that the organisation did not qualify as an interested party because the statutes of the organisation were not specific enough. According to the court it was not possible to determine which public interest the organisation intended to defend. This ruling was followed in subsequent case law.⁵⁷ The latest step of restricting access to justice has been the introduction of the so-called *relativiteitsvereiste* (requirement of connection) into Dutch administrative law.⁵⁸ This requirement stipulates that the

‘administrative judge does not annul an administrative decision because it infringes written or unwritten rules or general principles if this rule or principle

⁵² H. Tolsma, K. de Graaf & J.H. Jans, ‘The Rise and Fall of Access to Justice in the Netherlands’ [2009/2] *JEL* 315.

⁵³ Wet van 26 mei 2005 tot aanpassing van diverse wetten aan de Wet uniforme openbare voorbereidingsprocedure Awb (Aanpassingswet uniforme openbare voorbereidingsprocedure Awb) *Stb.* 2005, 282 (Statute to amend various laws with regard to the statute on the uniform decision making procedure).

⁵⁴ Memorie van Toelichting 2003/2004, nr. 29421, nr. 3, p. 3, 4.

⁵⁵ Article 1:2 Awb.

⁵⁶ ABRvS 1 October 2008, nr. 200801150/1, AB 2008, 348 with a comment by Michiels.

⁵⁷ See for examples: ABRvS 14 January 2009, nr. 200800497/1; ABRvS 9 September 2009, nr. 200802966/1, JM 2008/141 with a comment by van Velsen; ABRvS 2 May 2012, nr. 201011273/1/A4; ABRvS 12 December 2012, nr. 201206403/1/T4; ABRvS 27 February 2013, nr. 20112182/1/R3.

⁵⁸ The *relativiteitsvereiste* was introduced with the Wet van 18 maart 2010, houdende regels met betrekking tot versnelde ontwikkeling en verwenzelijking van ruimtelijke en infrastructurele projecten (Crisis- en herstelwet), *Stb.* 2010, 135; Article 1.9 Chw applied until 1 January 2013, *Stb.* 2012, 682. Since then, it has become generally binding for administrative law in article 8:69 a Awb (Wet van 20 december tot wijziging van de Algemene Wet bestuursrecht en aanverwante wetten met het oog op enige verbeteringen en vereenvoudigingen van het bestuursprocesrecht (Wet aanpassing bestuursprocesrecht), *Stb.* 2012, 684).

evidently does not aim at protecting the interest of those who want to rely on it.⁵⁹

This rule does not aim at preventing the admissibility of a claim in the courts, but its purpose is to prevent the annulment of an administrative decision once standing in courts has been granted at the stage of admissibility, if in a certain case, there is no sufficient connection between the claimant and the rule which has been infringed.⁶⁰ Thus, the admissibility of the claim of individuals and environmental organisations is still assessed according to the question of whether they can be qualified as interested parties under the general rules of administrative law.⁶¹ However, when it comes to the merits of the case, the rule in question must aim at the protection of the interest of the claimant. This new rule has similarities with the German doctrine explained above, but there are also important differences.⁶²

The first difference is that in Germany, the infringement of a rule which *at least also* protects the *rights* of individuals is required, whereas in the Netherlands, a decision will not be annulled if the rule in question *obviously does not* aim at protecting the *interests* of the claimant. The difference between ‘rights’ and ‘interests’ becomes apparent, when comparing the national interpretation of similar rules, for example the provisions of the European EIA procedure, which are applicable in both legal systems. According to the traditional German doctrine and jurisprudence, most steps in the EIA procedure do not provide for individual rights under public law. Therefore, many claimants, including environmental organisations, were for a long time factually barred from accessing courts in EIA cases. The situation only began to change with the ruling of the Court of Justice in *Trianel*, and it changed only to the extent that recognised environmental organisations were vested with the possibility to access courts without being required to claim the infringement of an individual right under public law.⁶³ Contrary to this, in the Netherlands, provisions of the EIA procedure can aim at the protection of the interests of the claimant. For example in a case decided by the Dutch Council of State in October 2014, an association brought a claim on the ground that a strategic environmental assessment⁶⁴ was

⁵⁹ Own translation; the rules of 1:9 Chw and 8:69 a Awb are identical.

⁶⁰ ABRvS 19 February 2014, nr. 201303313/1/A4, para. 3, M&R 2014/80 with a comment by Soppe.

⁶¹ Art. 1:2 Awb.

⁶² R.J.N. Schlössels, B.J. van Ettehoven, B. Schueler & M. van Harten, ‘Een Schutznorm in het bestuursproces: selectief winkelen bij de burens?’ [2007/38] *NTB* 2007 245; P. Willemsen, ‘Een relativiteitseis in het bestuursprocesrecht: meer rechtsbescherming? Een vergelijking tussen het Nederlandse en het Duitse bestuursprocesrecht’ [2010/8] *Trema* 345-350.

⁶³ See *supra* 2.2.

⁶⁴ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, *OJ L* 197, 21.7.2001, p. 30-37.

wrongfully omitted.⁶⁵ According to the association's statutes, their aim was the preservation of the cultural and historic heritage of a municipality. The interest of this association was the protection of a good *woon- en leefklimaat* (good and healthy environment for living). Due to the fact that in a strategic environmental assessment, also the effects of the plan on the cultural and historic heritage have to be described, the court found that these procedural rules also protect the interests of the association. Hence, the *relativiteitsvereiste* did not prevent the court from annulling the administrative decision.⁶⁶ This case illustrates that with regard to the EIA procedure, the Dutch concept of 'interests' is broader than the German interpretation of 'rights'.

Another difference concerns the stage at which the 'connection' between the claimant and the rule infringed is raised in court. In Germany, the general rule is that the claimant has to allege the potential infringement of an individual right under public law already at the stage of the admissibility of the claim.⁶⁷ Hence, the *Schutznorm* requirement is a hurdle for accessing the courts. In the case that the claim is admissible, the court will subsequently assess whether the rule infringed actually aimed at protecting the rights of the claimant at the stage of the merits of the case.⁶⁸ An exception to this assessment in two stages is made for environmental organisations which are granted standing under the special rules implementing some of the requirements of the Aarhus Convention. These organisations do not need to allege the potential infringement of a rule protecting at least also the rights of individuals.⁶⁹ In order to be successful with their claim, a rule has to be infringed which aims at the protection of the environment and the interests of the environmental organisation as provided for in their statutes have to be affected.⁷⁰ As explained previously, in the Netherlands, the *relativiteitsvereiste* is not a hurdle for accessing court, but it only plays a role when the judge has to determine whether or not the remedy sought can be granted.

Despite these differences, the German and the Dutch rule have in common that in practice, claimants not having a special connection with the infringed rule will be prevented from successfully challenging decisions dealing with environmental law in national courts. In this regard, there is convergence between the litigation rules of these two Member States.

⁶⁵ ABRvS Judgment of 1 October 2014, nr. 201307140/1/R1.

⁶⁶ ABRvS Judgment of 1 October 2014, nr. 201307140/1/R1, para. 4.8.

⁶⁷ § 42 (2) VwGO.

⁶⁸ § 113 (1) VwGO.

⁶⁹ § 2 (1) UmwRG; under nature protection law, standing is granted on the basis of § 64 Bundesnaturschutzgesetz (BNatSchG).

⁷⁰ § 2 (5) UmwRG.

So far, this section has focused on the creation of judicial procedural coherence between the Dutch and the German legal system. The question remains whether any convergences between these legal systems and the English legal system can be detected. As set out in the introduction to this section, the English approach to standing has always been comparably broad, also in environmental matters and this approach did not change. This was confirmed a recent judgment of the UK Supreme Court in *Walton*.⁷¹ In this case, an individual brought an action against schemes and orders made by the Scottish Ministers concerning the construction of a bypass in the vicinity of Aberdeen. Mr. Walton was granted standing, because

'he made representations to the Ministers (...) He took part in the local inquiry held under the Act. He is entitled as a participant in the procedure to be concerned that, as he contends, the Ministers have failed to consult the public as required by law and have failed to follow a fair procedure. He is not a mere busybody interfering in things which do not concern him. He resides in the vicinity of the western leg of the WPR. Although that is some distance from the Fastlink, the traffic on that part of the WPR is estimated to be greater with the Fastlink than without it. He is an active member of local organisations concerned with the environment, and is the chairman of the local organisation formed specifically to oppose the WPR on environmental grounds. He has demonstrated a genuine concern about what he contends is an illegality in the grant of consent for a development which is bound to have a significant impact on the natural environment'.⁷²

Hence, when the German legal system was obliged to broaden its rules as far as environmental organisations are concerned, and when the Dutch system was in a process of constriction because of national reforms, the English rules on standing remained liberal and no national reforms induced convergences with the other two legal systems. In comparison with the legal systems of Germany and the Netherlands, the English rules on standing are broader, especially as far as individuals are concerned. Therefore, in conclusion, there is only partially procedural judicial coherence between the three legal systems.

⁷¹ *Walton v. The Scottish Ministers* [2012] UKSC 44; [2013] 1 CMLR 28.

⁷² *Ibid.* [88].

3 Rules on Time Limits

3.1 The Legal Situation before the Adoption of the Aarhus Convention

Before the adoption of the Aarhus Convention, rules on time limits for bringing litigations to administrative courts in environmental matters were different in the Union. Whereas under the general administrative rules in Germany and the Netherlands, strict time limits were fixed at one month⁷³ and six weeks⁷⁴ respectively, the English rule for bringing actions for judicial review was less strict. According to English law, applications for judicial review had to be made ‘promptly’ and ‘no later than three months after the grounds to make the claim first arose’.⁷⁵ In the following, it will be described how and to what extent procedural judicial coherence has been established.

3.2 No Reforms under the Aarhus Convention

The development towards procedural judicial coherence with regard to time limits was not triggered by the adoption of the Aarhus Convention. Article 9 (4) of the Aarhus Convention and the respective Union norms⁷⁶ require that national litigation procedures shall be timely. The implementation guide of the Aarhus Convention explains that timeliness means that Member States should ensure an ‘expeditious’ review processes, explicitly naming the possibility of introducing time limits for entire court proceedings.⁷⁷ However, the Convention does not prescribe a specific time limit. Hence, there is no strict benchmark against which the different national rules on time limits for bringing administrative litigations to court could be tested. Nevertheless, national rules on time limits have been in a process of transformation as will be explained in the following section.

3.3 National Reforms Inducing Procedural Judicial Coherence

In environmental matters, neither the Union legislator, nor the Court of Justice has so far interfered with the national time limits for making claims in administrative litigations of the three legal systems under analysis. However, the issue of time limits under English law was subject to a

⁷³ § 74 VwGO.

⁷⁴ Art. 6:7 Awb.

⁷⁵ Rule 54.5 (1) Civil Procedure Rules (CPR).

⁷⁶ Art. 11 (4) EIA Directive; Article 16 (4) IPPC Directive.

⁷⁷ J. Ebbesson, H. Gaugitsch, J. Jendroska, F. Marshall & S. Stec, *The Aarhus Convention: An Implementation Guide* (2014) 201.

reference for preliminary ruling in the case of *Uniplex*, concerning Union rules on public contracts.⁷⁸ In this case, the Court of Justice ruled that with regard to the enforcement of the specific public procurement regulation at stake, English litigation rules were in breach of Union law. According to the court, the English rules were not sufficiently clear and precise, and the discretion of the national court created too much uncertainty.⁷⁹ In the aftermath of this ruling, the English legislator adopted more stringent rules for cases brought under the Union rules on public contracts.⁸⁰ This reform however did not concern other areas of the law apart from the rules on public procurement. As far as actions for judicial review under environmental law are concerned, the general rule requiring a prompt application which is made no later than three months was partially abandoned with the adoption of the Civil Procedure Rules (CPR) in 2013.⁸¹ With this reform, the national legislator decided to modify the rules regarding time limits for claims brought under the English planning law system. Since April 1st of that year, judicial review cases dealing with decisions under planning law have to be brought within a time limit of six weeks.⁸² According to the explanatory memorandum, ‘the policy intention for shortening time limits is to reduce delay’⁸³ in proceedings. By this means, the time limit of judicial review in planning cases is aligned to the time limit that applies under the rules of statutory appeal⁸⁴ in planning law.⁸⁵ The reform was preceded by a government consultation, in which the majority of consultees opposed the shortening of time limits.⁸⁶ However, especially from the side of business and public authorities, the reform was supported, as the brief time limit would reduce the period of uncertainty in which legal challenges could be brought and as the reform would clarify the *Uniplex* ruling.⁸⁷ In reducing the time limit, the English litigation regime in environmental matters has adopted a standard which is similar to the rules provided for in the Netherlands and in Germany. Thus, there are convergences between the national litigation systems and, at

⁷⁸ C-406/08, *Uniplex (UK) Ltd v. NHS Business Services Authority* [2010] ECR I- 817.

⁷⁹ *Ibid.*, para. 43.

⁸⁰ The Public Procurement (Miscellaneous Amendments) Regulation 2011, No. 2053.

⁸¹ The Civil Procedure (Amendment No. 4) Rules 2013, No. 1412 (L.14).

⁸² Rule 54.5 (5) CPR.

⁸³ Explanatory Memorandum to the Civil Procedure (Amendment No. 4) Rules 2013, no.1412 (L.14), at 7.3.

⁸⁴ Under section 288 TCPA.

⁸⁵ Explanatory Memorandum to the Civil Procedure (Amendment No. 4) Rules 2013, no.1412 (L.14), at 7.3.

⁸⁶ Reform of Judicial Review: the Government Response, April 2013, at 15, available at www.consult.justice.gov.uk/digital-communications/judicial-review-reform/results/govt-response-judicial-review-proposals-for-reform-april-2013.pdf (last visited 20.06.2015).

⁸⁷ Reform of Judicial Review: the Government Response, April 2013, at 17.

least as far as cases falling under the English planning regime are concerned, procedural judicial coherence is established.

4 Rules on Costs

4.1 The Legal Situation before the Adoption of the Aarhus Convention

Differences between legal systems also existed with respect to the rules on costs in environmental proceedings. This section will mainly focus on cost orders made by courts. Whereas Dutch legislation provides for a system of one-way cost shifting, the German and English systems are based on the loser-pays principle.

The Dutch system of one-way cost shifting means that in practice only public authorities are ordered to pay costs. In case an action for judicial review is successful, the administrative authority will have to reimburse the court fees of the claimant.⁸⁸ If the action for judicial review is not successful, the judge will not order the reimbursement of court fees.⁸⁹ In addition to that, administrative judges can make cost orders, which are in principle only directed at the public authority.⁹⁰ The calculation of procedural costs is based on an administrative statute, listing the costs which are eligible for cost orders.⁹¹ This system has the consequence that the cost risk for claimants (in environmental matters) is very limited.

Contrary to the approach adopted in the Netherlands, the German system of cost orders is based on the principle that the losing party has to pay the winning party's costs.⁹² Thus, in case the administrative authority loses the case, the authority has to bear the costs of the claimant, including court fees and other expenditures. Vice-versa, if the claimant is not successful, they have to bear the costs of the administrative authority. This system has the consequence that claimants (in environmental matters) incur the risk of high costs when bringing litigations to administrative courts.

⁸⁸ Art. 8:74 (1) Awb.

⁸⁹ L.J.A. Damen et al., *Bestuursrecht* (Den Haag 2012) 351.

⁹⁰ *Ibid.*, 353.

⁹¹ Besluit van 22 december 1993, houdende nadere regels betreffende de proceskostenveroordeling in bestuursrechtelijke procedures, *Stb.* 1993, 763.

⁹² § 154 VwGO.

Similar to the German system, rules on cost orders in England are based on the loser pays principle.⁹³ In England, costs for environmental litigation have traditionally been very high because of high court fees and costs of lawyers, the latter being particularly high because of the adversarial nature of the English legal system.⁹⁴ Moreover, there was no system in place that would have covered the high costs incurred by the losing party. As will be shown in the next section, the English system of costs had to be reformed under the requirements of the Aarhus Convention.

4.2 The Aarhus Convention Inducing National Reforms

Article 9 (4) of the Aarhus Convention and the respective implementing legislation requires that environmental litigations should not be ‘prohibitively expensive’. The interpretation of the expression ‘not prohibitively expensive’ has triggered intensive debates, especially with regards to the costs regime in the UK. At the national level, Lord Justice Jackson presented his findings on civil litigation rules in 2009 which showed that, particularly in environmental cases, costs constituted a barrier to access to justice.⁹⁵ Furthermore, a working group guided by Lord Justice Sullivan identified excessive costs as the key element limiting access to justice in environmental matters.⁹⁶ In further empirical research, it was found that 56% of cases in which clients were advised by lawyers to proceed with litigation, this was not done due to costs.⁹⁷ The Aarhus Compliance Committee had to express its opinion on the English cost regime several times, and it found that costs were prohibitively expensive.⁹⁸ In the Union, the Court of Justice had to rule on the requirement of ‘not prohibitively expensive costs’ with regard to English rules in two cases.⁹⁹ The first case was a reference for preliminary ruling referred to the Court of Justice in the case of *Edwards and Pallikaropoulos* concerning a cost order, according to

⁹³ Rule 44.3 (2) CPR.

⁹⁴ Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales*, 2008, available at www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf (last visited: 20.06.2015).

⁹⁵ R. Jackson, *Review of Civil Litigation Costs: Final Report*, The Stationery Office, 2010.

⁹⁶ Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales*, 2008, available at: www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf (last visited: 23.1.2015).

⁹⁷ The Environmental Law Foundation, *Cost Barriers to Environmental Justice, A Report in Association with BRASS*, December 2008, available at: www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/correspondence/FrELF_Report2009.pdf (last visited 20.06.2015).

⁹⁸ Communication ACCC/C/2008/23; Communication ACCC/C/2008/33, Communication ACCC/C/2009/38.

⁹⁹ C-260/11, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others* [2013] not yet published; C-530/11, *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2014] not yet reported.

which Mrs. Pallikaropoulos, after having lost her case in the national courts, was ordered to pay the costs of the public authority.¹⁰⁰ The Court of Justice held that the courts have to make an objective analysis of the amount of costs and have to take the claimant's financial situation into consideration.¹⁰¹ Moreover, the court

'may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.'¹⁰²

Additionally, the fact that the claimant was not deterred from bringing a claim is not sufficient for the conclusion that costs are in compliance with the Aarhus requirement.¹⁰³ Taking this guidance by the Court of Justice into account, the national court in the end found that the cost order of £ 25,000 against Mrs. Pallikaropoulos could be upheld.¹⁰⁴

In a second case, the European Commission had brought infringement proceedings against the UK for failing to comply with its obligations under the Union directives implementing the Aarhus Convention.¹⁰⁵ In its judgment, the Court of Justice had to deal with the general costs regime applicable in environmental litigations. After having repeated the findings of *Edwards*, the court assessed the English rules on protective cost orders, which it considered to be incompatible with directive 2003/35/EC.¹⁰⁶ Moreover, the court held that the

'regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United King-

¹⁰⁰ C-260/11, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others* [2013] not yet published.

¹⁰¹ *Ibid.*, para. 40.

¹⁰² *Ibid.*, para. 46.

¹⁰³ *Ibid.*, para. 47.

¹⁰⁴ *R (on the application of Edwards and another (Appellant) v. Environment Agency and others (Respondents) (No.2)* [2013] UKSC 78.

¹⁰⁵ C-530/11, *European Commission v. United Kingdom of Great Britain and Northern Ireland* [2014] not yet reported.

¹⁰⁶ *Ibid.*, para. 57.

dom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.¹⁰⁷

In addition to these breaches of Union law, the Court of Justice found that also the practice of requiring cross-undertakings in actions for interim relief in environmental matters 'constitutes an additional element of uncertainty and imprecision so far as concerns compliance with the requirement that proceedings not be prohibitively expensive.'¹⁰⁸

As a consequence of these European judgments, the communications of the Aarhus compliance committee and national criticism, the English legislator finally redrafted the rules on costs in claims falling under the scope of the Aarhus Convention. For this purpose, a separate section was inserted in the CPR with the title 'Aarhus Convention Claims'.¹⁰⁹ This section provides for a cost cap at £ 5000 for individuals and a cap of £ 10.000 for other claimants. On the side of the defendant, costs are capped at £ 35,000.¹¹⁰

4.3 Independent National Reforms Inducing Procedural Judicial Coherence?

At the same time as the English reform process was triggered under the Aarhus Convention and Union pressure, the Dutch legislator discussed the adoption of a bill for full cost recovery in administrative litigations, independent from any previous interference by the Union.¹¹¹ The aim of the bill was to amend the existing legislation on court fees so that the fees would fully cover the costs incurred at the courts. Hence, parties bringing court proceedings would have been responsible for their expenses themselves, and not the wider public. The bill was however fiercely criticised¹¹² and finally abandoned.¹¹³ An important concern that was raised in the debates was the compatibility of the planned reform with international obligations.¹¹⁴ The international obligations

¹⁰⁷ *Ibid.*, para. 58.

¹⁰⁸ *Ibid.*, para. 71.

¹⁰⁹ Rule 45.41 (2) CPR.

¹¹⁰ Rule 45.43 CPR in conjunction with Practice Direction 45 para. 5.1, 5.2.

¹¹¹ Wijziging van de Algemene Wet Bestuursrecht en de Wet griffierechten burgerlijke zaken in verband met de invoering van kostendekkende griffierechten, *Kamerstukken II* 2011/12, 33071, nr. 2.

¹¹² D.A. Verburg & B.J. van Ettehoven, 'Uurtje, factuurtje: rekeningrijden bij de bestuursrechter. Over kostendekkende griffierechten' [2011] *JBPlus* 142-157.

¹¹³ Wijziging van de Algemene Wet Bestuursrecht en de Wet griffierechten burgerlijke zaken in verband met de invoering van kostendekkende griffierechten, *Kamerstukken II* 2012/13, 33071, nr. 11.

¹¹⁴ B.J. van Ettehoven & S. Lanshage, 'Verslag VAR/OSR-bijeenkomst "De toegang tot de rechter in geding?": het wetsvoorstel verhoging griffierechten' [2012/20] *NTB* 140-144.

constitute the limits within which the national legislator is free to reform its national litigation rules. It was emphasised that the limits prescribed by the Aarhus Convention and its implementing legislation must not be exceeded.¹¹⁵ Eventually, the reform did not take effect, meaning that court fees are still comparatively low. Moreover, the Dutch system on costs is still based on the principle of one-way-cost-shifting.

Finally, some remarks about the German system on costs in the post-Aarhus period have to be made. So far, neither the Aarhus Convention nor the rulings of the Court of Justice in the English cases have triggered substantial debates on a need to reform the German system on costs. However, at some points in literature, this lack of debate is criticised because in practice, costs in administrative litigations can be very high.¹¹⁶ This might in the future necessitate reforms in the German legal system and lead to further convergences between the national legal systems in the Union.

5 Conclusion

In the beginning of this paper, the question was raised as to what extent the Aarhus Convention and its implementing legislation at the Union level have contributed to rising procedural judicial coherence and how far reforms at the national level are causal for an approximation of litigation rules in the Union. Firstly, it was shown that the great differences in national procedural rules on standing, which originally existed between the different legal systems in the Union, have been diminishing since the adoption of the Aarhus Convention in 1998. On the one hand, this is due to the fact that Germany was forced to reform its national rules on standing for environmental organisations in order to comply with the requirements emanating from the Aarhus Convention. On the other hand, however, the differences between the litigation systems of the three Member States have also been diminishing because of independent national developments. This was illustrated with the process of restriction of the Dutch rules on standing, which ultimately led to convergences between the German and the Dutch legal systems. Furthermore, the brief comparison with the English legal system has shown that, as far as rules on standing for individuals are concerned, procedural judicial coherence is not yet established. The English approach to standing is still more liberal

¹¹⁵ From a comparative perspective on (*inter alia*) the general costs regime: Ch.W. Backes et al., 'Versnelling besluitvorming over complexe projecten – niet alleen in Nederland een hot issue!' [2010/11] *NTB* 58-66.

¹¹⁶ P. Kremer, 'Anmerkung zum Urteil des EuGH vom 13.2. 2014, Rs. C-539/11 und vom 11.4.2014, Rs. C-260/11' [2014/6] *ZUR* 348; M. Sauer, 'Rechtsschutz in Umweltangelegenheiten im Umbruch' [2014/4] *ZUR* 201.

than the rules in the other two legal systems. In any event, further convergences between the national rules on standing can take place by the mechanisms described in this paper.

As far as rules on time limits in environmental matters are concerned, it can be concluded that procedural judicial coherence between the three legal systems is developing. This development was not triggered by the alignment of national rules with the Aarhus Convention, but mainly by national reforms in England. An important guideline for these reforms was the *Uniplex* ruling by the Court of Justice concerning public procurement, but there was no specific international or Union rule on environmental matters that triggered this reform.

Regarding national rules on costs, a cautious convergence between the English and the German and the Dutch legal system was primarily triggered by the requirement of the Aarhus Convention that procedures should not be 'prohibitively expensive'. The reform of the English rules on costs did not change the principle that the loser has to bear the winning party's costs, but they reduced the amount of costs to be paid and provided for more certainty if compared to the old system. Nevertheless, due to the different systems underlying the rules on costs (one-way costs shifting v. the loser-pays principle), the cost risks are still very different in the three legal systems, so that there is no procedural judicial coherence in the Union.

To conclude, this paper has shown that the Aarhus Convention, its respective implementing Union legislation, and intervention by the Court of Justice were the decisive triggers for the reforms of the German environmental litigation system. This top-down intervention induced convergences between the German and the other two legal systems. However, as the examples of the Dutch rules on standing and the English rules on time limits show, national reforms, which are independent from specific Union intervention, also contribute to the alignment of litigation rules. Finally, despite this piecemeal development towards cross-border procedural judicial coherence, differences in the enforcement systems remain in place and are accepted under the premise of the principle of 'national procedural autonomy' within the limits prescribed by the Union legislator and the Court of Justice.