

# COMMON MARKET LAW REVIEW

## CONTENTS Vol. 60 No. 6 December 2023

Editorial comments: <i>Missing in action? Competition law as part of the internal market</i>	1503-1514
<b>Articles</b>	
M. Bobek, Preliminary rulings before the General Court: What judicial architecture for the European Union?	1515-1550
F. De Cecco, The trouble with trumps: On how (and why) not to define the core of fundamental rights	1551-1578
J. Mendes, Law and discretion in monetary policy and in the banking union: Complexity between high politics and administration	1579-1622
J.J. Piernas López, The transformation of EU State aid law ... and its discontents	1623-1654
V. Kraetzig and J. Lennartz, Copyright as democracy of aspiration: Rethinking EU law's approach to a protected "work"	1655-1682
<b>Case law</b>	
<b>A. Court of Justice</b>	
M. Chamon, Only Fans of the Council's implementing powers in Luxembourg: <i>Fenix International</i>	1683-1704
T. Verellen, The distortion theory in EU treaty-making: <i>Commission v. Council (Geneva Act)</i>	1705-1720
T. Martinelli, The liability of national central banks acting as resolution authorities, financial independence, and the prohibition of monetary financing: <i>Banka Slovenije</i>	1721-1744
M. Tecqmenne, Turning "public interest litigation" into a positive obligation deriving from Article 47 of the Charter: <i>Deutsche Umwelthilfe</i>	1745-1772
B. W. Wegener and M. Wilkens, No <i>Francovich</i> in environmental law: The ECJ's decision in <i>J.P. v. Ministre de la Transition écologique</i>	1773-1786
O. M. Ceran, Expeditiousness of child abduction proceedings, procedural autonomy, and what it has to do with sincere cooperation: <i>Rzecznik Praw Dziecka and Others</i>	1787-1806
<b>Book reviews</b>	1807-1834
<b>Index</b>	I-XXVI

**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. More information can be found at: [www.wolterskluwer.com/en/solutions/legal-regulatory/permissions-reprints-and-licensing](http://www.wolterskluwer.com/en/solutions/legal-regulatory/permissions-reprints-and-licensing)

---

*Common Market Law Review* is published bimonthly.

This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at [International-sales@wolterskluwer.com](mailto:International-sales@wolterskluwer.com).

Periodicals postage paid at Rahway, N.J. USPS no. 663-170.

U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.  
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

*Printed on acid-free paper.*

## COMMON MARKET LAW REVIEW

**Editors:** Thomas Ackermann, Loïc Azoulay, Marise Cremona, Michael Dougan, Christophe Hillion, Sara Iglesias Sánchez, Giorgio Monti, Niamh Nic Shuibhne, Ben Smulders, Eleanor Spaventa, Stefaan Van den Bogaert

### Advisory Board:

Kieran Bradley, Luxembourg  
Daniel Halberstam, Ann Arbor  
Janja Hojnik, Maribor  
Francis Jacobs, London  
Alison McDonnell, Haarlem  
Mary-Rose McGuire, Osnabrück  
Ulla Neergaard, Copenhagen

Giesela Rühl, Jena  
Eleanor Sharpston, Luxembourg  
Ernö Várnay, Debrecen  
Armin von Bogdandy, Heidelberg  
Joseph H.H. Weiler, New York  
Miroslaw Wyrzykowski, Warsaw

### Emeritus Board:

Alan Dashwood, Cambridge  
Jacqueline Dutheil de la Rochere, Paris  
Claus-Dieter Ehlermann, Brussels  
Jean-Paul Jacqué, Brussels  
Pieter Jan Kuijper, Amsterdam  
Siofra O'Leary, Strasbourg

Sacha Prechal, Luxembourg  
Allan Rosas, Luxembourg  
Wulf-Henning Roth, Bonn  
Piet Jan Slot, Amsterdam  
Christiaan W.A. Timmermans, Brussels  
Jan A. Winter, Bloemendaal

**Managing Editor:** Anna Krisztian  
*Common Market Law Review*  
Europa Instituut, Steenschuur 25  
2311 ES Leiden  
The Netherlands  
tel. + 31 71 5277784  
e-mail: [cmlrev@law.leidenuniv.nl](mailto:cmlrev@law.leidenuniv.nl)

### Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Institute of the University of Leiden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

### Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

### Submission of manuscripts

Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 10,000 words). Annotations should be no longer than 12 pages (approx. 5,000 words). Details concerning submission and the review process can be found on the journal's website <http://www.kluwerlawonline.com/toc.php?pubcode=COLA>

## Turning “public interest litigation” into a positive obligation deriving from Article 47 of the Charter: *Deutsche Umwelthilfe*

Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, Judgment of the Court (Grand Chamber) of 8 November 2022, EU:C:2022:857

### 1. Introduction

On 8 November 2022, the Grand Chamber of the European Court of Justice (the Court) rendered its much-awaited judgment in *Deutsche Umwelthilfe (Réception des véhicules à moteur)*. The Court was called on to determine whether the Member States ought to provide access to justice to environmental non-governmental organizations (environmental NGOs) in judicial proceedings concerning whether the authorization of a device regulating the level of emissions of nitrogen oxide (NO<sub>x</sub>) produced by cars complied with the prohibition of “defeat devices” established by Regulation 715/2007 (the Regulation).<sup>1</sup> In the main proceedings, the applicant, Deutsche Umwelthilfe, was denied standing because that environmental association could not derive subjective rights from the environmental provision at stake. Viewed from that perspective, the case illustrates one of the shortcomings relating to the domestic enforcement of EU environmental law: the existence of restrictive national rules on the standing of NGOs. Despite the adoption of the Aarhus Convention (the Convention),<sup>2</sup> which states explicitly that NGOs ought to be granted access to justice in the enforcement of environmental law, numerous procedural hurdles remain that restrict their ability to gain access to review proceedings at Member State level.<sup>3</sup>

1. Regulation (EC) 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, O.J. 2007, L 171/1, Art. 5(2).

2. UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

3. See further, on that topic, Milieu Consulting, “Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters” (2019), available at <[ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters_en)> (last visited 23 Sept. 2023). That issue was subsequently addressed, somewhat cautiously, by the European Commission following the adoption of a non-binding (interpretative) notice on

Against that background, the Grand Chamber of the Court considered that the Member States were bound to grant access to judicial review proceedings to environmental NGOs in relation to the enforcement of EU environmental provisions. In doing so, the Court clarified that “public interest litigation” constitutes an obligation flowing not only from the Aarhus Convention, but also, more importantly, from the right to an effective judicial remedy deriving from Article 47 of the Charter of Fundamental Rights of the EU (the Charter).<sup>4</sup> After a (relatively) brief analysis of the factual and legal background to the main proceedings, this case note will summarize the main findings of the Grand Chamber. It will subsequently attempt to retrace the evolution of the Court’s case law on restrictive standing rules with respect to the access of NGOs to environmental justice.

## 2. Factual and legal background

The situation at issue in the main proceedings may be summarized as follows. The procedure was initiated by Deutsche Umwelthilfe, an environmental organization recognized by German law, following the decision by the competent national authority to approve the use of a software developed by Volkswagen to regulate the level of emissions of NO<sub>x</sub> produced by some of its vehicles. That software established a “temperature window” according to which the portion of exhaust gas reinjected into the engine after initial use decreased at the same time as the outside temperature. The decrease in the level of exhaust gas recirculation also entailed an increase in the level of pollutants produced by cars. After the software was authorized by the competent national authority, the applicant, Deutsche Umwelthilfe, sought the annulment of the authorization in national review proceedings on the grounds that it constituted a prohibited “defeat device” within the meaning of Article 5(2) of the Regulation. According to Article 5(2), that prohibition covers “any element of design which senses” parameters such as outside temperature, or vehicle speed, for the purpose of activating “any part of the emission control

access to environmental justice at Member State level; see European Commission, “Commission Notice on access to justice in environmental matters”, C(2017)2616 final.

4. This case note does not discuss the issue of *locus standi* of NGOs before the ECJ, especially in the context of the action for annulment governed by Art. 263(4) TFEU. See on that topic e.g. De Schutter, “Public interest litigation before the European Court of Justice”, 13 MJ (2006), 9–34; Van Wolferen, “Access to justice in environmental matters in the EU: The EU’s difficult road towards non-compliance with the Aarhus Convention” in Peeters and Eliantonio (Eds.), *Research Handbook on EU Environmental Law* (Elgar, 2020), pp. 150–151; Winter, “Plaumann withering: Standing before the EU General Court underway from distinctive to substantial concern”, 15 *European Journal of Legal Studies* (2023), 85–123.

system that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use”. What is prohibited, in other words, is the use of devices that defeat the purpose of the emission control system by augmenting the level of pollutants produced by cars in normal conditions of use. However, the Regulation includes an exception in circumstances where the defeat device is necessary to protect the vehicle “against damage or accident and for safe operation of the vehicle” (Art. 5(2)(a)). The main (material) issue was whether the device set up by Volkswagen constituted a “defeat device” within the meaning of that provision and, if so, whether the use of that defeat device could be justified in view of the “need” to protect the engine against “damage or accident and for safe operation of the vehicle”.

The procedural issue of standing nevertheless proved a major stumbling block for the success of the material claim brought forward by the applicant. This case note will accordingly focus predominantly on that procedural aspect. In the main proceedings, Deutsche Umwelthilfe was denied standing to mount a legal challenge against the authorization. That denial was based on two grounds. The first ground followed from paragraph 42(2) of the German Code of Administrative Court Procedures (VwGO). That provision gives expression to the German doctrine of *Schutznorm*.<sup>5</sup> It states that the admissibility of an action of annulment against an administrative act is subject to the impairment of subjective rights held by the applicant. The implications of that approach are readily apparent: it is impossible to institute legal proceedings on the basis of provisions which do not give rise to any subjective right. That is particularly problematic in the field of environmental law. The difficulty arises from the fact that most environmental provisions are generally geared towards the protection of collective, rather than individual, interests. As a consequence, it is next to impossible to infer subjective rights from such provisions. Applying that provision in the main proceedings meant, in particular, that Deutsche Umwelthilfe was denied access to review proceedings concerning compliance with the prohibition against defeat devices. Because Article 5(2) of the Regulation was intended to protect collective interests (i.e. the improvement of air quality), rather than individual rights, Deutsche Umwelthilfe could not derive subjective rights deserving of judicial protection from that provision.

5. The *Schutznorm* doctrine originates from German administrative law. Other Member States also subscribe to that doctrine, or a slightly different conception of it (e.g. Austria, Croatia, Poland and Slovakia). See Warin, *Individual Rights under European Union Law – A Study on the Relationship Between Rights, Obligations and Interests in the Case Law of the Court of Justice* (Nomos, 2019), pp. 63–64.

The second ground for denial was based on the special law on access to review procedures in environmental matters (UmwRG). Pursuant to paragraph 3 thereof, the applicant, Deutsche Umwelthilfe, was recognized as an association capable of bringing proceedings for verifying compliance with environmental law. At the same time, however, the right to bring review proceedings conferred on environmental NGOs was restricted in circumstances where the subject matter of the decision concerned “product approvals”. Since the main proceedings concerned the authorization of software based on technical requirements set out in Regulation 715/2007, the applicant was precluded from having access to review proceedings. In that context, the Court was requested to ascertain whether an NGO could derive a right of action from the Aarhus Convention, read in conjunction with Article 47 of the Charter, in relation to an administrative authorization based on Article 5(2) of that Regulation.

### 3. Judgment of the Court

With its judgment, the Grand Chamber of the Court clarified that the Member States must turn “public interest litigation” into a reality with respect to the application and enforcement of EU environmental law. The findings expressed by the Court in support of that conclusion coincide to a large extent with the Opinion drafted by Advocate General Rantos. This case note will accordingly focus on an analysis of the judgment of the Court. Additional references to the findings expressed by the Advocate General may be made if deemed necessary.

As a preliminary issue, the Grand Chamber concluded that the German standing rules under consideration came within the scope of Union law for the purposes of Article 51 of the Charter. According to that provision, the Member States are bound to comply with the rights laid down in the Charter when they implement obligations deriving from Union law. In support of the conclusion that the present case fell within the scope of the Charter, the Court relied on its previous judgment in *Protect*. It followed from that judgment that the Member States must be deemed to implement Union law when they set out the procedural rules governing the enforcement of rights stemming from Union law.<sup>6</sup> Accordingly, the Court concluded in *Deutsche Umwelthilfe* that the German standing rules at issue came within the scope of the Charter because they concerned the (judicial) enforcement of rights conferred on

6. Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, EU:C:2017:987, para 44.

environmental associations by virtue of Article 5(2) of the Regulation.<sup>7</sup> Consequently, these rules had to comply with the rights enshrined in the Charter and, most notably, the right to an effective judicial remedy set out in Article 47 of the Charter.

The Court subsequently concluded that the German standing rules at issue were contrary to the requirements stemming from a combined reading of Article 9(3) of the Convention and Article 47 of the Charter. More specifically, the Court concluded that a restriction on the material scope of the right to bring proceedings laid down in Article 9(3) of the Convention was incompatible with the requirements arising from both provisions. Admittedly, Article 9(3) of the Convention left some discretion to the Member States with respect to the implementation of that right. That provision states that:

“each party shall ensure that, *where they meet the criteria, if any, laid down in its national law*, members 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” (emphasis added).

In the main proceedings, the German authorities had insisted on the possibility to use that discretion to exclude decisions on “product approvals” from the scope of the right to bring legal proceedings. The Grand Chamber of the Court denied that possibility. In support of that conclusion, the Court considered, in the first place, that Article 5(2) of Regulation 715/2007 constituted a national provision “relating to the environment” within the meaning of Article 9(3) of the Convention. That finding was warranted considering the fact that this Regulation had as its explicit aim “to ensure a high level of environmental protection and, more specifically, considerably to reduce the NO<sub>x</sub> emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution”.<sup>8</sup> It followed that an administrative decision based on Article 5(2) of the Regulation came within the material scope of the right to bring proceedings established by Article 9(3) of the Convention. In the second place, the Court found that an environmental association, such as Deutsche Umwelthilfe, came within the personal scope of Article 9(3) of the Convention. As an NGO promoting the interests of the environment and meeting the requirements set out in national law to bring proceedings, that association constituted a member of the “public concerned” in compliance with Article 2(5) of the Convention.

7. Judgment, para 65.

8. *Ibid.*, para 51.

The Court considered, in the third place, that the words “criteria, if any, laid down by national law” could not be used to introduce limitations on the subject matter of the decisions subject to the right to review proceedings. The Court’s reasoning in that respect relied on two arguments. First, and based on a literal interpretation of Article 9(3), the margin of discretion retained by the Member States did not concern the subject matter of the dispute, but rather the identification of the beneficiaries of that right.<sup>9</sup> That finding offers a stark contrast in comparison with the views expressed by Advocate General Rantos. The Advocate General had indeed opined that the object of that discretion also covered the subject matter of the right to bring proceedings enshrined in Article 9(3).<sup>10</sup> Second, and more importantly, the Court agreed with its Advocate General that the margin of discretion retained by the Member States was circumscribed by reference to the requirements arising from Article 47 of the Charter. For that purpose, the Court relied on its previous judgment in *Protect*.<sup>11</sup> It followed from that judgment that the Member States could in no event impose criteria so stringent that they would prevent “certain categories of the ‘members of the public’ – a fortiori ‘members of the public concerned’” from having *any* access to review proceedings in relation to the enforcement of EU environmental law.<sup>12</sup> Consequently, it was incumbent on the referring court to allow approved environmental associations to challenge an administrative decision granting EC-type approval. The very ability to gain access to justice was, however, missing altogether in the main proceedings, because *Deutsche Umwelthilfe* was denied access to review proceedings in relation to the prohibition against “defeat devices” laid down in Article 5(2) of Regulation 715/2007. Consequently, the national procedural rules at issue were incompatible with the requirements arising from Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter.

The Court then proceeded to set out the consequences deriving from that finding of incompatibility. The Court initially acknowledged that the referring court could interpret the national procedural rules at stake with a view to granting access to justice to an environmental association such as *Deutsche Umwelthilfe* in relation to the enforcement of Article 5(2) of the Regulation. If that interpretative endeavour proved impossible, however, it would become necessary to set aside the impugned standing rules. At that stage, the Court acknowledged the absence of direct effect of Article 9(3) of the Convention. Because that provision lacked direct effect, it could not be relied on to support

9. *Ibid.*, para 64.

10. Opinion in Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, EU:C:2022:156, para 56.

11. Case C-664/15, *Protect*.

12. *Ibid.*, para 46.

a duty to set aside the national standing rules at issue.<sup>13</sup> As explained by Advocate General Rantos, it followed that Article 9(3) of the Convention, “*by itself*, [could not] confer” standing on *Deutsche Umwelthilfe*.<sup>14</sup> In spite of that, the Court stressed that Article 9(3), “read in conjunction with Article 47 of the Charter, impose[d] on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law”.<sup>15</sup> By contrast with Article 9(3), the right laid down in Article 47 of the Charter possessed direct effect. As such, that provision could give rise to a duty to set aside the relevant provisions on standing. Consequently, Article 47 of the Charter, read in the light of Article 9(3) of the Convention, gave rise to a right of legal action for the benefit of associations such as *Deutsche Umwelthilfe* in relation to the enforcement of the prohibition against “defeat devices” laid down in Article 5(2) of the Regulation.

The ECJ subsequently dealt with the second question raised by the referring court. It considered that the software at issue in the main proceedings constituted a defeat device for the purposes of Article 5(2) of the Regulation. The reason for this was relatively simple, and followed from past case law: the software developed by Volkswagen would reduce the effectiveness of the emission control system even “under conditions which may reasonably be expected to be encountered in normal vehicle operation and use”.<sup>16</sup> Based on the case file, it was plain that the device reduced the exhaust gas recirculation rate (and, hence, increased the level of NOx emissions produced by cars) even in circumstances where the average temperatures recorded in Germany were reached. Subject to the findings of the referring court, the use of that device could not be justified by the “need” to protect the vehicle against damage or accident and for the safe operation of the vehicle. That conclusion was reached, in the first place, because the use of that device would turn the exception into the principle. Because the defeat device became operational in normal conditions of circulation, it would in practice operate during most of the year. That outcome would result in a “disproportionate infringement of the principle of limiting NOx emissions from vehicles”.<sup>17</sup> In the second place, the “need” for a defeat device could only be attested if, at the time of the approval, “no other technical solution ma[de] it possible to avoid immediate risks of damage or accident to the engine”.<sup>18</sup> In particular, it was not possible to derive

13. Judgment, para 78.

14. Opinion, para 58 (emphasis added).

15. Judgment, para 66.

16. *Ibid.*, para 83. See also Case C-128/20, *GSMB Invest GmbH & Co. KG v. Auto Krainer GesmbH*, EU:C:2022:570, paras. 46–47 ; Case C-134/20, *IR v. Volkswagen AG*, EU:C:2022:571, para 54.

17. Judgment, para 90.

18. *Ibid.*, para 94.

the “need” for such a device from considerations relating to the financial interests of car manufacturers.

#### **4. Analysis**

With this judgment, the Grand Chamber of the Court clarified, once again, that the Member States must turn “public interest litigation” into a reality with respect to legal challenges dealing with the enforcement of EU environmental provisions. As such, that judgment constitutes the latest illustration of a strand of cases demonstrating the willingness of the Court to develop far-reaching obligations of access to environmental justice for the benefit of NGOs. The following subsections will set out to analyse the main findings expressed in support of that outcome. The first subsection will describe the Court’s approach in relation to the identification of rights deserving of judicial protection for the purposes of Article 47 of the Charter. It will demonstrate that, in line with past case law, the Court opted for a conception of “right” that is significantly broader in comparison with the (narrow) emphasis on the existence of subjective rights exhibited by German law. The second subsection will explain how the Court was able to flesh out the content of Article 47 of the Charter by reference to the (more specific) guarantees expressed in the Aarhus Convention. It will demonstrate that the Court relied on Article 47 of the Charter, read in the light of the Aarhus Convention, to progressively turn “public interest litigation” into an obligation deriving from EU law.

##### **4.1. *Does the concept of “right guaranteed by the law of the Union” presuppose the existence of individual subjective rights?***

In *Deutsche Umwelthilfe*, the Grand Chamber of the Court concluded that the German authorities were “implementing” Union law within the meaning of Article 51 of the Charter when they set out procedural rules concerning the domestic enforcement of rights deriving from Article 5(2) of the Regulation. Consequently, the German standing rules under consideration had to comply with the right to an effective judicial remedy set out in Article 47 of the Charter. At first glance, that conclusion may seem surprising (at least for those unfamiliar with the Court’s case law). After all, the Member States are not bound by any specific obligation when it comes to the procedural requirements governing the enforcement of the prohibition on “defeat device” set out in Article 5(2) of the Regulation. EU law orthodoxy teaches us, however, that the Member States must be deemed to “implement” Union law when they set out the procedural rules governing the enforcement of rights

deriving from EU law. As Dougan puts it, the notion of implementation covers “the entire system for the decentralized enforcement” of Union law rights.<sup>19</sup> In line with this, Article 47 of the Charter prescribes that the Member States must respect the right to an effective judicial remedy in relation to proceedings concerning non-compliance with the “rights and freedoms guaranteed by the law of the Union”. This, of course, raises questions about the meaning of the concept of right guaranteed by Union law. The judgment of the Grand Chamber in *Deutsche Umwelthilfe* brought about some additional clarity on the meaning of that concept. More specifically, it confirmed the broad, or objective, conceptualization of the notion of right that already characterized past judgments on the general principle of effective judicial protection.

Before analysing the main findings of the Court in that respect, it is perhaps necessary to summarize here the stakes of the debate on the notion of right featuring in Article 47 of the Charter. Following the entry into force of the Charter, opinions have indeed diverged considerably in legal scholarship about whether the right to effective judicial protection enshrined in Article 47 of the Charter may capture national procedures for the enforcement of provisions dealing with environmental matters.<sup>20</sup> The application of Article 47 of the Charter in that context depends on the approach adopted in relation to the identification of “rights” for the purposes of that provision. Some commentators have maintained that Article 47 rests on the existence of “clearly discernible” individual rights guaranteed by EU law.<sup>21</sup> That approach rests on the wording of Article 47 of the Charter, which refers to the violation of “rights or freedoms guaranteed by the law of the Union”.<sup>22</sup> In turn, that approach is closely associated with national legal doctrines which make access to justice conditional on the existence of subjective rights (such as the *Schutznorm* doctrine).<sup>23</sup> In order for the requirements of effective judicial protection to apply, it would accordingly be necessary to determine whether the relevant provision exhibits a normative intention to protect the rights or

19. Dougan, “Judicial review of Member State action under the general principles and the Charter: Defining the ‘scope of Union law’”, 52 CML Rev. (2015), 1201–1245, at 1213.

20. Bonelli, “Effective judicial protection in EU law: An evolving principle of a constitutional nature”, 12 REALaw (2019), 35–62, at 53–54. See, for an account drafted before the entry into force of the Charter (and, hence, focusing on the general principle of effective judicial protection), Wennerås, *The Enforcement of EC Environmental Law* (OUP, 2007), pp. 84 et seq.

21. See e.g. Opinion of A.G. Bobek in Case C-403/16, *Soufiane El Hassani v. Minister Spraw Zagranicznych*, EU:C:2017:659, paras. 73 et seq.

22. *Ibid.*, para 76.

23. See on that topic Rüffert, “Rights and remedies in European Community law: A comparative view”, 34 CML Rev. (1997), 307–336; Warin, op. cit. *supra* note 5, pp. 42 et seq.

interests of clearly identifiable individuals.<sup>24</sup> That would make it possible to identify a legal bond whereby the obligation imposed on the debtor would directly translate into a subjective right (and corresponding remedy) for the benefit of these individuals.<sup>25</sup> A strict emphasis on the identification of subjective rights may nevertheless prevent environmental provisions from triggering the Charter right to effective judicial protection.<sup>26</sup> Because many environmental provisions are intended to protect collective, rather than individual interests, they may not so readily be construed as conferring individual rights within the meaning of Article 47 of the Charter.<sup>27</sup>

Other commentators have nevertheless pleaded in favour of a broader understanding of the concept of right for the purposes of Article 47 of the Charter.<sup>28</sup> The judgment in *Berlioz* is often mentioned in support of that approach.<sup>29</sup> That case may be summarized as follows. *Berlioz*, a company based in Luxembourg, received a fine for its refusal to communicate some information requested by the Luxembourg tax administration. In subsequent proceedings, *Berlioz* wished to challenge the validity of the information order underpinning that penalty. However, the competent judge declined to review the legality of that order. The referring court queried whether *Berlioz* could rely on Article 47 of the Charter to derive a right to bring proceedings concerning the validity of the information order. It was not immediately apparent, however, whether *Berlioz* could rely on a “right guaranteed by EU law” within the meaning of Article 47. After all, the order for information was made in order to respond to a request for an exchange of information made by

24. Eilmansberger, “The relationship between rights and remedies in EC law: In search of the missing link”, 41 CML Rev. (2004), 1199–1246, at 1242.

25. See for a recent judgment illustrating that approach Case C-353/20, *Skeyes v. Ryanair DAC, formerly Ryanair Ltd.*, EU:C:2022:423, paras. 38 et seq.

26. Unless, of course the (legal or natural) person wishing to bring legal proceedings can rely on other subjective rights (such as e.g. the right to property or other economic rights).

27. Eliantonio, “The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: Towards a new dawn for the ‘language of rights’?”, 12 REALaw (2019), 95–116, at 97.

28. See e.g. Opinion of A.G. Wathelet in Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l’administration des contributions directes*, EU:C:2017:2, paras. 50 et seq; Opinion of A.G. Wahl in Case C-33/17, *Čepelnik d.o.o. v. Michael Vavti*, EU:C:2018:311. See also Prechal, “The Court of Justice and effective judicial protection: What has the Charter changed?” in Paulussen, Takacs, Lazic and Van Rompuy (Eds.), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (TMC Asser Press, 2016), pp. 148 et seq.

29. Case C-682/15, *Berlioz Investment Fund*, EU:C:2017:373. See, on the issue of standing, Ellingsen, *Standing to Enforce European Union law Before National Courts* (Hart Publishing, 2021); Dougan, “Who exactly benefits from the Treaties? The murky interaction between Union and national competence over the capacity to enforce EU law”, 12 CYELS (2010), 73–120.

the French tax administration on the basis of Directive 2011/16.<sup>30</sup> As the Court itself pointed out, the purpose of that Directive was to set up arrangements and procedures for the cooperation between national tax authorities. It followed that this Directive did not confer subjective rights on individuals.<sup>31</sup> By contrast with Advocate General Wathelet, who had opined that the right to an effective judicial review could become applicable even in the absence of another subjective right,<sup>32</sup> the Court strived to identify a right for the purposes of Article 47 of the Charter. It isolated a right deriving from the general principle of protection against arbitrary or disproportionate intervention by public authorities.<sup>33</sup> Perhaps surprisingly, though, that right had not been invoked by the applicant, and did not even feature in the order for reference.

Viewed from that perspective, *Berlioz* feeds into the Court's tendency in some (recent) judgments to consider that Article 47 is applicable even "if it is not at least immediately clear if EU law confers any other right to an individual".<sup>34</sup> The next step would be to recognize explicitly that the requirements of effective judicial protection may be triggered even in the absence of another subjective right. To put it simply, Article 47 of the Charter would come into play once another EU law provision is at stake. That is, in essence, the approach recommended by Advocate General Wathelet in *Berlioz*. The Advocate General opined that the right to an effective judicial review should become applicable provided that the situation is found to be within the scope of Union law for the purposes of Article 51 of the Charter.<sup>35</sup> The mere existence of a (specific) obligation imposed on the Member States would suffice to render the requirements of Article 47 of the Charter applicable.<sup>36</sup> In the field of environmental law, the implications of this

30. Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, O.J. 2011, L 64/1.

31. Case C-682/15, *Berlioz*, paras. 46–47.

32. Opinion in Case C-682/15, *Berlioz*, paras. 51 et seq.

33. *Ibid.*, para 51. See also Joined Cases C-245 & 246/19, *État luxembourgeois v. B and Etat luxembourgeois v. B, C, D, F.C., A (Droit de recours contre une demande d'information en matière fiscale)*, EU:C:2020:795, paras. 56–59.

34. Bonelli, *op. cit. supra* note 20, at 54–55. See also Case C-418/11, *Texdata Software GmbH*, EU:C:2013:559, paras. 75 et seq.; Case C-562/12, *Liivima Lihaveis MTÜ v. Eesti-Läti programmi 2007–2013 Seirekomitee and Eesti Vabariigi Siseministeerium*, EU:C:2014:2229, paras. 61 et seq.

35. A.G. Wathelet takes the view that the notion of "implementation", on which the application of the Charter is based, "necessarily implies" the existence of a right guaranteed by Union law; Opinion in Case C-682/15, *Berlioz*, para 63. On the notion of "implementation" within the meaning of Art. 51 of the Charter, see e.g. Lenaerts, "Exploring the limits of the EU Charter of Fundamental Rights", 8 *EuConst* (2012), 375–403, esp. at 378–380; Dougan, *op. cit. supra* note 19.

36. The requirement of specificity follows from recent judgments dealing with the limits of Charter application. See e.g. Case C-467/19 PPU, *QR, Spetsializirana prokuratura, YM, ZK*,

approach would be important: if that approach was maintained, there would be nothing to prevent environmental provisions from being subject to the requirements of effective judicial protection expressed by Article 47 of the Charter. Even though many environmental provisions do not confer subjective rights on individuals, they could be subject to the requirements of effective judicial protection provided that they contain an unconditional obligation imposed on national public authorities.

The judgment analysed in this contribution clarifies that the notion of right must be understood in a broad manner. That approach was certainly already exhibited in previous judgments. In *Brown Bears I*, the Grand Chamber of the Court was called on to determine whether an environmental association could derive a right to bring proceedings from EU law and, in particular, Article 9(3) of the Aarhus Convention. In the main proceedings, an environmental association requested access to judicial proceedings concerning the decision to derogate from the system of protection set up in accordance with Articles 12 and 16 of Directive 92/43 (the Habitats Directive)<sup>37</sup> in relation to some protected species (including brown bears). Unfortunately, that request was rejected on the grounds that this association could not rely on subjective rights as prescribed by Slovak law. By contrast, the Court ruled that the relevant provisions of the Habitats Directive conferred a right whose enforcement was subject to the principles of effectiveness and equivalence, together with the requirements arising from the effective judicial protection of these rights.<sup>38</sup> In support of that finding, the Court merely mentioned the existence of obligations deriving from the system of protection of species set up in accordance with Articles 12 and 16 of the Habitats Directive.<sup>39</sup> In turn, those obligations were deemed to confer rights on individuals. The Court, however, offered no explanation about why that was the case.<sup>40</sup> The lack of engagement with the concept of right was somewhat surprising considering the fact that those provisions had little to do with the conferral of rights on individuals. That judgment could therefore be taken to mean that the mere existence of an obligation imposed on national public authorities by EU law sufficed to render the requirements of effective judicial protection applicable. At the same time,

*HD*, EU:C:2019:776, para. 41; Joined Cases C-609 & 610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto (AKT) ry v. Satamaoperaattorit ry*, EU:C:2019:981, para 53. See, on that topic, Tecqmenne, “Minimum harmonisation and fundamental rights: A test-case for the identification of the scope of EU law in situations involving national discretion?”, 16 *EuConst* (2020), 493–512.

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

38. Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej Republiky (Brown Bears I)*, para 36.

39. Case C-240/09, *Brown Bears I*, para 37.

40. *Ibid.*, paras. 47 et seq.

it is perhaps fair to acknowledge that the Court refrained in that judgment from making any explicit allusion to the Charter, let alone the right enshrined in Article 47 thereof. It did not even mention expressly the principle of effective judicial protection. Instead, the reasoning displayed in that judgment was underpinned by considerations oscillating between the “effectiveness” of environmental law and the “effective judicial protection of the rights conferred by EU law” in that area.<sup>41</sup>

Viewed from that perspective, that judgment did relatively little to clarify the rather opaque relationship between the principle of effectiveness and the principle of effective judicial protection.<sup>42</sup> An argument often heard is that in contrast to the principle of effectiveness, which is concerned about ensuring the effective application of Union law, the principle of effective judicial protection aims to guarantee the legal protection of individual rights conferred by EU law.<sup>43</sup> In that context, the field of environmental law offered a “unique ‘playground’ for distilling the possible differences between the seemingly more ‘objective’ principle of effectiveness . . . and the right-based principle of effective judicial protection and Article 47 of the Charter”.<sup>44</sup> The argument was as follows: considering the fact that most environmental provisions are meant to protect collective interests, it is not readily apparent how they may be deemed to create directly enforceable individual rights. Consequently, these provisions would seem incapable of triggering the application of the principle of effective judicial protection. By contrast, the principle of effectiveness could capture such provisions, because it is primarily concerned with the effective application of EU law. In *Brown Bears I*, the Court nevertheless seemed to conflate the assessment carried out under both principles. That seemed to suggest that both principles were underpinned by considerations relating to the effective application of EU law. At the same time, it remained quite unclear whether the Court’s approach could also have implications with respect to Article 47 of the Charter.

41. *Ibid.*, paras. 48–50.

42. Eliantonio, *op. cit. supra* note 27, at 109. On the relationship between these principles, see e.g. Dougan, “The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union law before the national courts” in Craig and De Búrca (Eds.), *The Evolution of EU Law* (OUP, 2011); Prechal and Widdershoven, “Redefining the relationship between *Rewe* effectiveness and effective judicial protection”, 4 *REALaw* (2011), 31–50; Krommendijk, “Is there light on the horizon? The distinction between ‘*Rewe* effectiveness’ and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*”, 53 *CML Rev.* (2016), 1395–1418; Widdershoven, “National procedural autonomy and general EU law limits”, 12 *REALaw* (2019), 5–34.

43. See, amongst others, Wennerås, *op. cit. supra* note 20, pp. 84 et seq.; Prechal and Widdershoven, *op. cit. supra* note 42, at 42; Eliantonio, *op. cit. supra* note 27, at 97.

44. Eliantonio, *ibid.*, at 97; Bonelli, *op. cit. supra* note 20, at 53–54.

The reasoning adopted in the subsequent *Brown Bears II* judgment created some additional confusion in legal scholarship about whether Article 47 of the Charter could also apply in the absence of another subjective right. In that judgment, an environmental association was precluded from participating in administrative proceedings concerning the construction of an enclosure within an area protected pursuant to the Habitats Directive. According to Slovak law, the status of party to the proceedings could only be granted in relation to those whose rights were affected by the project. Consequently, the NGO concerned was unable to challenge that authorization for (non-)compliance with Article 6(3) of the Habitats Directive. The Court was requested to determine whether the standing requirements at stake were in keeping with Article 47 of the Charter. In its judgment, the Grand Chamber was able to construe a subjective right to public participation on the basis of Article 6(3) of the Habitats Directive, interpreted in the light of Article 6(2)(b) of the Aarhus Convention. That preliminary step of identifying a right guaranteed by Union law allowed the Court to subsequently analyse the national standing rules based on Article 47 of the Charter. That judgment seems to have generated some expectation that the Court would “strive to read a ‘right’ into the situation brought before it” in order to justify the application of Article 47 of the Charter.<sup>45</sup> After all, the right identified by the Court on the facts of the case coincided with the subjective participatory right carved out by reference to Article 6(3) of the Habitats Directive, read in the light of Article 6(2)(b) of the Convention.<sup>46</sup> As such, a combined reading of these provisions indeed gave rise to a subjective right for the purposes of Article 47 of the Charter.

It is worth mentioning here, however, that the Court was keen to emphasize that the category of Union rights included more broadly the right to “rely in legal proceedings on the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect”.<sup>47</sup> Crucially, that conclusion prevailed even beyond the subjective participatory rights identified on the basis of the third paragraph of Article 6 of the Habitats Directive. The rights subject to the requirements of effective judicial protection encompassed more generally the rules of national law deriving from Article 6 of the Habitats Directive.<sup>48</sup> They included, for instance, the rule according to which an environmental assessment must be carried out in relation to any plan or project which is likely to have a

45. Eliantonio, *op. cit. supra* note 27, at 112.

46. Case C-243/15, *Lesoochranarske zoskupenie VLK v. Obvodny urad Trencin and Biely potok a.s. (Brown Bears II)*, para 52.

47. *Ibid.*, para 59.

48. *Ibid.*, para 60.

significant effect on a protected area. What mattered most, in order to identify a right within the meaning of Article 47, was the existence of a directly effective provision of EU environmental law or a national provision implementing EU law. In other words, that judgment already hinted that the material scope of the right to effective judicial protection set out in Article 47 of the Charter covered the enforcement of provisions that have little to do with the conferral of subjective rights.

In *Deutsche Umwelthilfe*, the Grand Chamber confirmed the broad, or objective, conceptualization of the notion of right within the meaning of Article 47 of the Charter. That much was made clear when the Court stated, at paragraph 65 of its judgment, that:

“where a Member State lays down rules of procedural law applicable to the matters referred to in Article 9(3) of the Aarhus Convention concerning the exercise of the rights that an environmental organization derives from Article 5(2) of Regulation No 715/2007 . . . the Member State is implementing EU law for the purposes of Article 51(1) of the Charter and must, therefore, ensure compliance, inter alia, with the right to an effective remedy, enshrined in Article 47 thereof”.<sup>49</sup>

By the same token, it confirmed that the mere existence of an obligation imposed on national public authorities by EU law sufficed to render the requirements of effective judicial protection applicable. More importantly, that finding applied even though the provision at issue did not give rise to subjective rights for the sake of clearly identifiable individuals. The objective underlying that provision was indeed clear: the prohibition against “defeat devices” was meant to reduce the level of pollution produced by cars and, hence, guarantee a high level of environmental protection.<sup>50</sup> As such, that provision did not aim to protect individual rights (or interests, for that matter), but rather collective, diffuse, interests relating to the improvement of air quality.<sup>51</sup> In spite of that, the Grand Chamber of the Court was adamant that

49. In doing so, the Grand Chamber reiterated the findings expressed by a smaller chamber formation in *Protect*; Case C-664/15, *Protect*, para 44.

50. Judgment, para 57.

51. It could be suggested that the objective underpinning the Regulation is intrinsically related to protection of human health and should accordingly give rise to subjective rights for the sake of individuals concerned by the breach of its provisions. That would be consonant with a tendency, in legal scholarship, to consider that secondary provisions intended to protect (at least partially) human-related interests exhibit a normative intention of conferring subjective rights on individuals. However, it is worth pointing out that this line of reasoning did not feature in that judgment (and has also been rejected in a recent judgment dealing with secondary law on air quality, see Case C-61/21, *JP v. Ministre de la Transition Ecologique and Premier Ministre (Responsabilité de l’Etat pour la pollution de l’air)*, EU:C:2022:1015). See, on that

this provision gave rise to a right deserving of judicial protection in compliance with Article 47 of the Charter.<sup>52</sup> As we shall see in the next section, this entails, in particular, that individuals and NGOs alike must be given access to review proceedings for ensuring compliance with that right.

Viewed from that perspective, that judgment reiterated the broad, or objective, approach that already characterized much of the case law dealing with the identification of Union rights before the adoption of the Charter.<sup>53</sup> The judgments analysed in this section specified, in particular, that the category of Union right encompasses in a broad manner any environmental provision having direct effect, as well as national provisions implementing environmental law into national law.<sup>54</sup> That means that the requirements of effective judicial protection set out in Article 47 of the Charter are not limited to ensuring the protection of individual rights. They may, rather, be conceptualized as a means to further the (effective) application and implementation of Union law provisions within the national legal orders. In other words, the fundamental right to an effective judicial remedy – which is traditionally viewed as a “‘benchmark’ for assessing procedures established for protecting *other* rights” deriving from EU law – has acquired a “self-standing” status.<sup>55</sup> It may become applicable even in the absence of another individual subjective right deriving from EU law. The consequences for national remedial autonomy, or “competence”,<sup>56</sup> may be far-reaching, especially in the Member States where standing is conditional on the violation of subjective rights. As we shall see in the next section, these Member States may have to introduce new remedies in order to allow NGOs to institute legal

topic, Beljin, “Rights in EU law” in Prechal and Van Roermund (Eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, 2008), p. 114; Opinion of A.G. Kokott in Case C-61/21, *Ministre de la Transition Ecologique and Premier Ministre (Responsabilité de l’Etat pour la pollution de l’air)*, EU:C:2022:359, paras. 72 et seq.

52. Judgment, para 65.

53. Wennerås, op. cit. *supra* note 20, at p. 87; Jacobs, “The evolution of the European legal order”, 41 CML Rev. (2004), 303–316, at 308.

54. Case C-664/15, *Protect*, para 39. See also e.g. Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, EU:C:2011:289, paras. 48–59; Case C-243/15, *Brown Bears II*, paras. 59–60. This seems in line with the general approach of the Court, which is to consider that rights arise as a by-product of sufficiently clear, precise and unconditional EU obligations. See, amongst others, Episcopo, “Deconstructing the CJEU’s jurisprudence to enable judicial dialogue” in Mak and Kas (Eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), p. 84; Hofmann, “Article 47” in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2021), pp. 1268–1269.

55. Bonelli, op. cit. *supra* note 20, at 43–44.

56. Van Gerven, “Of rights, remedies, and procedures”, 37 CML Rev. (2000), 501–536, at 502; Bonelli, op. cit. *supra* note 20, at 55 et seq. See further, on the distinction between “remedies” and “procedures”, Van Gerven, *ibid.*, at 502.

proceedings in relation to the enforcement of (all) EU environmental provisions.

#### **4.2. *The difficulty of defining the protective scope of environmental rights, or who is entitled to bring proceedings in relation to the enforcement of environmental law?***

The analysis carried out above demonstrated that the Court recognized the existence of rights deserving of judicial protection in relation to provisions that have little to do with the conferral of subjective rights. What matters most, according to that approach, is not so much (or not only) to safeguard individuals' rights and liberties. Judicial review is geared towards the (objective) control of the legality of acts adopted by the Member States in the light of their (hierarchically superior) obligations deriving from Union law. Viewed from that perspective, the Court's approach indicated an unwavering commitment to guaranteeing that the Member States do indeed set up adequate procedures for the decentralized enforcement of provisions originating from EU law. The principle is clear: once an (objective) right guaranteed by EU law is identified, the Member States ought to set up a remedy in favour of the beneficiaries of that right. More specifically, individuals must be given access to judicial review proceedings (if necessary by instituting new proceedings) to examine whether the competent national authorities have effectively complied with their obligations deriving from EU environmental law.<sup>57</sup> The Grand Chamber of the Court further specified that that obligation belonged to the essence of Article 47 of the Charter.<sup>58</sup>

The implications for national procedural autonomy may be far-reaching, especially in Member States that subscribe to the *Schutznorm* doctrine. In essence, these Member States are required to give access to justice to

57. Beyond the right to initiate review proceedings, the national judiciary must take "all necessary measures", including an order or a financial penalty, in order to guarantee that EU environmental provisions are respected. However, the obligation to make other remedies available comes into play only if these remedies are already provided by national law and are not contrary to other fundamental rights provided by the Charter (Case C-237/07, *Dieter Janecek v. Freistaat Bayern*, EU:C:2008:447, paras. 38–39; Case C-404/13, *The Queen, on application of ClientEarth v. The Secretary of State for the Environment, Food and Rural Affairs*, EU:C:2014:2382, paras. 55–58; Case C-723/17, *Craeynest and Others*, EU:C:2019:533, para 56; Case C-752/18, *Deutsche Umwelthilfe eV v. Freistaat Bayern*, EU:C:2019:1114, para 30). By contrast, the ECJ has ruled out the possibility that State liability could be established as a matter of EU law in relation to infringements of EU environmental law (Case C-61/21, *Ministre de la Transition Ecologique and Premier Ministre*, para 62). The ECJ nevertheless left open the possibility that State liability may be established on the basis of national law. That possibility was taken up in two recent judgments delivered by the Administrative Tribunal of Paris (judgments of 16 June 2023, *Tribunal administratif de Paris* (n°2019924 and 2019925)).

58. Joined Cases C-245 & 246/19, *État luxembourgeois*, para 66.

individuals and NGOs alike in relation to the enforcement of EU environmental provisions, even if they cannot avail themselves of any subjective individual right on the basis of these provisions. That does not mean, however, that “everyone” must be granted a right to bring proceedings in relation to any question of Union law.<sup>59</sup> In other words, the approach adopted by the Court does not come close to establishing an *actio popularis*.<sup>60</sup> Admittedly, some uncertainty remains when it comes to the identification of the holders of environmental rights (and corresponding remedies). That uncertainty turns on the question of who should be granted standing in relation to the enforcement of environmental provisions. Clearly, holding that the prohibition against “defeat devices” gives rise to rights whose enforcement is subject to Article 47 of the Charter comes with a caveat. Based on that provision, it is indeed next to impossible to identify the category of individuals, or group of individuals, who should be granted access to national review proceedings in order to rely on that provision. The following questions therefore arise: who should be entitled to initiate legal proceedings in relation to the enforcement of such provision? Should that entitlement accrue to “any individual” who seeks to challenge “the legality of any decision or other national measure relative to the application to him [or her] of” that EU provision, as suggested by Advocate General Wahl in another context?<sup>61</sup> Or, in contrast, should that entitlement accrue to a clearly identifiable individual or group of individuals?<sup>62</sup> And, if so, how should these individuals be identified amongst the general public?

Time and again, the European Court of Justice has had the opportunity to deal with restrictive standing rules based (in most instances) on the *Schutznorm* doctrine. The bottom line seems to be the following: any natural or legal person that is “directly concerned” by the infringement of a rule belonging to EU environmental law must be “in a position to require the competent authorities to observe such obligations, if necessary by pursuing their claims by judicial process”.<sup>63</sup> This, of course, begs the question of how to identify the NGOs that are “directly concerned” by an infringement of EU

59. A.G. Bobek alluded to a similar idea when he opined that “if the drafters had intended the first paragraph of Article 47 to be a universally applicable provision, triggered by Article 51(1), irrespective of any *concrete* rights or freedoms, they would have simply provided that ‘everyone has the right to an effective remedy before a tribunal’, omitting any further specifications or limits”; Opinion in Case C-403/16, *El Hassani*, para 76.

60. Judgment, para 74.

61. Opinion in Case C-33/17, *Čepelnik*, para 97. See, however, Dougan, *op. cit. supra* note 29, at 90.

62. Opinion in Case C-403/16, *El Hassani*, para 82; Opinion in Case C-61/21, *Ministre de la Transition écologique and Premier Ministre*, paras. 95 et seq.

63. See e.g. Case C-237/07, *Janecek*, para 39; Case C-197/18, *Wasserleitungsverband Nördliches Burgenland, Robert Prandl and Others*, EU:C:2019:824, para 32.

environmental provisions. In that context, the Court relied on Article 47 of the Charter, read in the light of the more specific guarantees of access to justice enshrined in the Aarhus Convention, to identify the NGOs entitled to seek legal action for non-compliance with environmental provisions. By the same token, it progressively turned “public interest litigation” into a (positive) obligation stemming from Article 47 of the Charter.

In *Brown Bears I*, the Grand Chamber considered for the first time that a national standing rule depriving NGOs of access to review proceedings in environmental matters was incompatible with the requirements arising from the effective judicial protection of environmental rights. In the main proceedings, an environmental association was denied access to review proceedings in relation to the enforcement of some of the provisions of the Habitats Directive. Although that association satisfied the requirements of Article 2(5) of the Aarhus Convention, with the consequence that it should have been granted access to justice by virtue of Article 9(3) of that Convention, it was denied that possibility because it could not derive subjective rights from these provisions. In that context, the referring court was instructed to interpret its national law with a view “to enabl[ing] [such] environmental protection organization . . . to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law”.<sup>64</sup> By relying on a combination of the principles of effectiveness and effective judicial protection, the Court was able to prescribe that an environmental association satisfying the conditions of Article 2(5) of the Convention had, so far as possible, to be granted access to justice in relation to the enforcement of Union environmental law.

That approach was reiterated in *Brown Bears II*. On that occasion, the Grand Chamber clarified that Article 47 of the Charter had to be interpreted in accordance with the requirements established by Article 9(2) of the Aarhus Convention. The reason for this was relatively straightforward: “Article 47 of the Charter, read in conjunction with Article 9(2) and (4) of the Aarhus Convention, enshrine[d] the right to effective judicial protection.”<sup>65</sup> In other words, both provisions expressed the same right to effective judicial protection. Consequently, the right enshrined in Article 47 of the Charter had to be read in conjunction with the more specific guarantees of access to justice set out in the Convention. The Court subsequently analysed whether the applicant NGO could derive a right of legal action from Article 9(2) of the Convention. Because a decision based on Article 6(3) of the Habitats Directive concerned activities that were likely to have considerable effects on the environment, such decisions fell within the scope of Article 9(2) of the

64. Case C-243/15, *Brown Bears II*, para 51.

65. *Ibid.*, para 73.

Convention.<sup>66</sup> Based on that provision, any environmental association meeting the requirements prescribed by Article 2(5) of the Convention had to be granted access to court to challenge the legality of such decisions. Consequently, it was incumbent on the Member States to confer a right to bring a legal action on any environmental organization meeting the conditions featured in Article 2(5) of the Convention in order to challenge a decision for compliance with Article 6(3) of the Habitats Directive.<sup>67</sup> In doing so, the Court clarified that the obligation to turn “public interest litigation” into a reality was grounded on the requirements of effective judicial protection deriving from Article 47 of the Charter, read in the light of Article 9(2) of the Aarhus Convention. At the same time, though, the Court did not specify whether Article 47 of the Charter could support a duty to set aside national standing rules conflicting with the (non-directly effective) requirements of the Aarhus Convention.

The Court took that approach a step further in its subsequent *Protect* judgment. That judgment is unequivocal: if national standing rules are incompatible with the requirements of effective judicial protection deriving from Article 47 of the Charter, it falls on the referring court to disapply, if necessary, these illegal rules. In support of that conclusion, the Court initially held that a national standing rule precluding an NGO from having access to review proceedings in relation to the enforcement of EU environmental law was contrary to the requirements arising from Article 47 of the Charter, read in conjunction with the Aarhus Convention. More specifically, the Court held that Article 9(3) of the Convention would be deprived of:

“its *very substance*, if it had to be conceded that, by imposing those conditions, certain categories of ‘members of the public’, *a fortiori* ‘the public concerned’, such as environmental organizations that satisfy the requirements laid down in Article 2(5) of the Aarhus Convention, were to be denied of *any* right to bring proceedings”.<sup>68</sup>

In other words, the Court considered that members of the public must at least have the *possibility* of raising legal challenges to determine whether those rules have been complied with. But that mere possibility transitioned into a *genuine right* to initiate proceedings in a situation where the environmental organization concerned satisfied the requirements of Article 2(5) of the Convention. As a member of the “public concerned”, such environmental organization had to “be able to contest before a court a decision granting a

66. *Ibid.*, paras. 56–57.

67. *Ibid.*, paras. 58–61.

68. Case C-664/15, *Protect*, para 46 (emphasis added).

permit project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60”.<sup>69</sup> The NGO concerned was nevertheless denied access to national review proceedings in relation to that provision. Consequently, the standing rules at issue were incompatible with the requirements of effective judicial protection deriving from Article 47 of the Charter, read in conjunction with Article 9(3) of the Convention. The Court subsequently carved out a duty to set aside these requirements notwithstanding the fact that Article 9(3) of the Convention lacked direct effect. From that judgment, it has accordingly been inferred that the application of the doctrine of primacy had been decoupled from the requirements of direct effect.<sup>70</sup> Because the Court was able to construe a duty to set aside national provisions contrary to Article 9(3) even though that provision lacked direct effect, the doctrine of primacy, or so the argument went, did not only apply in relation to directly effective provisions. Additionally, it could also apply in relation to any EU provision irrespective of whether such provision possessed direct effect.

Viewed from that perspective, the case law analysed here cannot be dissociated from long-standing debates about the interaction between the principles of direct effect and primacy.<sup>71</sup> More specifically, *Protect* fits in a line of judgments that seemed to validate the proposition that the principle of primacy could play out even if the relevant provision lacked the attributes to produce direct effect. *Mangold* and *Kücükdeveci* also spring to mind in that context.<sup>72</sup> These judgments appeared to suggest that EU directives could, alone or in conjunction with EU general principles, give rise to a duty to set aside conflicting national laws in the context of horizontal disputes.<sup>73</sup> At the

69. *Ibid.*, para 58.

70. See e.g. Krämer, “Direct effect in EU environmental law: Towards the end of a doctrine?” in Peeters and Eliantonio, *op. cit. supra* note 4, pp. 192–195. See in a similar vein Squintani and Perlaviciute, “Access to public participation: Unveiling the mismatch between what law prescribes and what the public wants” in Peeters and Eliantonio, *ibid.*, pp. 136–137; Peeters and Eliantonio, “On regulatory power, compliance and the role of the Court of Justice in EU environmental law” in Peeters and Eliantonio, *ibid.*, p. 487.

71. See e.g. Lenaerts and Corthaut, “Of birds and hedges: The role of primacy in invoking norms of EU law”, 31 *EL Rev.* (2006), 287–315; Dougan, “When worlds collide! Competing visions of the relationship between direct effect and supremacy”, 44 *CML Rev.* (2007), 931–963.

72. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709; Case C-555/07, *Seda Küçükdeveci v. Swedex GmbH & Co. KG.*, EU:C:2010:21.

73. That view was rejected in subsequent judgments. The Court confirmed that it is the general principle as such (or, for that matter, the relevant Charter right) that justifies the disapplication of conflicting national provisions. The requirements expressed by secondary law remain relevant to reconstruct the content of the relevant primary law norm (see e.g. Case C-176/12, *Association de Médiation Sociale*, EU:C:2014:2, paras. 36 and 49; Case C-122/17, *David Smith v. Patrick Meade and Others*, EU:C:2018:631, paras. 44 et seq.).

same time, they could not produce horizontal direct effect, in the sense of creating subjective rights and obligations invocable as such in horizontal settings. Put differently, a provision that was deemed incapable of producing (horizontal) direct effect could nevertheless be relied on to disapply the impugned national norm.<sup>74</sup> It has accordingly been suggested that *Mangold* and *Küçükdeveci* owed more to the principle of primacy, rather than direct effect. Similarly, it has been suggested that the judgment handed down in *Protect* gave expression to the principle of primacy. The reason for this was simple: even if they lacked direct effect, the provisions stemming from Article 9(3) of the Aarhus Convention seemed to form the basis for the disapplication of the impugned national norm.

A closer look at the Court's reasoning nevertheless enables clarifying that the duty to set aside carved out in *Protect* did not result from the mere application of Article 9(3) of the Convention. Whilst the Court conceded that Article 9(3), "*in itself*, ha[d] no direct effect in EU law", it also stressed that "that provision, *read in conjunction* with Article 47 of the Charter, impose[d] an obligation to ensure effective judicial protection of the rights conferred by EU law".<sup>75</sup> The Court's insistence that Article 9(3) did not have direct effect *in itself* seemed to suggest that the legal effects of that provision could be strengthened if it was *combined* with another EU law provision.<sup>76</sup> And indeed, the Court subsequently considered that "denying environmental organizations *any* right to bring an action against such a decision to grant a permit, . . . [was] contrary to the requirements flowing from a *combined reading* of Article 9(3) of the Aarhus Convention and Article 47 of the Charter".<sup>77</sup> That statement clarified that the obligation of disapplication formulated by the Court was not grounded on Article 9(3) alone, but rather on a combination of that provision together with Article 47 of the Charter.<sup>78</sup>

See on that topic e.g. Lazzerini, "(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS*", 51 CML Rev. (2014), 907–933, esp. at 921–23.

74. Lazzerini, "The horizontal application of the general principles of EU law: Nothing less than direct effect" in Ziegler, Neuvonen and Moreno-Lax (Eds.), *Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe* (Edward Elgar Publishing, 2022), p. 176.

75. Case C-664/15, *Protect*, para 45 (emphasis added).

76. Sobotta, "New cases on Article 9 of the Aarhus Convention", 15 *Journal for European Environmental & Planning Law* (2018), 241–258, at 254–255.

77. Case C-664/15, *Protect*, para 52.

78. This seems to give credence to the suggestion proffered by Sophie Robin-Olivier, who had opined that the legal effects of EU norms rest on a combination of legal norms; Robin-Olivier, "The evolution of direct effect in the EU: Stocktaking, problems, projections", 12 *International Journal of Constitutional Law* (2014), 165–188, esp. at 168 et seq. As we shall see, it can nevertheless be inferred from subsequent judgments that the duty to set aside conflicting national provisions is ultimately rooted in Art. 47 of the Charter.

Against that background, the judgment handed down by the Grand Chamber in *Deutsche Umwelthilfe* sheds additional light on the interaction between Article 47 of the Charter and Article 9 of the Aarhus Convention. In some ways, that judgment falls squarely in line with *Protect*. As a matter of principle, the judgment in *Deutsche Umwelthilfe* confirmed that the Member States must provide access to justice to recognized NGOs with respect to the domestic enforcement of EU environmental provisions. The novelty of that judgment comes from the finding that the Member States can in no event make use of their retained discretion to exclude a category of decisions from the ambit of the right to bring proceedings set out in Article 9(3) of the Aarhus Convention. In the wake of *Brown Bears I*, the German legislature established a special regime allowing NGOs to have access to environmental justice even in the absence of subjective rights (paragraph 3 UmwRG). But the legislature, perhaps influenced by the fierce lobbying exerted by car manufacturers against that measure, guarded against including decisions on product approvals within the material scope of the right to bring proceedings conferred on NGOs. That exclusion was sanctioned by the Grand Chamber. More specifically, the discretion retained by the Member States in the implementation of Article 9(3) of the Convention was circumscribed by reference to Article 47 of the Charter. At paragraph 69 of this judgment, the Court took the view that:

“[a]lthough they imply that Member States retain discretion as to the implementation of that provision, the words ‘criteria, if any, laid down in its national law’ in Article 9(3) of the Aarhus Convention cannot allow those States to impose criteria so strict that it would be effectively impossible for environmental associations to challenge the acts or omissions that are the subject of that provision”.

Because the rule at issue would precisely deny NGOs *any* right to bring proceedings in relation to the enforcement of the prohibition against “defeat devices” laid down in Article 5(2) of Regulation 715/2007, it was contrary to the requirements flowing from a combined reading of Article 9(3) of the Convention and Article 47 of the Charter.<sup>79</sup> As such, that exclusion constituted a limitation on the right to an effective remedy featuring in Article 47 of the Charter.<sup>80</sup> If the national referring court were unable to interpret national law in a way that is consistent with the requirements arising from that right, there would remain only one possibility: the duty to set the impugned norm aside. According to the Court, that duty rested on the referring court by virtue of

79. Judgment, para 71.

80. *Ibid.*, para 72.

Article 47 of the Charter itself. Consequently, the referring court was instructed to offer standing to NGOs approved by national law, if necessary by disappling the disputed national legal norm.

Viewed from that perspective, the judgment under consideration illustrates the positive and forward-looking dimension of the right to effective judicial protection enshrined in Article 47 of the Charter. Following the entry into force of the Lisbon Treaty, some commentators anticipated that the formal constitutionalization of the principle of effective judicial protection (by means of Arts. 47 of the Charter and 19 TEU) could support the creation of more “intrusive” procedural standards.<sup>81</sup> The judgment under consideration effectively confirmed the (more) “prescriptive” undertones of the case law post-Lisbon.<sup>82</sup> Whereas past judgments grounded on the general principle of effective judicial protection merely imposed a duty of consistent interpretation on national judicial authorities,<sup>83</sup> *Deutsche Umwelthilfe* went a step further. Based on the Court’s judgment, it was incumbent on the referring court (and also, more generally, national authorities) to grant standing to recognized NGOs in relation to the judicial enforcement of environmental law provisions. In the main proceedings, the consequences for national remedial autonomy were readily apparent: that judgment created a new cause of action beyond those already available at national level (or, from a different perspective, it extended the scope of pre-existing national remedies to cover matters that were previously excluded from their scope).

That finding brings us to another clarification brought about by that judgment. In the wake of *Protect*, it has often been suggested that the legal effects of Article 9(3) of the Convention had been bolstered by reference to the right to effective judicial protection.<sup>84</sup> According to Eliantonio, the Court in this judgment read Article 9(3) in the light of Article 47 of the Charter.<sup>85</sup> Widdershoven similarly opined that Article 47 of the Charter had been

81. See, amongst others, Arnulf, “The principle of effective judicial protection in EU law: An unruly horse”, 36 *EL Rev.* (2011), 51–70, at 68; Van Cleynenbreugel, “The confusing constitutional status of positive procedural obligations in EU law”, 5 *REALaw* (2012), 81–101, at 91.

82. Bonelli, “Article 47 of the Charter, effective judicial protection and the (procedural) autonomy of the Member States” in Bonelli, Eliantonio and Gentile (Eds.), *Article 47 of the Charter and Effective Judicial Protection. Volume I: The Court of Justice’s Perspective* (Hart Publishing, 2022), pp. 96 et seq.; Bonelli, Eliantonio and Gentile, “Conclusions” in *ibid.*, pp. 274–275.

83. See e.g. Case C-240/09, *Brown Bears I*.

84. See also Sobotta, *op. cit. supra* note 76, at 254–255; Neframi, “La Charte dans l’action extérieure de l’Union Européenne” in Iliopoulou-Penot and Xenou (Eds.), *La Charte des Droits Fondamentaux, Source de Renouveau Constitutionnel Européen* (Bruylant, 2020), pp. 169–170.

85. Eliantonio, *op. cit. supra* note 27, at 113.

employed as a “means of interpretation strengthening the judicial protection” guarantees offered by the Aarhus Convention. In his view, “the Court applied an Article 47 CFR consistent interpretation of Article 9(3) of Aarhus Convention” in order to guarantee access to justice for the sake of NGOs.<sup>86</sup> That suggestion may be implicitly grounded on the EU hierarchy of norms. After all, international agreements concluded by the Union (and its Member States) rank at an intermediary level between primary and secondary law.<sup>87</sup> Based on a conventional understanding of the hierarchy of norms, it makes sense to interpret the lower norms originating from the Aarhus Convention in the light of the hierarchically superior guarantees offered by Article 47 of the Charter. However, it can be inferred from *Deutsche Umwelthilfe* that it is the right to effective judicial protection *as such* which dictated the outcome of that judgment. As the Court has recently established, that provision “is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such”.<sup>88</sup> In other words, that provision is directly effective. It may, as a result, give rise to a duty to set aside conflicting national provisions. Viewed from that perspective, it is not so much the legal effects of Article 9(3) that are “strengthened”, or “bolstered” by virtue of Article 47 of the Charter. Quite the contrary, it is Article 47, enriched or fleshed out by reference to the Aarhus Convention and, in particular, Article 9(3), that activated the duty to set aside any incompatible national provision. That means that the substantive content of Article 47 of the Charter is shaped by reference to the specific guarantees of Article 9(3) of the Convention; in some ways, the latter provision produces some “indirect effect” on the higher norm belonging to the Charter.<sup>89</sup>

It is perhaps unfortunate that the Court did not expound explicitly on the normative foundation of its approach to the identification of the substantive content of the right to effective judicial protection by reference to the standards expressed in the Aarhus Convention. To that end, some support could be found in Articles 52(3) and 53 of the Charter, as well as Article 6(3) TEU.<sup>90</sup> It is fair to acknowledge, from the outset, that none of these provisions require expressly that the content of Charter rights must be fleshed out in the

86. Widdershoven (2019), *op. cit. supra* note 42, at 18–19.

87. Lenaerts and Gutiérrez-Fons, *Les Méthodes d’Interprétation de la Cour de Justice de l’Union Européenne* (Bruylant, 2021), p. 93.

88. Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, EU:C:2018:257, para 78; Case C-556/17, *Alekszij Torubarov v. Bevandoriyasi és Menekültügyi Hivatal*, EU:C:2019:626, para 56.

89. See also Schütze, “Direct effects and indirect effects of Union law” in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law*, vol. 1 (OUP, 2018), p. 293.

90. See, in a similar vein, Lenaerts and Gutiérrez-Fons, “The general system of EU environmental law enforcement”, 30 *YEL* (2011), 3–41, at 36.

light of international agreements. Taken together, these provisions nevertheless emphasize the important role attributed to international human rights law with respect to the interpretation of EU fundamental rights.<sup>91</sup> As was established by past judgments, the identification of EU fundamental rights (under the guise of general principles) has traditionally been carried out by reference to “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”.<sup>92</sup> That was reiterated by the Preamble of the Charter, which states that the Charter “reaffirms . . . the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States”.<sup>93</sup> Seen in that light, the provisions mentioned above militate in favour of an interpretation of EU fundamental rights grounded on, or at least inspired by, international treaties for the protection of human rights.<sup>94</sup> That is especially significant when an international treaty sets out more extensive protection in comparison with the guarantees recognized at EU level. It follows that these provisions provide authority for the approach adopted in *Deutsche Umwelthilfe* with respect to the interaction of Article 47 of the Charter and Article 9(3) of the Aarhus Convention. Because Article 9(3) of the Convention contained more detailed (and specific) guarantees of effective judicial protection, it could be used to put flesh on the bones of the right enshrined in Article 47 of the Charter.

## 5. Conclusion

The judgment analysed in this case note illustrates the far-reaching demands posed by the right to effective judicial protection in relation to national procedural law also beyond the existence of subjective rights originating from the law of the Union. By referring to the right to effective judicial protection, read in the light of the guarantees offered by the Aarhus Convention, the Court was able to define the extent to which the Member States must give access to justice in relation to EU environmental provisions. It instructed national

91. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar Publishing, 2018), pp. 30 et seq.

92. See e.g. Case C-4/73, *Nold KG v. Commission*, EU:C:1974:51, paras. 12–13; Case C-44/79, *Hauer/Land Rheinland-Pfalz*, EU:C:1979:219, para 15.

93. The explanations relating to the Charter also make various references to international treaties for the protection of human rights as sources of guidance for the interpretation of Charter provisions.

94. There is nothing here that should be taken as meaning that international human rights law may justify a departure from EU primary law. See further Lenaerts and Gutiérrez-Fons, *op. cit. supra* note 87, at pp. 91–93.

courts to offer access to justice to NGOs in relation to judicial review proceedings dealing with the enforcement of EU environmental law. The case law constitutes a positive contribution towards ensuring effective access to justice in relation to the enforcement of EU environmental provisions. This is especially the case bearing in mind the fragmented harmonization of the rights of access to justice enshrined in Article 9 of the Convention. There is, of course, little denying that this does not compensate for the absence of harmonization of national standing requirements in relation to the judicial enforcement of Union environmental provisions. Significant regulatory shortcomings remain with respect to access to environmental justice at Member State level. It is also fair to acknowledge that the EU itself has come under intense criticism in recent years over its poor track record concerning the justiciability of environmental claims in direct actions before the ECJ.<sup>95</sup>

By relying on the Aarhus Convention to define access to environmental justice in relation to such provisions, the case law analysed here may nevertheless “limit the adverse repercussions” resulting from the absence of political consensus on the implementation of Article 9 of the Convention at EU level.<sup>96</sup> That case law has indeed generated significant repercussions in (some of) the Member States which did not previously offer standing to NGOs in environmental matters.<sup>97</sup> It has, in particular, transformed “public interest litigation” into an EU law obligation weighing on the Member States with regard to the enforcement and application of Union environmental provisions. It is perhaps fair to acknowledge, however, that the far-reaching demands imposed on the national judiciary in order to ensure a wide access to environmental justice are difficult to square with the EU’s own (strict) approach to the standing of individuals and NGOs in direct actions before the Court. If Article 47 of the Charter truly imposes an obligation to make access to justice available to a wide audience, there seems to be a good argument that the EU itself ought to do more in terms of allowing concerned individuals and NGOs to be granted access to the Court in environmental matters. After all, the right set out in Article 47 of the Charter does not only bind the Member States

95. See on that issue e.g. Schoukens, “Access to justice in environmental cases after the rulings of the Court of Justice of 13 January 2015: *Kafka* revisited?”, 31 *Utrecht Journal of International and European Law* (2015), 46–67, at 46; De Lucia, “The new Aarhus Regulation and the defensive behaviour of the European legislator”, 15 *REALaw* (2022), 7–34.

96. Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 90, at 36.

97. See e.g. Darpö and Epstein, “Under fire from all directions: Swedish wolf management hunting scrutinized by Brussels and at home” in Born, Cliquet, Schoukens, Misonne and Van Hoorick (Eds.), *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge, 2016), p. 359. They observe that the Swedish courts “revised their attitude towards standing for NGOs in environmental decision making under the pressure of EU law, making public interest litigation possible”.

(when they implement EU law), but also, perhaps more importantly, the Union institutions themselves.

Maxime Tecqmenne\*

\* PhD student, EU Legal Studies (University of Liège). The author would like to acknowledge the support of the European Research Council (Project EUDAIMONIA, grant agreement 948473).

## COMMON MARKET LAW REVIEW

Personal subscription prices at a substantially reduced rate as well as online subscription prices are available upon request. Please contact our sales department for further information at +31 172641562 or at [International-sales@wolterskluwer.com](mailto:International-sales@wolterskluwer.com).

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

All requests for further information and specimen copies should be addressed to:

Kluwer Law International  
P.O. Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
fax: +31 172641515

For Marketing Opportunities please contact [International-marketing@wolterskluwer.com](mailto:International-marketing@wolterskluwer.com)

Please visit the Common Market Law Review homepage at <http://www.kluwerlawonline.com> for up-to-date information, tables of contents and to view a FREE online sample copy.

**Consent to publish** in this journal entails the author's irrevocable and exclusive authorization of the publisher to collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in Article 17, paragraph 2, of the Dutch Copyright Act of 1912 and in the Royal Decree of 20 June 1974 (S.351) pursuant to Article 16b of the Dutch Copyright Act of 1912) and/or to act in or out of court in connection herewith.

**Microfilm and Microfiche** editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM; IBZ-Online; IBZ-International Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.