OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 16 December 2010 [1]

1. The present reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Nordrhein-Westfalen Land) (Germany) concerns an environmental non-governmental organisation ('an environmental NGO') that is seeking judicial review of an administrative decision likely to affect the environment. The proceedings are not a group action (for example, by an organisation grouping together a number of local residents who contend that they will be adversely affected by the effects of a particular project in the locality in which they live). Rather, the application for judicial review seeks to challenge the contested administrative decision in so far as it authorises activities which, it is alleged, will have an adverse effect on the environment as such. In that sense, it may be said that the environmental NGO is seeking to act on behalf of the environment itself.

2. Under German law, a party wishing to bring an action for judicial review must rely on the infringement of a substantive individual right. The referring court seeks an interpretation of Article 10a of Directive 85/337/EEC ('the EIA Directive'), [2] as amended by Directive 2003/35/EC. [3] In so doing, the referring court asks, in effect, whether the EIA Directive and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') give, or require Member States to give, environmental NGOs the right to bring an action before the national courts, without demonstrating or relying on the infringement of a substantive individual right.

International law

The Aarhus Convention

3. On 25 June 1998, the European Community, the individual Member States and 19 other States signed the Aarhus Convention, which entered into force on 30 October 2001. It was approved on behalf of the European

1 — Original language: English.

2 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

3 — Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17; 'Directive 2003/35').

Community on 17 February 2005 [4] and was ratified by Germany on 15 January 2007.

4. The 7th, 8th, 13th and 18th recitals in the preamble to the Aarhus Convention read as follows:

'[7] Recognising … that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations';

'[8] Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights';

'[13] Recognising further the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection';

'[18] Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced.'

5. Article 2(5) defines 'the public concerned' as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

6. Article 9 contains provisions relating to access to justice for both individuals and non-governmental organisations, as well as rules

4 — Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters ('Council Decision 2005/370') (OJ 2005 L 124, p. 1). The text of the Aarhus Convention is reproduced on p. 4 et seq. of that issue of the Official Journal.

applying to judicial procedures. In particular, Article 9(2) states:

'2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, [5] where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of sub-paragraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of sub-paragraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.'

European Union law

The EIA Directive as amended by Directive 2003/35

7. The Aarhus Convention was incorporated into the Community legal order by means of (inter alia) Directive 2003/35. That

5 — The meaning of this expression in English is not, perhaps, entirely obvious. Its true meaning may be closer to "alleging the infringement of a right"; that is, an abbreviation for "alleging that a right is, or is at risk of being, impaired". In order to remain faithful to the text, I have in general used "maintaining the impairment of a right" where necessary below.

directive amended two environmental directives, namely the EIA Directive and the IPPC Directive, [6] so as 'to ensure that they are fully compatible with the provisions of the [Aarhus] Convention, in particular … Article 9(2) … thereof'. [7]

8. Recitals 3 and 4 in the preamble to Directive 2003/35 concern public participation. Recital 4 refers expressly to the role of environmental NGOs:

'(3) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(4) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including inter alia by promoting environmental education of the public.'

9. Article 1(2) of the EIA Directive, as amended by Directive 2003/35, mirrors Article 2(5) of the Aarhus Convention in defining 'the public concerned' as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'. [8]

10. Directive 2003/35 also inserted a new article — Article 10a — into the EIA Directive.

6 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

7 — Recital 11 to Directive 2003/35.

8 — Article 2(2) refers to integrating the environmental impact assessment both into existing procedures for granting consent to projects in the Member States and into procedures that are to be established to comply with the aims of the EIA Directive.

That article contains provisions dealing with access to justice. It reads as follows:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

National law

11. Article 19(4) of the Grundgesetz (Basic Law) states that '[s]hould any person's rights be impaired by public authority, he may have recourse to the courts …'.

12. Paragraph 42 of the Verwaltungsgerichtsordnung (Administrative Court Rules; 'the VwGO') provides that:

'(1) An action can seek to have an administrative measure set aside (action for annulment) or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoinder).

(2) Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act.'

13. The first sentence of Paragraph 113(1) of the VwGO provides that 'in so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate.'

14. Paragraph 1(1) of the Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC, also known as the Umwelt-Rechtsbehelfsgesetz; 'the UmwRG') states, inter alia:

'(1) The present law shall apply to actions which challenge

1. decisions within the meaning of Paragraph 2(3) of the Gesetz über die Umweltverträglichkeitsprüfung [Law on environmental impact assessments: "the UVPG"] concerning the admissibility of projects in relation to which under

   (a) the [UVPG],

   …

   there may be an obligation to implement an environmental impact assessment.'

15. Paragraph 2(1) of the UmwRG provides, in particular:

'A domestic or foreign association recognised under Paragraph 3 may bring an action in accordance with the [VwGO] to challenge a decision within the meaning of the first sentence of Paragraph 1(1) or a failure to adopt such a decision, without being required to maintain an impairment of its own rights, provided that the association

1. asserts that a decision within the meaning of the first sentence of Paragraph 1(1) or a failure to adopt such a decision contravenes legislative provisions which seek to protect the environment, which confer individual rights and which may be relevant to the decision.'

16. Paragraph 2(5) of the UmwRG states that:

'Actions brought in accordance with subparagraph 1 shall be deemed well founded,

1. in so far as the decision within the meaning of the first sentence of Paragraph 1(1) or the failure to adopt such a decision infringes legislative provisions which seek to protect the environment, which confer individual rights and which are relevant to the decision and the infringement affects environmental protection concerns included in the objectives which the association, under its statutes, is committed to promote.'

17. The first sentence of Paragraph 2(1) of the UVPG is worded as follows:

'The environmental impact assessment forms an integral part of administrative procedures aimed at reaching a decision as to whether a project can be authorised...'

18. Paragraph 2(3) of the UVPG provides, in particular:

'Decisions within the meaning of the first sentence of subparagraph 1 include

1. ... permits, planning approval decisions and other official decisions as to whether a project can be authorised, taken in the course of an administrative procedure ...'

19. Paragraph 61(1) and (2) of the Gesetz über Naturschutz und Landschaftspflege (Law on nature protection and countryside preservation, also known as the Bundesnaturschutzgesetz) states that:

'(1) Independently of any impairment of its own rights, a... recognised association may bring actions in accordance with the [VwGO] challenging

1. Exemptions from prohibitions and requirements intended to protect nature conservation areas, national parks and other protected areas established under Paragraph 33(2) and

2. Planning approval decisions concerning projects which entail an encroachment on nature and the countryside, together with planning permits, where public participation is provided for

...

(2) Actions brought in accordance with subparagraph 1 are not admissible unless the association

1. claims that the adoption of one of the administrative measures mentioned in the first sentence of subparagraph 1 contravenes provisions of the present law, provisions which have been adopted or which continue to apply on the basis or within the framework of the present law, or other provisions which must be taken into account when adopting an administrative measure and whose objectives include concern for nature protection and countryside preservation,

2. is affected as regards a matter which, under its statutes, is within its ambit and in respect of which it is recognised,...'

Facts, procedure and questions referred

20. Trianel Kohlekraftwerk Lünen ('Trianel', the intervener in the proceedings before the referring court) intends to construct and operate a coal-fired power station in Lünen, Nordrhein-Westfalen. The project is subject to a mandatory environmental impact assessment.

21. Within 8 km of the project site there are five areas designated as conservation zones under national law.

22. On 6 May 2008, the Bezirksregierung Arnsberg (the Arnsberg District Administration) issued a preliminary decision and a partial permit for the project to Trianel. The preliminary decision stated that there were no legal objections in relation to the project site.

23. On 16 June 2008, an environmental NGO known as Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (the Nordrhein-Westfalen branch of Friends of the Earth Germany ('BUND')) initiated proceedings against the Arnsberg District Administration in which it sought an order setting aside the preliminary decision and the permit. BUND is an association recognised under Paragraph 3 of the UmwRG (the provision specifying the 'requirements of national law' that an environmental NGO must satisfy for the purposes of Article 1(2) of the EIA Directive).

24. BUND claims that the preliminary decision and permit contain formal and substantive defects, and alleges that the project infringes the protective and precautionary principles of the anti-pollution laws and the requirements of the water and nature protection laws.

25. The court took the view that BUND was not entitled to bring that action, because BUND was not maintaining the impairment of a substantive individual right, as is required in German law to obtain *locus standi*. However, the court wonders whether the German requirement that an environmental NGO must maintain the impairment of a right in that sense is itself compatible with European Union law; in particular, with Article 10a of the EIA Directive.

26. The court therefore stayed the proceedings and referred the following questions to the Court of Justice:

'(1) Does Article 10a of [the EIA Directive] as amended by [Directive 2003/35] require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?

(2) Unless Question 1 is answered unreservedly in the affirmative:

Does Article 10a of [the EIA Directive] as amended by [Directive 2003/35] require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to base their argument on the infringement of environmental provisions relating to the approval of a project which are derived directly from Community law or which transpose Community environmental legislation into domestic law, including provisions intended to serve the interests of the general public alone, rather than those which, at least in part, protect the legal interests of individuals?

(a) If Question 2 calls, in principle, for an affirmative response:

Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

(b) If Question 2(a) is answered in the affirmative:

What are the relevant substantive conditions (for example, direct effect, protection objective or aim of the legislation)?

(3) If either Question 1 or Question 2 is answered in the affirmative:

Does the directive directly entitle non-governmental organisations to a right of access to the courts which exceeds that provided for under the rules laid down in national law?'

27. Written observations were submitted by BUND, the Bezirksregierung Arnsberg, Trianel, the German, Greek and Italian Governments and the Commission. BUND, Trianel, the German Government and the Commission presented oral argument at the hearing on 10 June 2010.

Preliminary comments

Action against Germany

28. The Commission notes that there is an action pending against Germany before the Aarhus Convention Compliance Committee, concerning essentially the same question as the one at issue in the present case. [9] However, that action has been stayed pending the outcome of the present reference for a preliminary ruling. I therefore do not propose to take it into further consideration.

The legal situation in Germany

29. The written observations of the German Government have been helpful in clarifying the problem set out in the order for reference. The general rule in Germany governing admissibility in administrative proceedings is to be found in Paragraph 42(2) of the VwGO. The effect of this provision is, as I understand it, that applications for the review of administrative actions are admissible only if (a) they are based on a legal provision whose purpose is to protect individual rights and (b) the individual applicant falls within the scope of its protection.

30. The German Government states that the right to bring an action for judicial review thus amounts to a 'right which protects individuals', as enshrined in Article 19(4) of the

9 — Dossier No ACCCC/C/2008/31, available at: http://www.unece.org/env/pp/compliance/Compliance%20Committee/31TableGermany.htm.

Grundgesetz. During the course of such an action, the court may review facts *ex officio*, examine whether all the factual elements necessary for a decision were present, evaluate the legality of the decision (for example, by assessing whether it has infringed a principle such as proportionality) and verify that the decision was not taken *ultra vires*. The court may exercise its powers of review even where administrative bodies have a margin of discretion. The German Government contends that this process amounts to a particularly intense level of judicial scrutiny. [10]

31. However, the German Government further observes that the resources available to the German courts are limited. The condition that access to justice is normally limited to those persons whose rights are directly affected by a decision is therefore the practical corollary of the intense levels of judicial scrutiny required for effective judicial protection. An increase in the numbers of applicants permitted to bring actions before the courts would 'clog the system'. That would in turn reduce the effectiveness with which the German courts could protect the rights of potential applicants. The result would be potentially to reduce the judicial protection offered to persons whose individual rights are infringed, as a consequence of extending access to a wider circle of applicants.

32. The German Government also notes that, when an action for judicial review is brought, the related administrative proceedings are suspended. An increase in the number of actions brought before the courts would therefore slow down administrative proceedings significantly.

33. The German Government points out that, although the general rule is that applicants must 'maintain the impairment' of an individual right, Paragraph 2(1)(1) of the UmwRG provides an exception in favour of recognised environmental NGOs. These may apply for judicial review, provided that the provisions they are alleging have been infringed confer rights on individuals. This exception thus places environmental NGOs in a more favourable position than individual applicants.

34. It seems to be common ground that in Germany the environment is protected not as an expression of an individual's interest, but

10 — In their oral submissions both BUND and the Commission challenged this assertion.

as a general public interest.[11] Accordingly, and as a general rule, legal provisions aimed at protecting the environment may not necessarily also confer rights on individuals.

35. In practice, environmental NGOs therefore cannot request, and the German courts cannot undertake, a review of an administrative action on the basis that it violates a provision protecting the environment as such. They may only act where they can point to a substantive individual right that is, or is at risk of, being impaired.

36. Against that background, I turn to examine Question 1.

Question 1

37. By its first question, the referring court asks whether Article 10a of the EIA Directive obliges Member States to permit environmental NGOs to seek judicial review on the ground that an environmental provision relevant to the approval of a project — including a provision which is intended to serve the interests of the general public alone, rather than which protects the legal interests of individuals — has been infringed.

38. Is there a textual basis in the EIA Directive for thinking that access to the courts may be made contingent upon the existence of substantive individual rights?

39. The Commission emphasises the link which the EIA Directive draws between the protection of the environment and the protection of individual rights to health. However, in my view that link should be understood in general terms. *Locus standi* to challenge an alleged failure correctly to apply particular provisions of environmental legislation should not be made dependent upon showing a particular or specific link with human health.[12]

11 — The Commission, in its written observations, referred to a number of articles that discuss the consequences of conceptualising environmental protection in this way. It seems that the topic is not without controversy: see, for example, F. Spieth and M. Appel, 'Umfang und Grenzen der Einklagbarkeit von UVP-Fehlern nach Umwelt-Rechtsbehelfsgezetz', NuR, 2009, p. 312, and H.-J. Koch, 'Die Verbandsklage im Umweltrecht', NVwZ, 2007, p. 369. See also K.-H. Ladeur and R. Pelle, 'Judicial Control of Administrative Procedural Mistakes in Germany: A Comparative European View of Environmental Impact Assessments', in K.-H. Ladeur (ed) *The Europeanisation of administrative law*, Aldershot (2002), and the articles there cited.

12 — Reference has been made to Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273, paragraph 33, and Case C-237/07 *Janecek* [2008] ECR I-6221, paragraph 38, where the Court dealt with the two concepts together. However, these cases were not concerned with the EIA Directive.

40. First, Article 10a of the EIA Directive does not specify that such a link is required. Second, both Article 191 TFEU [13] and Directive 2003/35 treat environmental protection as an aim in itself, separate from the protection of human health. [14] For those reasons, to read legislative provisions designed to protect the environment as being inextricably linked to human health would, in my view, limit the scope of those provisions unnecessarily and impermissibly.

41. The German Government argues that Article 10a of the EIA Directive does not require Member States to modify their national systems so as to allow an *actio popularis* whereby any party enjoys unlimited access to challenge administrative decisions on environmental grounds. That is correct. However, the central issue of the present proceedings is whether it is compatible with the EIA Directive for a Member State to maintain procedural rules on *locus standi* whose effect is that *no party at all* may bring an action alleging infringement of legislation aimed only at protecting the environment.

42. The *actio popularis* provision of the Aarhus Convention is Article 9(3), which has not yet been incorporated into EU law. [15] Consequently, there is, as yet, no EU law obligation on the Member States to permit an *actio popularis*.

43. The purpose of Article 10a, as inserted into the EIA Directive by Article 3(7) of Directive 2003/35, was to incorporate Article 9(2) of the Aarhus Convention into EU law. In contrast with Article 9(3), that provision requires only that Member States permit certain members of the 'public concerned' to have access to a review procedure to challenge the legality of administrative decisions, acts or omissions. This requirement is duly reproduced in Article 10a of the EIA Directive.

44. The first paragraph of Article 10a requires Member States to grant standing either (a) to

13 — Formerly Article 174 EC.

14 — During the preparatory stages of the Aarhus Convention, the Belgian delegation suggested specifically linking the environment and human health: see the travaux préparatoires detailing the first session of the Economic and Social Council's Working Group (CEP/AC.3/2, p. 2). This proved controversial (see the details of the second session (CEP/A.C3/4, p. 2)), although by the eighth session (CEP/AC.3/16, p. 2) the embryonic Aarhus Convention contained what would become the final draft of Article 1, which notes the 'right of every person of present and future generations to live in an environment adequate to his or her health and well-being...'

15 — See point 76 et seq. of my Opinion in Case C-240/09 *Lesoochranárske Zoskupenie* (judgment pending).

bodies which have a sufficient interest, or (b) to those which 'are maintaining the impairment of a right'. The alternatives are necessary in order to take account of the different tests for standing in the various national legal systems of the States signatory to the Aarhus Convention. [16]

45. The third paragraph of Article 10a provides that Member States are to determine what constitutes a 'sufficient interest' and the 'impairment of a right', consistently with the objective of giving the public concerned wide access to justice. It then states that, to this end, environmental NGOs [17] are to be deemed to have a sufficient interest for the purpose of criterion (a) and rights capable of being impaired for the purpose of criterion (b).

46. Herein lies the crux of the problem. What type of 'right' may an environmental NGO claim is being impaired? Correspondingly, does Article 10a allow Member States scope for limiting the rights whose impairment may be alleged to a sub-category of rights (that is, substantive individual rights)?

47. The German Government argues that the third paragraph of Article 10a of the EIA Directive permits it to specify that an NGO applicant, like a private individual, may rely only on provisions which protect the legal interests of individuals. That provision merely stipulates that environmental NGOs should be deemed to hold rights equivalent to those of individuals (when, in reality, they cannot and do not). It thus places environmental NGOs on a par with individuals, without altering the nature of the rights environmental NGOs must invoke to gain *locus standi*, or limiting the power of Member States to restrict the types of rights which can be invoked in the course of an application for judicial review. In so far as environmental NGOs are permitted to rely on provisions which protect the rights of third parties rather than their own individual rights, environmental NGOs enjoy a wider right of access to justice than individuals.

16 — See the *travaux préparatoires* detailing the fifth session of the Economic and Social Council's Working Group (CEP/AC.3/10, p. 11), where 'one delegation contended that any review mechanism should be subordinated to the relevant constitutional and legal provisions of each contracting party'. It was generally agreed that those able to participate in the decision-making procedure itself should have access to a review mechanism, but 'some delegations maintained that such persons/organisations would have to assert impairment of their individual rights'. This assertion seems to have led to the text containing criteria (a) and (b), a draft of which first appears in the *travaux préparatoires* detailing the eighth session (cited in footnote 16, p. 9). In the interim, however, the words 'impairment of their individual rights' had become 'impairment of a right'.

17 — As defined in Article 1(2) of the EIA Directive, as amended. It is not disputed that BUND meets that definition.

48. The Commission takes the view that Article 10a merely stipulates that environmental NGOs are to be able to bring actions on the basis of an impairment of a right. The existence of that right, it contends, is a matter for national law — although due consideration must be given to the need for broad access to justice.

49. On its face, the wording of Article 10a ('maintain the impairment of a right') appears more or less neutral. It does not state that the right must be any particular kind of right. Nor does it state that any particular type, or all types, of right will suffice to establish standing. Nor does it contain wording which specifies the kind(s) of rights upon which a Member State may permit an applicant to rely.

50. In *Djurgården*,[18] I took the view that Article 10a of the EIA Directive gives environmental NGOs that satisfy the definition in Article 1(2) of that Directive automatic *locus standi* before national courts.[19]

51. As I suggested in that Opinion,[20] the special role, and corresponding rights, accorded to environmental NGOs under the Aarhus Convention and the EIA Directive result in a particularly strong and effective machinery for preventing environmental damage. An environmental NGO gives expression to the collective interest and may possess a level of technical expertise that an individual may not enjoy. To the extent that a single action brought by an environmental NGO may replace a plethora of equivalent actions that would otherwise be brought by individuals, the effect may be to streamline litigation, reduce the number of claims pending before the courts and improve the efficiency with which limited judicial resources are used to dispense justice and protect rights.

52. The prominent role given to environmental NGOs also provides a counter-balance to the decision not to introduce a mandatory *actio popularis* for environmental matters. Furthermore, involving environmental NGOs in both the administrative and judicial stages of decision-making strengthens the quality and the legitimacy of decisions taken by the public authorities, and improves the effectiveness

18 — Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967.

19 — Points 42 to 45 of my Opinion.

20 — Ibid., points 59 to 65.

of the procedures aimed at preventing environmental damage. [21]

53. It seems to me that permitting an environmental NGO to contest an administrative decision in favour of a project is even more vital if — as appears to be the case in Germany — a corresponding *negative* decision can always be contested by the project managers, who can (by definition) allege an impairment of their individual substantive rights.

54. In *Djurgården*, I reasoned that any environmental NGO (within the definition set out in national law in accordance with Article 1(2) of the EIA Directive) has an automatic right of access to justice, notably because Article 10a expressly states that such an NGO will be deemed to have 'rights capable of being impaired' or an 'interest' that is deemed 'sufficient'. In my view, this clearly demonstrates that environmental NGOs are in a uniquely privileged position.

55. I also indicated that, in my view, the fact that a right of access to justice is to be conferred 'in accordance with the … national legal system' does not mean that Member States enjoy additional scope for manoeuvre when transposing that provision. Rather, the phrase serves merely to emphasise that the provisions on access to justice apply within the procedural framework of each Member State. [22]

56. In its judgment, the Court decided the case on slightly narrower grounds.

57. The specific question referred in *Djurgården* did not directly address the issue of whether a Member State may restrict the *types* of rights upon which an environmental

21 — This theme appears in the academic literature concerning this area of law: see, for example A. Ryall, 'EIA and Public Participation: Determining the Limits of Member State Discretion', (2007) 19 *Journal of Environmental Law* Vol. 2, p. 247, in which the Court's decision in Case C-216/05 *Commission* v *Ireland* [2006] ECR I-10787 is criticised for its failure to take account of the likely cumulative effect of imposing a participation fee on environmental NGOs. It is also reflected in the Aarhus Convention Implementation Guide (p. 31) and in the *travaux préparatoires* to the Aarhus Convention (to give two examples, in the Draft Elements (CEP/AC.3/R.1, p. 2) and in the Resolution taken at Aarhus (ECE/CEP/43/Add.1/Rev.1)) and to Directive 2003/35: see, for example, the Commission's proposal (COM(2000) 839 final, p. 2) — although the Committee of the Regions noted, during the discussion of that directive, that environmental interest and pressure groups might be enabled to delay the implementation of necessary projects (OJ 2001 C 357, p. 58, point 1.5). In drafting the Aarhus Convention, the UN Economic and Social Council took into account the views of several NGOs concerned with environmental matters (see, for example, the Report of the First Session (CEP/AC.3/2 p. 1)), commending them in the Resolution for their 'active and constructive participation in the development of the Convention'. It might be inferred from this that the drafters of the Aarhus Convention considered the voices of environmental NGOs to be valuable in the drafting process and, indeed, thereafter.

22 — That is, both natural and legal persons and environmental organisations remain subject to the normal rules on the jurisdiction of national courts, time-limits, legal capacity and so forth which are part of domestic procedural law.

NGO may rely. It may be for this reason that the Court's language is not entirely clear upon the point currently at stake. Thus, the Court stated that 'persons who are members of the public concerned and either have sufficient interest, or if national law so requires, maintain that one of the projects covered by Directive 85/337 impairs their rights, are to have access to a review procedure' (paragraph 34) and that 'parties … whose rights [such a project] impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts' (paragraph 45). At paragraph 44, it held that 'those [non-governmental] organisations "meeting any requirements under national law" are to be regarded either as having "sufficient interest" or as having a right which is capable of being impaired by projects falling within the scope of that directive'; and later that 'members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it' (paragraph 48).

58. The present case is an appropriate opportunity for the Court to address the uncertainty that remains after its judgment in *Djurgården*.

59. Article 10a of the EIA Directive states that 'Member States shall ensure that members of the public concerned … maintaining the impairment of a right where administrative procedural law of a Member State requires this as a precondition … have access to a review procedure before a court of law …'.

60. In the case of an individual, that implies alleging that a right which he himself enjoys is, or is at risk of being, impaired by a particular project.

61. However, if the same standard were applied to environmental NGOs, that would either put them in exactly the same position as individuals (if only their own rights were concerned) or merely enable them to stand in for individuals (if their *locus standi* were dependent on the impairment or threatened impairment of individual rights enjoyed by others). It seems to me, however, that environmental NGOs are intended to enjoy broader standing than that.

62. The correct interpretation of Article 10a becomes clearer when one considers its third paragraph.

63. That paragraph applies equally to environmental NGOs in systems in which standing is accorded on the basis of criterion (a)

in the first paragraph and to those in which standing is accorded on the basis of criterion (b).

64. It operates not by conferring any right or interest on such NGOs but by considering that, provided that they meet any applicable requirements under national law, they necessarily meet the requirement of possessing a sufficient interest or having rights capable of being impaired, as the case may be.

65. Thus, with regard to criterion (a), all environmental NGOs are considered to have sufficient interest to have access to a review procedure before a court of law or other independent and impartial body. They need do nothing to prove that they have such an interest, but are treated as though in fact they had proved it. They therefore have standing to challenge the substantive or procedural legality of all decisions, acts or omissions sub that fall within the scope of the EIA Directive.

66. The same must surely be the case where criterion (b) is concerned. An environmental NGO must have the same, unfettered access to a review procedure regardless of which criterion a Member State applies. If that were not so, Member States applying criterion (b) would have more leeway to refuse *locus standi* to environmental NGOs than those applying criterion (a), implying profound differences in access to justice between Member States. The efficacy of the EIA Directive as an instrument to guarantee proper scrutiny of projects having a significant potential impact on the environment would be undermined, and the divergences might have an appreciable influence on the siting of projects, particularly in border areas.

67. In my view the correct interpretation is therefore that, in a Member State which applies criterion (b) in the first paragraph of Article 10a, the third paragraph of that article means that the Member State must ensure that environmental NGOs *can* 'maintain the impairment of a right', and thus that the national system must recognise that they have 'a right' capable of being impaired, even if that right is fictitious in a national legal system that would otherwise only recognise the impairment of substantive individual rights.

68. It follows that a national legal rule under which an environmental NGO seeking to challenge a decision likely to affect the environment must be able to maintain the impairment of a substantive individual right in order to enjoy *locus standi* is not compatible with Article 10a of the EIA Directive.

69. It might be objected that the first sentence of the third paragraph of Article 10a permits Member States to determine what 'constitutes a sufficient interest and impairment of a right' in accordance with the

requirements of national law. Does that not expressly authorise Member States to apply their own definitions?

70. In my view, their ability to do so is (equally expressly) made subject to an important limitation. That same sentence makes it clear that that determination by a Member State must be done 'consistently with the objective of giving the public concerned wide access to justice'. The objective of providing 'wide access' to justice gives the parameters within which Member States' legislative discretion may be exercised.

72. Furthermore, if the German Government were correct, whether an environmental NGO had *locus standi* to bring an action would depend in part on chance. Imagine two lakes, fairly alike in flora and fauna. The first is in the wilderness, in a remote corner of a large tract of land under the general control of the local authority (which will also consider any planning request). Not a soul lives nearby. The second is near a few houses. Under the German Government's interpretation, an environmental NGO could have *locus standi* to challenge a decision authorising a construction project bordering on the second lake (if it alleged that the householders' rights were or could be impaired) but not the first. That surely cannot be the intent of the EIA Directive. Access to justice cannot be made dependent on extraneous factors, such as the precise location of the project that an environmental NGO fears may cause damage to the environment.

71. Widening access to justice is one of the express objectives of the Aarhus Convention. In particular, recital 18 thereto states that 'effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced'. For its part, the preamble to Directive 2003/35 refers, in its third recital, to 'increasing the accountability … of the decision-making process', and indicates that '[p]articipation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered' (fourth recital).

Effectiveness

73. In its observations, Trianel emphasises that 'wide' access is not the same as 'unlimited' access, and argues that environmental NGOs should not have automatic standing under Article 10a of the EIA Directive. The

German Government likewise argues that EU law does not require unlimited access to the courts for environmental NGOs. The Commission accepts that the Aarhus Convention does not authorise environmental NGOs to bypass the criteria for admissibility laid down in national law: although an environmental NGO can maintain the impairment of a right, such a right must first exist in order to be infringed. However, the Commission then relies on the principle of effectiveness to conclude that the notion of 'impairment of a right' must be interpreted broadly.

74. In case the Court is not convinced that both the wording and objective of Article 10a of the EIA Directive lead to the conclusion that environmental NGOs should be granted automatic *locus standi*, it is necessary briefly to examine the question from the perspective of the principle of effectiveness, given that the amendments to the EIA Directive effected by Directive 2003/35 were intended, inter alia, to create wide access to justice.

75. The German Government contends that the effectiveness principle is not infringed by making *locus standi* contingent on the existence of substantive individual rights.

76. During the hearing, it became clear that there was a wide range of environmental legislation in place in Germany, not all of which can readily be associated with the protection of substantive individual rights. As the Commission rightly points out, the Court has on a number of occasions interpreted the EIA Directive extensively. [23] Against that background, it seems to me that excluding all actions based on environmental provisions other than those which also accord substantive rights to individuals is clearly not an effective implementation of the EIA Directive.

77. The German Government has explained that its system of judicial review involves a careful and detailed scrutiny of administrative decisions and results in a high level of protection of individual rights. [24] However, like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action. As I understand it, in circumstances in which no substantive individual right is at risk of impairment, neither an individual nor an environmental NGO has *locus standi* to bring an action. No one can act on behalf of the environment itself. There are nevertheless circumstances — for example, where a project listed in Annex I to the EIA Directive (and therefore subject to a compulsory environmental impact

23 — Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, paragraph 31; Case C-435/97 *WWF* [1999] ECR I5613, paragraph 40; Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293, paragraph 46; and Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 28.

24 — See above, point 30.

assessment under Article 4(1) thereof) is located on a virgin site well away from human habitation — where effective participation in environmental decision-making and effective monitoring of the implementation of the EIA Directive make it essential that an environmental NGO should have *locus standi* to bring an action for judicial review.

78. The German Government argues that the present very intense level of judicial scrutiny would have to be diluted if the requirements for *locus standi* were eased, in order to avoid overwhelming the administrative courts. That would, it suggests, result in weaker and less effective implementation of the EIA Directive.

79. As a matter of logic, that does not meet the point that, at present, no action can be brought before the German courts (because no applicant has *locus standi*) in certain circumstances that nevertheless fall within the scope of the EIA Directive, and where (accordingly) Article 10a requires there to be the possibility of review by a judicial body. I add that, for the reasons that I have already expressed,[25] allowing environmental NGOs to bring actions may in fact result in a more efficient and cost-effective use of limited judicial resources.

80. At the hearing BUND contended that, in reality, a mere 0.1 % of environmental actions are brought by environmental NGOs. If that is indeed the case, easing the conditions for *locus standi* slightly is unlikely to produce too significant an increase in the total number of litigants. Furthermore, presumably vexatious or frivolous applications, even if admissible, can be dismissed on the substance. I do not, therefore, find the argument that there would be a significant increase in workload[26] convincing as a reason for not remedying a significant lacuna in the present system.

Consistent interpretation

81. The German Government suggests that this case raises the question of how far European Union law can constrict the way that the German legal system construes *locus standi*.

82. However, it is well established that even constitutional norms of Member States must

25 — See my Opinion in *Djurgården*, cited in footnote 18, point 51, and point 62 above.

26 — The argument introduced by the German Government and noted above, point 31.

not obstruct the application of EU law (in particular, by making such application unconditionally dependent on whether the applicant can assert individual rights). Thus, if Article 10a of the EIA Directive necessitates giving a particular reading to 'maintain the impairment of a right', then the German legal system must respect that requirement. [27]

83. Trianel suggests that the interpretation of Article 10a advocated by BUND would mean that Germany would be obliged to abandon the rights-based test for *locus standi*. To my mind, it is far from obvious that that would necessarily be the case.

84. As I understand the current position, it might be possible for a German court to interpret national law in conformity with the requirements of Article 10a of the EIA Directive by allowing environmental NGOs to bring actions on the basis of an impairment of environmental rights that were deemed to be individual. [28] What is clear is that Germany must comply with is obligations under the EIA Directive as amended by Directive 2003/35. How it does so is a matter for the legislature and the national courts.

Conclusion on question 1

85. In the light of the above, I conclude that Article 10a of the EIA Directive requires that environmental NGOs wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right should be permitted to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals.

Question 2

86. Since I have proposed that Question 1 should be answered unreservedly in the affirmative, it is not necessary to answer Question 2. I would merely add that the provisions of Article 10a of the EIA Directive apply only to matters falling *ratione materiae* within the scope of that directive.

27 — See recently, for a more general consideration of the duty of consistent interpretation, Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 44 et seq. and the case-law cited there.

28 — See Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, at paragraphs 113 to 119, where the Court urged the referring court to use every tool at its disposal to arrive at an interpretation of national law that was consistent with the requirements of a directive.

Question 3

87. By its third question, the referring court asks whether the EIA Directive gives environmental NGOs direct entitlement to a right of access to the courts which exceeds that provided for under the rules laid down in national law. In other words, if the rules of national procedural law do not enable an environmental NGO (such as BUND) to establish *locus standi* to bring an action for judicial review, is it entitled to rely directly on the provisions of Article 10a?

88. The Court has on many occasions stated that where the provisions of a directive are sufficiently clear, precise and unconditional, they may be relied on before the national courts by individuals against the State where the latter has failed to implement (or to implement correctly) that directive in domestic law by the end of the period prescribed. [29] The Court has defined a provision in a directive as being sufficiently 'precise' as 'where it sets out an obligation in unequivocal terms.' [30]

89. Article 10a of the EIA Directive is certainly sufficiently clear and precise to give it direct effect. Is it, however, sufficiently unconditional?

90. The Court has stated that a provision in a directive is sufficiently 'unconditional' where 'it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effect, to the taking of any measure either by the [institutions of the European Union] or by the Member States.' [31]

91. The present case raises three potential points of doubt. First, Article 10a cross-refers to environmental NGOs as defined in Article 1(2), thus leaving it to the Member State to identify which environmental NGOs shall come within the scope of, inter alia, Article 10a. Second, the second paragraph of Article 10a provides that what constitutes a sufficient interest and impairment of a right is to be determined by the Member State. Third, Article 10a sets out two different systems for the grant of *locus standi*, again leaving it to the Member State to decide which system shall apply within its territory. Do any of these points prevent Article 10a from being considered to be sufficiently unconditional to satisfy the test for direct effect?

92. On the first point, the Court has already held that a provision can be directly effective where partial implementation of a directive

29 — - See Pfeiffer, cited in footnote 28, paragraph 103.

30 — See, most recently, Case C-194/08 *Gassmayr* [2010] ECR I-6281, paragraphs 44 and 45.

31 — *Gassmayr*, cited in footnote 30, paragraph 45.

has occurred in the Member State. [32] The fact that Germany has already specified the criteria that, under Article 1(2), an NGO must satisfy in order to be recognised as an environmental NGO for the purposes of the EIA Directive means that the category of 'environmental NGOs' is unconditionally identified. Any NGO that satisfies those criteria (such as BUND) is therefore able to rely on the provisions of Article 10a.

93. Regarding the second point, for the reasons that I have already given, I consider that the third paragraph of Article 10a automatically accords *locus standi* to environmental NGOs. The ability of a Member State to define what constitutes a sufficient interest, or the impairment of a right, is correspondingly limited. Such definitions are, by virtue of the third paragraph of Article 10a, irrelevant to environmental NGOs. Thus, such NGOs may rely upon the direct effect of Article 10a, even if the Member State in question has defined 'impairment of a right' in such a way that individuals cannot do so.

94. Finally, on the third point — the fact that Article 10a offers a choice of two systems — the Court stated in *Gassmayr* that '[a] provision of European Union law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States.' [33] The present situation is one in which any Member State's legal system will already reflect one of the two options set out at (a) and (b). The Member State in question is not obliged to take any particular measure. Similarly, the presence of two different options does not imply that this provision is conditional. [34] Like its parent provision in the Aarhus Convention (Article 9(2)), Article 10a was framed as it is precisely in order to accommodate the two different systems under which *locus standi* is commonly assessed in the Member States of the European Union (and amongst States signatory to the Aarhus Convention). It should not be regarded as conditional, rather than unconditional, merely because it does so.

32 — This goes back at least to Case 14/83 *Von Colson and Kamann* [1984] ECR I-1891, paragraph 27; and may be considered to have become part of the wider test for 'incorrect implementation' referred to in, most recently, Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 56.

33 — Cited in footnote 30, paragraph 45.

34 — A parallel may be drawn in this respect with the judgments of the Court in the field of external relations in, for example, Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, paragraph 29, and Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraphs 24 and 25.

Conclusion

95. I therefore suggest that, in answer to the questions referred by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, the Court should rule as follows:

'(1) Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, requires that environmental NGOs wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right should be permitted to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals.

(2) In the absence of full implementation into national law, an environmental NGO is entitled to rely directly on the provisions of Article 10a of Directive 85/337/EEC, as amended by Directive 2003/35/EC.'