

# Judicial protection against plans and programmes affecting the environment

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*A backdoor solution to get an answer from Luxembourg*

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## **Abstract**

Despite the importance of access to justice in the context of plans and programmes affecting the environment, no single EU secondary law measure requires Member States to ensure effective judicial protection against such acts, and thus access to the preliminary reference procedure. At national level, this could lead to the absence of procedures to ensure effective judicial protection against plans and programmes. The Netherlands is used in this contribution as an example of the presence of such a lacuna. We argue that the lack of effective judicial protection against plans and programmes affecting the environment is in breach of both the Aarhus Convention and EU law. The duty to reconsider definitive acts, as established under the case law of the Court of Justice of the European Union, can serve as a short-term solution to offer effective judicial protection by the backdoor.

## **Keywords**

Access to justice – Aarhus Convention – plans and programmes – preliminary procedure – effective judicial protection – duty to reconsider definitive acts

## **1. Introduction**

This special issue of JEEPL focuses on the functioning of Article 267 of the Treaty on the Functioning of the European Union (TFEU) as an instrument for the enforcement of EU environmental law. One of the key features of the preliminary reference procedure regulated under this provision is the cooperation between the Court of Justice of the European Union (CJEU) and the national courts. A prerequisite for the functioning of this cooperation is the availability of procedures for acceding a court at national level. In the field of environmental

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law, access to justice in environmental matters is one of the pillars of the Aarhus Convention.<sup>2</sup> This Convention needs little introduction as it has already been the topic of many publications in this journal.<sup>3</sup>

The most important provision of the Convention about access to justice is Article 9 thereof. This provision prescribes three procedures which the parties to the Convention must implement in their legal orders. Article 9(1) requires procedures to challenge denials of the right to information. Article 9(2) requires the establishment of procedures to challenge, at least, the specific acts covered under Article 6 of the Convention. Finally, Article 9(3) requires the establishment of procedures to challenge acts or omissions of private and public bodies contravening national and EU environmental law, other than those covered by Article 9(1) and 9(2) of the Convention. As regards the European Union and its Member States, which are the Convention Parties forming the focal point of this article, there is little doubt that compliance with the third of the procedures prescribed under Article 9 of the Convention is the most problematic one.<sup>4</sup>

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<sup>2</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998, Treaty Series, vol. 2161, p. 447.

<sup>3</sup> *J. Wates*, The Aarhus Convention: a Driving Force for Environmental Democracy, JEEPL 2005 (2), pp. 2-11; *J. Jendroska*, Aarhus Convention and Community Law: the Interplay, JEEPL 2005 (2), pp. 12-21; *M. Dross*, Access to Justice in EU Member States, JEEPL 2005(2), pp. 22-30; *V. Koester*, Review of Compliance under the Aarhus Convention: a Rather Unique Compliance Mechanism, JEEPL 2005 (2), pp. 31-44; *V. Molaschi*, Standing to Sue of Environmental Groups in Italy and in the United States of America, JEEPL 2006 (1), pp. 52-68; *V. Ni*, The Aarhus Convention: A Basis for Reforming the Legislation on Access to Environmental Information in Kazakhstan, JEEPL 2007 (4), pp. 289-295; *M. von Unger*, Access to EU Documents: An End at Last to the Authorship Rule?, JEEPL 2007 (6), pp. 440-448; *H. Unnerstall*, Public Participation in the Establishment and Management of the Natura 2000 Network. Legal Framework and Administrative Practices in Selected Member States, JEEPL 2008 (1), pp. 35-68; *R. Macrory*, Public Consultation and GMO Policy. A Very British Experiment, JEEPL 2008 (1), pp. 97-109; *J. Jendroska*, Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention, JEEPL 2009 (4), pp. 495-515; *C. Herman*, Lisbon and Access to Justice for Environmental NGOs: A Watershed?, JEEPL 2010 (4), pp. 391-410; *Th Schomerus & D Bünger*, Private Bodies as Public Authorities under International, European, English and German Environmental Information Laws, JEEPL 2011 (1), pp. 62-81; *J. Jendroska*, Aarhus Convention Compliance Committee: Origins, Status and Activities, JEEPL 2011 (8), pp. 301-314; *B.W. Wegener*, European Right of Action for Environmental NGOs, JEEPL 2011 (4), pp. 315-328; *J. Jendroska*, Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice, JEEPL 2012 (1), pp. 71-90; *Y. Epstein & J. Darpö*, The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law, JEEPL 2013 (3), pp. 250-261; *S. Benvenuti*, Access to Justice in Environmental Matters, JEEPL 2014 (2), pp. 163-182; *A. Epiney & B. Pirker*, The Case Law of the European Court of Justice on Access to Justice in the Aarhus Convention and Its Implications for Switzerland, JEEPL 2014 (4), pp. 348-366; *J. Darpö*, Article 9.2 of the Aarhus Convention and EU Law, JEEPL 2014 (4), pp. 367-391; *E. Fasoli*, The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System, JEEPL 2016 (1), pp. 64-81.

<sup>4</sup> *Jendroska* 2012, *supra* note 3 at pp. 76-78; *Dross supra* note 3.

The European Union has not passed legislation to implement Article 9(3) of the Convention, nor in the context of actions against EU measures, nor in the context of actions against national measures.<sup>5</sup> This contribution focuses on the lack of EU requirements concerning judicial protection against one of the acts, that, as further discussed below, falls under the scope of application of Article 9(3) of the Convention, namely plan and programmes, at national level. More specifically, we focus on plans and programmes setting a regulatory framework, rather than policy lines.<sup>6</sup> The focus on this specific kind of acts is due to the fact that they are required in many EU measures and, at least in some Member States, there is a growing wish to rely on what has been called a 'programmatic approach'.<sup>7</sup> Under the strictest form of programmatic approach, a programme of measures or a plan is not only the main instrument to achieve EU goals. Plans and programmes also have a delinking effect. With delinking effect, it is referred to the fact that individuals cannot rely on the limit values or quality standards set out under the EU measure at hand to challenge in court specific decisions adopted in light of a plan or programme.<sup>8</sup> Judicial protection against the plan or programme as such is thus crucial to achieve the goals of the Convention. Besides, even when it is still possible to challenge specific decisions in light of limit values or quality standards, thus when a plan or programme does not have a delinking effect, the possibility to challenge a plan or programme is vital to ensure that environmental harm is prevented at source, or in any case, as soon as possible.

Despite the importance of access to justice in the context of plans and programmes for the management of the environment, no single EU secondary law measure requires the Member States to ensure judicial protection against such acts, not even those EU measures that require the Member States to adopt plans and programmes, as means to achieve, rather than formulate, (general) environmental objectives.<sup>9</sup> It seems that the existence of an obligation to

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<sup>5</sup> The Commission proposal aiming at partial implementation of this provision, COM(2003) 624 final, has been withdrawn OJ [2014] C153/3. See also *M. Eliantonio*, *Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?*, *Legal Issues of Economic Integration* 2014 (3), pp. 257-274.

<sup>6</sup> See the second and third kinds of plans and programmes covered by *L. Squintani & H.F.M.W. van Rijswijk*, *Improving Legal Certainty and Adaptability under the Programmatic Approach*, *JEL* 2016 (3), DOI:10/1093/jel/eqw022.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> E.g. Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1; Directive 2001/81/EC of 23 October 2001 on national emission ceilings for certain atmospheric pollutants [2001] OJ L309/22; Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1; and Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes

ensure access to justice in the context of plans and programmes having a regulatory nature is not recognized by the EU legislature, as well as by some scholars.<sup>10</sup> Only Article 19(1) of the Treaty on European Union (TEU) and the principles of equivalence and effectiveness, as well as the principle of effective judicial protection,<sup>11</sup> in the context of procedural autonomy provide a general framework under which Member States must ensure effective legal protection in the fields covered by Union law.<sup>12</sup> As further explained below, this general legal framework does not prevent Member States, such as the Netherlands, to impede, or at least render excessively burdensome, to challenge plans and programmes affecting the environment in court. This means that the European Union and, at least some of its Member States, are not in compliance with the Aarhus Convention on this issue. Similarly, they are not in compliance with Article 19(1) TEU, especially when considered in conjunction with the Aarhus Convention and the many EU measures requiring the adoption of plans and programmes with a regulatory nature. While in Germany the government seems willing to change this situation,<sup>13</sup> at EU level and in the Netherlands, this is not the case.

Accordingly, this contribution aims first at highlighting the presence of a duty to ensure effective judicial protection against plans and programmes affecting the environment (section 2). Second, by focusing on the Netherlands, it aims at showing that at national level there can be cases in which this duty is breached (Section 3). Third, it aims at showing how the normative framework deriving from Article 19(1) TEU and the case law of the Court of Justices in the field of procedural autonomy can be used to put pressure on the Member States about the need of passing legislation ensuring effective judicial protection against plans and programmes affecting the environment (Section 4). More precisely, this contribution argues

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relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

<sup>10</sup> In particular, *Jendroska* 2009, *supra* note 3 at p. 501 and *J. Jendroska*, Public Participation in Environmental Decision-Making, in: M. Pallemarts (ed.), *The Aarhus Convention at Ten*, 2011, pp. 91-148.

<sup>11</sup> For a recent overview of the meaning of these norms see *R. Ortlep & R.J.G.M. Widdershoven*, Judicial Protection, in: J.H. Jans, S. Prechal, & R.J.G.M. Widdershoven, *Europeanisation of Public Law*, 2015, pp. 333-433.

<sup>12</sup> Access to national judges has to be guaranteed under Article 19(1) TEU with regard to national legislation which falls within the scope of EU law, with the possibility of preliminary reference (Article 267 TFEU). Together with the restricted access to justice at EU-level (Article 263(4) TFEU), the principle of effective judicial protection, codified in Article 47 of the EU Charter, is assured. On the relationship between Article 19(1) TEU and Article 47 EU Charter as regards judicial protection see *S. Prechal*, *Europeanisation of National Administrative Law*, in: J.H. Jans, S. Prechal, & R.J.G.M. Widdershoven, *Europeanisation of Public Law*, 2015, pp. 39-72, at 53-58; and *Ortlep & Widdershoven*, *supra* note 11.

<sup>13</sup> Draft Bill of the Federal Government Alining the Law on Judicial Review in Environmental Matters (Umwelt-Rechtsbehelfsgesetz) and other Acts to International and EU law (Entwurf eines Gesetzes zur Anpassung des Umwelt-Rechtsbehelfsgesetzes und anderer Vorschriften an europa- und völkerrechtliche Vorgaben); BR 12 August 2016, BR-Drucksache 422/16 and BT 5 September 2016, BT-Drucksache 18/9526.

that the case law of the Court of Justice concerning the duty to reconsider definitive acts, *i.e.* those acts which have acquired the status of *res judicata*, can serve as a means of to force the review of a plan or programme affecting the environment from a backdoor.<sup>14</sup> This would allow judicial litigation,<sup>15</sup> which, as seen in the Netherlands with the *Urgenda* case,<sup>16</sup> can serve as a catalyst of regulatory reforms.<sup>17</sup>

## 2. Judicial protection in the context of plans and programmes: A normative framework

Judicial protection in the context of plans and programmes under EU law partially stems from the Aarhus Convention. This Convention is a so-called ‘mixed agreement’,<sup>18</sup> as both the Member States and the European Union are parties to the Convention. Under the EU hierarchy of norms, the provisions of the Convention rank higher than secondary law, but lower than the Treaties.<sup>19</sup> For the Member States this means that the provisions of the Convention create their effects in legal orders of the Member States via the medium of EU law.<sup>20</sup> Hence, the provisions of the Convention have primacy over conflicting national rules.<sup>21</sup> Primacy does not only apply to those provisions of the Convention which have been

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<sup>14</sup> *Ortlep & Widdershoven*, *supra* note 11.

<sup>15</sup> See e.g., *M. Adebawale*, *Using the Law: Access to Environmental Justice, Barriers and Opportunities*, 2004; accessible at <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexBEJUsingtheLaw009Capacity04.pdf>; *R.L. Rabin*, *Lawyers for Social Change: Perspectives on Public Interest Law*, *Stanford Law Review* 1976 (2), pp. 207-261; *L. Krämer*, *Public Interest Litigation in Environmental Matters before European Courts*, *JEL* 1996 (1), pp. 1-18; *Ch. Schall*, *Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?*, *JEL* 2008 (3), pp. 417-453;

<sup>16</sup> The Hague District Court (Rb. Den Haag) 24 juni 2015, ECLI:NL:RBDHA:2015:7145. For English language literature on this case see *K.J. de Graaf & J.H. Jans*, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, *JEL*, 2015 (3), pp. 517-527; *A.S. Tabau & Ch. Cournil*, *New Perspectives for Climate Justice: District Court of The Hague, 24 June 2015, Urgenda Foundation versus the Netherlands*, *JEEPL* 2015 (3-4), pp. 221-240; *L. Bergkamp*, *A Dutch Court’s ‘Revolutionary’ Climate Policy Judgment: The Perversion of Judicial Power, the State’s Duties of Care, and Science*, *JEEPL* 2015 (3-4), pp. 241-263; and *M.A. Loth*, *Climate Change Liability After All: A Dutch Landmark Case*, *Tilburg Law Review* 2016, pp. 5-30.

<sup>17</sup> In reaction to this judgment, the Dutch Parliament prescribed the government to reform its action on climate change mitigation, *Proceedings of the Second Chamber of the States General Kamerstukken II* 2015/16, 32 813, nr. 115.

<sup>18</sup> On mixed agreement see, e.g. *J.H. Jans & H.H.B. Vedder*, *European Environmental Law*, 2012, pp. 71-74; *E. Hey & H.F.M.W. van Rijswijk*, *Transnational watermanagement*, in: O. Jansen & B. Schöndorf-Haubold (eds), *The European Composite Administration*, 2011, p. 240. See also *J.M.I.J. Zijlmans*, *De doorwerking van natuurbeschermingsverdragen in de Europese en Nederlandse rechtsorde*, 2011, p. 46 and *Ch.W. Backes*, *Slovaakse bruine beren, Frans parfum en Duitse medicijnen. Hoe de Nederlandse bestuursrechter met internationaal recht omgaat dat deel uitmaakt van de Europese rechtsorde*, *Jurisprudentie Bestuursrecht Plus*, 2013 (4), pp. 174-191.

<sup>19</sup> Article 216(2) TFEU. See also Case 104/81, *Kupferberg*, ECLI:EU:C:1982:362; and Case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, paras. 35 and 36.

<sup>20</sup> E.g. *Zijlmans*, *supra* note 18 at p. 45.

<sup>21</sup> *Id.*, p. 49.

translated into EU provisions embedded into EU secondary law. It also applies to those provisions which have not yet been implemented by the EU legislator,<sup>22</sup> such as Article 9(3) of the Convention, which is the focal point of this article. Article 9(3), as integrated by Article 9(4), of the Convention states:

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Despite their binding force, these provisions leave considerable discretion to the European Union and its Member States about how to regulate several aspects of the judicial protection procedures, such as *locus standi*, costs and burden of proof.<sup>23</sup> Such a discretionary power is limited by the goal of the Convention as set out in its Article 1, 2 and 3,<sup>24</sup> namely that “*effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.*”<sup>25</sup> This benchmark is applied by taking into consideration the whole system of judicial protection envisaged in a legal order. According to the Aarhus Convention Compliance Committee (ACCC) the concept of ‘whole system’ means looking at the ‘general picture’ which, in the words of the ACCC, “[...] *includes both the legislative framework of the Party concerned concerning access to justice in environmental matters, and its application in practice by the courts.*”<sup>26</sup> This means that Article 9(3) of the Convention can be implemented by means of private law

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<sup>22</sup> See Case C-240/09, *Lesoochránárske Zoskupenie VLK*, ECLI:EU:C:2011:125 (hereafter: *Zoskupenie*).

<sup>23</sup> For an overview of the requirements concerning these elements of judicial protection, see *A. Andrusevych, S. Kern* (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2014)*, 3rd Edition 2016, pp. 101-140. E.g. access to justice under Article 9(3) of the Convention must be the rule and not the exception, see Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 36.

<sup>24</sup> Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 34.

<sup>25</sup> Preamble to the Convention para. 18; as applied in e.g. Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, 11 January 2013, para. 52 and Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, para. 64.

<sup>26</sup> E.g. Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, para. 64.

procedures, public law procedures or criminal law procedures, as well as a combination of these systems.<sup>27</sup> The letter of the law is not enough to establish the general picture. It is also necessary to look at judicial practice. In the words of the ACCC: “*the Committee does not only examine whether the Party concerned has literally transposed the wording of the Convention into national legislation, but also considers practice, as shown through relevant case law. [...] If the relevant national provisions can be interpreted in compliance with the Convention’s requirements, the Committee considers whether the evidence submitted to it demonstrates that the practice of the courts of the Party concerned indeed follows this approach. If it does not, the Committee may conclude that the Party concerned fails to comply with the Convention.*”<sup>28</sup> In order to comply with Article 9(3) of the Convention, the European Union and its Member States must ensure that the procedures envisaged to implement the Convention are effective. This requirement, which stems in particular from Article 9(4) of the Convention, means that judicial protection procedures can indeed offer a solution for the problem at hand.<sup>29</sup>

Environmental Non-Governmental Organizations (ENGOS) have a special status under the Convention provisions on judicial protection.<sup>30</sup> This special role does not concern only Article 9(2) of the Convention, which regulates the *locus standi* of ENGOS explicitly.<sup>31</sup> Also under Article 9(3) of the Convention, ENGOS are among the members of the public that must be able to have access to court. In the words of the ACCC: “[...] *If, on the other hand, due to the criteria of a direct and subjective interest for the person, no member of the public may be in a position to challenge such acts or omissions, this is too strict to provide for access to justice in accordance with the Convention. This is also the case if, for the same reasons, no environmental organization is able to meet the criteria set by the Council of State.*”<sup>32</sup> As we

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<sup>27</sup> See Denmark ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, 29 April 2008, para. 32

<sup>28</sup> See Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014, para. 65.

<sup>29</sup> E.g. United Kingdom ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3, December 2010, para. 125.

<sup>30</sup> E.g. *Jendroska* 2005, *supra* note 3 at p. 18;

<sup>31</sup> Article 9(2) of the Convention states: “[...]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 organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.”

<sup>32</sup> See Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 39.

can see, under the Convention, there must be at least some ENGOs that are able to obtain judicial protection.<sup>33</sup>

It should be noted that the scope of application of Article 9(3) of the Convention is especially relevant for plans and programmes. The concept of plans and programmes is not defined by the Convention. It should be interpreted broadly,<sup>34</sup> but it does not cover specific decisions which are already covered by Article 6 of the Convention. As regards judicial protection against plans and programmes, Article 9(2) of the Convention only covers judicial protection in the context of specific decisions adopted under Article 6 of the Convention. The Convention Parties can choose to extend the legal regime of Article 9(2) of the Convention so as to cover other acts than those falling under Article 6. Yet, this is only an option and not an obligation. Using this option would amount to gold-plating, a practice which is always more rejected by the Member States.<sup>35</sup> If the European Union and its Member States do not implement this option, acts other than those covered by Article 6 of the Convention fall under the regime envisaged by Article 9(3).<sup>36</sup> This means that, by default, judicial protection in the context of plans and programmes, which are regulated by Article 7 of the Convention, falls under Article 9(3) of the Convention.

The existence of a duty to ensure effective judicial protection against plans and programmes has been refuted in the literature based on the vague wording used under Article 9(3) of the Convention.<sup>37</sup> In our opinion, the presence of a discretionary power does not mean that there is not an obligation to ensure effective judicial protection against plans and programmes. Article 9(3) of the Convention refers to ‘acts of public authorities’ without further defining this concept. There is little doubt that plans and programmes are ‘acts of public authorities’.

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<sup>33</sup> Similarly *Epiney & Pirker*, *supra* note 3 at p. 361 who relied on the *Zoskopenie* case for their conclusion. This does not mean that ENGOs should have unrestricted standing. On the meaning of wide access to justice for ENGOs see *E.J. Lohse*, Unrestricted access to justice for environmental NGOs? The decision of the ECJ on the non-conformity of § 2(1) Umweltrechtsbehelfsgesetz with Directive 2003/35 on access to justice in environmental law and the Aarhus Convention (C-115/09), *ELNI Review* 2011 (2), pp. 96-103.

<sup>34</sup> On the interpretation of this concept, see *Jendroska* 2009, *supra* note 3.

<sup>35</sup> On this concept, *L. Squintani*, Gold-plating of European Environmental Law (PhD thesis, University of Groningen) 2013; *H.T. Anker et al.*, Coping with EU environmental legislation: transposition principles and practices, *JEL* 2015 (1), p. 17; *J.H. Jans, L. Squintani with others*, ‘Gold Plating’ of European Environmental Measures?, *JEEPL* 2009 (4), pp. 417, 418.

<sup>36</sup> See *United Nations Economic Commission for Europe*, *The Aarhus Convention: An implementation guide*, second edition 2014, p. 173 & 193. See also Armenia, ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, paras. 28-38. See also *J. Jendroska & S. Stec*, *The Aarhus Convention: Towards a New Era in Environmental Democracy*, *Environmental Liability Journal*, 2006 (5), p. 150 and *H. Lang*, *Public Participation in Environmental Decision-Making in China*, (diss.) 2014, p. 73.

<sup>37</sup> In particular, *Jendroska* 2009, *supra* note 3 at p. 501 and *Jendroska* 2011, *supra* note 10 at pp. 91-148.



Accordingly, the letter of Article 9(3) of the Convention points towards the existence of such a duty. The ACCC practice points into the same direction as shown by *Belgium* case first, in which the ACCC stated “Based on the information received from the Party concerned and the Communicant, the Committee understands that decisions concerning area plans (“*plan de secteur*”) do not have such legal functions or effects as to qualify as decisions on whether to permit a specific activity. Therefore, article 9, paragraph 3, is the correct provision to review Belgian law on access to justice with respect to area plans, as provided for in Walloon legislation.”.<sup>38</sup> So far these cases have been dealing with spatial plans. Yet, the approach introduced in the *Belgium* case shows the ACCC conviction that all acts not covered by Article 9(2) of the Convention are covered by Article 9(3) of the Convention. This would include also plans and programmes other than spatial plans, at least to the extent that they are of regulatory nature, rather than a policy-making nature.<sup>39</sup> The interpretation followed by the ACCC in these judgments is not only in line with the letter of Article 9(3) of the Convention, but also with the fact that judicial protection plays a crucial role in ensuring the effectiveness of public participation,<sup>40</sup> including public participation in the context of plans and programmes. Without effective judicial protection against plans and programmes, the obligation to provide for public participation in the context of plans and programmes established under Article 7 would be deprived of (part of) its normative force. Member States could breach Article 7 without individuals being able to defend their right to participate in the decision-making process of plans and programmes. Finally, the inclusion of the review of plans and programmes under Article 9(3) of the Convention enhances the possibility to achieve the main goal of the Convention, *i.e.* that people can enjoy their right to a healthy

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<sup>38</sup> See *Belgium*, ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 31. This approach was confirmed in *Armenia*, ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, paras. 28-38. See also *Czech Republic* ACCC/C/2010/50; para. 85 and *Bulgaria* ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, paras. 66 and 83.

<sup>39</sup> The German government recently proposed a bill going in this direction as well, *supra* note 13. This bill is proposed following Decision V/9h of the Meeting of the Parties to the Aarhus Convention, [http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9h\\_Germany/Decision\\_V9h.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9h_Germany/Decision_V9h.pdf) and Case C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683. According to the government, for implementation of Article 9(3) of the Aarhus Convention the possibility for judicial review is extended to decisions on the adoption of plans and programs which may be subject to a strategic environmental assessment, thus not only to decisions which are subject to an environmental impact assessment which is covered by Article 9(2) of the Aarhus Convention, see BT 5 September 2016, BT-Drucksache 18/9526, p. 23 *et seq.*

<sup>40</sup> See *United Nations Economic Commission for Europe* 2014, *supra* note 36 at p. 187; *Lang*, *supra* note 36 at Chapter 3; and *J. Jendroška*, Public Participation under Article 6 of the Aarhus Convention: Role in Tiered Decision-Making and Scope of Application, in: G. Bándi (ed.), *Environmental Democracy and Law. Public Participation in Europe*, 2014, pp. 113-138; *E.J.H. Plambeck*, Paradoxes of the EU Regulatory Framework in Water Management: Developing an Assessment Framework to put the Governance Approach to the Test, *Water Law* 2015 (5-6), pp. 272-280.

environment. Indeed, plans and programmes precede specific acts in the chain of administrative actions. In light of the prevention principle and the at-source principle, plans and programmes affecting the environment should be reviewable as such without the need to wait for their implementation by means of specific acts by public authorities. This finding is even more valid in those cases in which no further act by public authority is needed.<sup>41</sup>

Similarly to the ACCC, the Court of Justice interprets the Aarhus Convention in a teleological manner.<sup>42</sup> Following a teleological interpretation, in the *Zoskupenie* case the Court of Justice has already established, that, differently from what generally considered, Article 9(3) of the Convention does not only cover breaches of national environmental law, but also breaches of EU environmental law.<sup>43</sup> It can accordingly be expected that the Court of Justice will follow the interpretation provided above and hence reach a conclusion as regards the linkage between Article 9(3) of the Convention and plans and programmes similar to the conclusion provided by the ACCC in the *Belgium* case.

### **3. The lack of judicial protection as regards plans and programmes at EU and national level**

Being part to the Aarhus Convention, the European Union should ensure that effective judicial protection against plans and programmes affecting the environment is guaranteed at both EU and national level. As this contribution focuses on judicial protection as a prerequisite for the functioning of the preliminary reference procedure, after an overview of how EU law harmonizes national provisions on judicial protection against plans and programmes affecting the environment (section 3.1), section 3.2 shows that at national level there could be cases in which no effective judicial protection is available. The Netherlands is used as a case study to this prove this point.

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<sup>41</sup> For the existence of these kinds of situations, see *E.J.H. Plambeek, L. Squintani & H.F.M.W. van Rijswijk*, Towards more effective protection of water resources in Europe by improving the implementation of the Water Framework Directive and the Aarhus Convention in the Netherlands, in: L. Maljean-Dubois (ed.), *The effectiveness of environmental law*, 2016 (forthcoming), in which reference is made to the use of plans in combination with general binding rules to regulate human activities falling under the scope of application of the Water Framework Directive.

<sup>42</sup> E.g. *Zoskupenie* case. See also *C. Poncelet*, Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?, *JEL* 2012 (2), pp. 287-309, at 294 with further references.

<sup>43</sup> See *B. Müller*, Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law, *JEL* 2011 (3), p. 505, 515; *J. Ebbesson*, Access to Justice at the National Level. Impact of the Aarhus Convention and European Union Law, in: M. Pallemarts (ed.), *The Aarhus Convention at Ten*, 2011, p. 245, 264. See also the ACCC ruling in Denmark ACCC/C/2006/18, 29 April 2008, para. 27.

### 3.1 The lack of harmonization as regards judicial protection against plans and programmes affecting the environment

The European Union has adopted legislation to implement the Aarhus Convention.<sup>44</sup> Yet, it seems that the EU secondary law framework is not enough to guarantee fulfillment with Article 9(3) of the Convention in the context of plans and programmes.<sup>45</sup> There is not a single provision in the pieces of EU legislation implementing, explicitly or implicitly, the Convention which refers to a duty of ensuring effective judicial protection in the context of plans and programmes. As stated in the introduction to this contribution, in none of the Directives prescribing the use of plans and programmes with a regulatory nature, there is trace of such an obligation. Not even the Special Environmental Assessment Directive regulates judicial protection as regards plans and programmes.<sup>46</sup>

Only in the field of air quality, the Court of Justice has pointed at the presence of such a duty. In the *Janecek* case,<sup>47</sup> the Court of Justice has concluded that under the Air Framework Directive,<sup>48</sup> today repealed by the Air Quality Directive, peoples directly affected by bad air quality must be able to accede a court of law to challenge the (lack of) a plan to improve air quality. The same duty was reaffirmed in the *RWE* case concerning the NEC Directive.<sup>49</sup> Yet, it is unclear what the Court of Justice means with this duty and whether a similar duty applies in all others cases in which the EU legislator requires the Member States to adopt plans and programmes to achieve an environmental goal. According to Ebbesson, there is no indication that access to justice is only required under air quality law.<sup>50</sup> According to him the case law of

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<sup>44</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; OJ [2003] L41/26; 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] L156/17; and Regulation (EC) N° 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ [2006] L264/13. See also Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage OJ [2004] L143/56.

<sup>45</sup> See also *Ponzelet*, *supra* note 42 at pp. 290-291.

<sup>46</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ [2001] 197/30.

<sup>47</sup> Case C-237/07, *Janecek v Freistaat Bayern*, ECLI:EU:C:2008:447 (*Janecek*).

<sup>48</sup> Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management OJ [1996] L296/55.

<sup>49</sup> Joined cases C-165/09 to C-167/09, *Stichting Natuur en Milieu and others v College van Gedeputeerde Staten van Groningen (C-165/09) and College van Gedeputeerde Staten van Zuid-Holland (C-166/09 and C-167/09)*, ECLI:EU:C:2011:348 (*RWE*), para. 100.

<sup>50</sup> *Ebbesson*, *supra* note 43 at p. 265.

the Court of Justice implies that where rights relating to health and the environment are bestowed to member of the public by Union law, they should also be able to ascertain these rights and rely on them before national courts.<sup>51</sup> Although in light of Article 19(1) TEU we share the merits of this finding, which did not focus on plans and programmes as such, for the purpose of this section, it remains that, so far, the case law of the Court of Justice in the field of air quality law has not had a follow up in other fields of EU environmental law.

This does not mean that the European Union and its Member States do not have to comply with the Convention. Decision 2005/370/EC has made the Convention part of the EU *acquis communautaire*.<sup>52</sup> As mentioned above, this means that the Convention is, in its entirety, binding upon the European Union and its Member States. The Court of Justice recognized the binding force of Article 9(3) of the Convention in the *Zoskupenie* case.<sup>53</sup> In this case, the Court of Justice required the national courts to interpret national law as far as possible in conformity with Article 9(3) of the Convention.<sup>54</sup> The existence of such a duty implies that Member States have to implement Article 9(3) of the Convention regardless of whether the EU legislator has adopted specific measures to this extent.<sup>55</sup> This finding is reinforced by the fact that under Article 19(1) TEU Member States must ensure effective legal protection in the fields covered by EU law. The adoption of environmental plans and programmes to comply with those EU environmental measures that require them is a field covered by EU law. Based on the existence of EU secondary law regulating environmental protection, the Court of Justice ruled that judicial protection under Article 9(3) of the Aarhus Convention also falls within the scope of EU law.<sup>56</sup> A conjunctive reading of Article 19(1) TEU and Article 9(3 and 4) of the Aarhus Convention, together with those EU secondary acts prescribing the use of plans and programmes in the environmental field, leaves little doubts about the existence of a duty to ensuring effective judicial protection against plans and programmes affecting the

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<sup>51</sup> *Id.*

<sup>52</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters OJ [2005] L124/1.

<sup>53</sup> See *Zoskupenie* case.

<sup>54</sup> *Id.* para. 51.

<sup>55</sup> This makes clear that those arguments sustaining that by not implementing this provision, Article 9(3) of the Convention would have not been part of the *acquis communautaire* were wrong, see references to this arguments in *Jendroska* 2005, *supra* note 3 at p. 19.

<sup>56</sup> See *Zoskupenie* case, paras 33-37. See also *K. Lenaerts & J.A. Gutiérrez-Fons*, The General System of EU Environmental Law Enforcement, *Yearbook of European Law*, 2011 (1) p. 3, 33 et seq.

environment.<sup>57</sup> Still, as discussed in the next section, not all Member States seem to be aware of such a duty.

### 3.2 Judicial protection against plans and programmes in the Netherlands

As discussed in the previous sections, although EU secondary law does not prescribe to ensure effective judicial protection in the context of plans and programmes affecting the environment, Member States still have to implement Article 9(3 and 4) of the Convention.<sup>58</sup> They also have to ensure compliance with Article 19(1) TEU. This section argues that this is not what happens in the Netherlands, as regards certain plans and programmes having regulatory nature.

This is for example the case for plans and programmes in the context of water management and air quality law, despite the fact that they can have a delinking effect.<sup>59</sup> From a public law perspective, the main rule concerning plans and programmes made by competent authorities is that they are not meant to create legal effects *vis-à-vis* third private parties. They are only binding upon the public authorities that has made them or authorities at decentralized levels. Also a review by the public authorities themselves is precluded. This is because plans and programmes are adopted by means of a special procedure against which no administrative review is possible.<sup>60</sup> Hence, no judicial protection is provided under administrative law, nor for private persons, neither for ENGOs, in the context of plans and programmes about water management and air quality law.<sup>61</sup> Differently, it is possible to challenge a land use plan under administrative law.<sup>62</sup>

In some cases it is possible to challenge a plan or programme in the context of water management indirectly in case there is a decision taken based on such a plan or programme. The plan or programme is then marginally assessed together with the decision based on it.

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<sup>57</sup> Similarly, *Lenaerts & Gutiérrez-Fons*, *supra* note 56 at p. 35-36.

<sup>58</sup> The absence of direct effect of this provision does not affect the existence of the obligation to implement fully this provision of the Convention, see *Zoskupenie* case; and for The Netherlands see Dutch Council of State (ABRvS) 29 July 2011, ECLI:NL:RVS:2011:BR4025.

<sup>59</sup> On the possibility of having a delinking effect, *Squintani & Van Rijswijk*, *supra* note 7.

<sup>60</sup> This procedure is called ‘uniforme openbare voorbereidingsprocedure’ and is regulated under Title 3.4 of the GALA.

<sup>61</sup> See e.g. Article 8:5 j° Article 1, Appendix 2, of the GALA with regard to air quality plans (Air Quality Directive), and water plans (Water Framework Directive). Recently on a water plan, see Dutch Council of State (ABRvS) 27 January 2016, ECLI:NL:RVS:2016:152, AB 2016/238 with note of E.J.H. Plambeck.

<sup>62</sup> The land use plan, however, is not a plan in the sense of many EU directives, but consists of allocation of zones for land use and general rules applicable in those zones. Access to justice in first and last instance by the Dutch Council of State is laid down in Article 8:6, first paragraph, j° Article 2, Appendix 2, of the GALA.

According to the Dutch Council of State, if (part of) a plan or programme is in conflict with higher legal rules or principles it shall be set aside in that specific case.<sup>63</sup> The plan and programme remains in force for the other cases. It is questionable whether this kind of review is effective.<sup>64</sup> It is also not in compliance with the requirement in Article 9(3 and 4) of the Convention for challenging a plan or programme itself.

Judicial protection via criminal law procedures is also excluded in the context of plans and programmes. This is because the adoption of plans and programmes is an exclusive power of public authorities. Under Dutch criminal law, public authorities are immune from criminal persecution when they exercise exclusive competences.<sup>65</sup>

In order to review the ‘general picture’ of judicial protection in environmental matters in the Netherlands, it is important to notice that under Dutch civil law it is possible to challenge plans and programmes affecting the environment.<sup>66</sup> The question is, however, whether civil law procedures offer an effective possibility to challenge plans and programmes affecting the environment.<sup>67</sup> To this extent, it should be noticed, that during the implementation of the Water Framework Directive, the Dutch Council of State<sup>68</sup> advised the Dutch government to amend its administrative law procedure in order to allow judicial protection against plans and programmes implementing the Water Framework Directive before the administrative courts. According to the Council of State, Dutch civil law procedures, which are based on tort law, do

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<sup>63</sup> See e.g. Dutch Council of State (ABRvS) 2 July 2014, ECLI:NL:RVS:2014:2435.

<sup>64</sup> *E.M.H. Hirsch Ballin*, *Dynamiek in de bestuursrechtspraak*, in: *Rechtsontwikkeling door de bestuursrechter* (preadviezen VAR), 2015, pp. 7-58; *L. van den Berge*, *Bestuursrecht tussen autonomie en verhouding. Naar een relationeel bestuursrecht* (diss.), 2016, pp. 271-302.

<sup>65</sup> See Article 51 of the of the Dutch Criminal Law Code, as interpreted by the Dutch Supreme Court (Hoge Raad) in the *Pikmeer II* arrest of 6 January 1998, ECLI:NL:HR:1998:AA9342 and in Dutch Supreme Court (Hoge Raad) 25 January 1994, ECLI:NL:HR:1994:ZC9616. For an overview of this legal norm see *A.P.W. Dijkersloot & A.R. Hartmann*, *De aansprakelijkheid van de overheid: een overspannen constructie bij bestrafing? Strafrechtelijke en bestuursrechtelijke aansprakelijkheid van de overheid*, in: L.F.M. Besselink en R. Nehmelman, *De aangesproken staat*, 2009, pp. 71-116.

<sup>66</sup> The Dutch Council of State explicitly refers to this kind of procedure when it declares itself unauthorised to review a plan, or even to declare whether a plan has to be drafted, see e.g. Dutch Council of State (ABRvS) 31 March 2010, ECLI:NL:RVS:2010:BL9651, where it concludes that it is not contrary to *Janecek* case and the EU principle of effective judicial protection to have only access to justice before a civil judge with regard to an air quality plan.

<sup>67</sup> The Dutch Council of State holds that civil law procedures provides for effective judicial protection, as they cannot be seen as unfair, unequitable, not timely and prohibitively expensive, e.g. Dutch Council of State (ABRvS) 29 July 2011, ECLI:NL:RVS:2011:BR4025 and Dutch Council of State (ABRvS) 7 December 2011, ECLI:NL:RVS:2011:BU7093. The Council of State, however, does not focus on whether the procedure is adequate and effective in the terms of Article 9(4) of the Convention, as we do in this contribution.

<sup>68</sup> As is the case in France and Belgium, the Dutch Council of State has two different tasks. At the one hand it is an advisory body on legislation, and on the other hand the highest general administrative court. Currently, these functions were carried out by two separate divisions. In this sentence and the remaining part of this paragraph, by the Council of State, the Advisory Division is meant.

not offer an appropriate alternative for the lack of judicial protection before the administrative courts.<sup>69</sup> The Dutch government did not disagree with the Council of State on this point, but it considered that an act of parliament was needed to pursue the reform advised by the Council of State.<sup>70</sup> Having the advice been given in the context of a procedure for the adoption of an order in council, the Government was not in the possibility to take over the advice of the Council of State right away. Almost a decade has passed since this discussion, but the act of parliament to reform Dutch administrative law as regards judicial protection against plans and programmes in environmental matters has not been proposed yet. The government does not seem intentioned to propose such an act any soon.

This is a pity since, as discussed here, civil law procedures are not adequate an effective in affording effective judicial protection against plans and programmes affecting the environment. Other authors have already criticized Dutch civil law procedures as a means to enforce environmental standards in general.<sup>71</sup> Three main shortcomings can be highlighted.

First, judicial protection via a civil law procedure can jeopardize the principle of separation of powers, thus *trias politica*. Plans and programmes operationalize policy lines. The more generally formulated plans and programmes are, the more difficult it is to justify a review by a civil law court in the absence of explicitly coverage provided by law. This problematic issue has been widely debated in the post-*Urgenda*-literature.<sup>72</sup> As already discussed in this journal,<sup>73</sup> this case concerns a (at the moment) successful action based on tort law started by an ENGO against the Dutch State, which was accused to have not done enough to reduce CO<sub>2</sub> emissions in the Netherlands. So far, no action based on tort law has been launched in the Netherlands to challenge a plan or programme in the field of environmental protection. No

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<sup>69</sup> Additional Explanatory Note to the Bkmw 2009, appendix to Proceedings of the Second Chamber of the States General *Kamerstukken II* 2009/10, 27 625, nr. 154, p. 7.

<sup>70</sup> *Id.*

<sup>71</sup> See in particular *C.N.J. Kortmann*, *Onrechtmatige overheidsbesluiten*, 2006; *L.F. Wiggers-Rust*, *Belang, belanghebbende en relativiteit in bestuursrecht en privaatrecht*, 2011 with special attention on environmental law. As regards ENGOs, see *United Nations Economic Commission for Europe*, Task Force on Access to Justice, Study on the Possibilities for Non-Governmental Organisations Promoting Environmental Protection to Claim Damages in Relation to the Environment in Four Selected Countries, France, Italy, the Netherlands and Portugal, Unedited informal document, 2015, and *M.G. Faure et al.*, *Milieuaansprakelijkheid goed geregeld?*, 2010, who also focuses on the efficiency of the system and concludes that the system is not efficient.

<sup>72</sup> See The Hague District Court, (Rb. Den Haag) 24 juni 2015, ECLI:NL:RBDHA:2015:7145. See among others *De Graaf & Jans*, *supra* note 16; *Tabau & Cournil*, *supra* note 16; *Bergkamp*, *supra* note 16; *R. Schutgens*, *Enkele staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter*, NJB 2015, p. 2270-2277; Two authors are positive about the judgment, including with regard to the *trias politica*: *R.A.J. van Gestel & M.A. Loth*, *Urgenda: roekeloze rechtspraak of rechtsvinding 3.0?*, NJB 2015/1849; See also *Loth*, *supra* note 16.

<sup>73</sup> *Tabau & Cournil*, *supra* note 72; and *Bergkamp*, *supra* note 72.

discussion concerning justiciability has hence taken place so far about the issue discussed in this contribution. Yet, it cannot be excluded that this discussion would occur if tort law was used to challenge plans and programmes affecting the environment. While the gravity of climate change could justify a reshaping of the manner in which the principle of separation of powers has been shaped in the Netherlands,<sup>74</sup> it is unclear whether in other fields of environmental law such a reshape is justifiable.

The second problem concerns *locus standi* under Sections 6:162 and 3:305a of the Dutch Civil Code, which regulate the actions based on tort law, including those brought by ENGOs. The tort law procedure regulated under Section 6:162 is meant to protect the individual interests of the claimant. This is a limitation when the claimant aims at protecting a general interest such environmental protection. Also ENGOs can rely on Article 6:162 as such only if they aim at protecting their *individual* interest.<sup>75</sup> As well known, environmental interests are not suitable for individualization.<sup>76</sup> ENGOs could also rely on Article 3:305a of the Dutch Civil Code in conjunction with Article 6:162. This would allow ENGOs to defend *collective* interests of other persons.<sup>77</sup> Still, the collective interest of other persons is not the same as a general interest.<sup>78</sup> Collective interests can overlap with general interests, such as the fundamental right to non discrimination,<sup>79</sup> but they are two different interests. For example, nature conservation cannot be reduced to a collective interest,<sup>80</sup> as confirmed by a seminal

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<sup>74</sup> *Van Gestel & Loth, supra* note 72.

<sup>75</sup> As regards ENGOs see Rotterdam District Court (Rb Rotterdam) 15 March 1991, M&R 1991/130 with note of P.A. Kottenhage-Edzes, in which the individual interest concerned the costs for cleaning a beach polluted by a leakage in the Borcea ship. See also *Wiggers-Rust, supra* note 71 at p. 74-78.

<sup>76</sup> See *Wiggers-Rust, supra* note 71 at p. 77 with further references.

<sup>77</sup> The specific environmental interest must be mentioned in the status of the ENGO and the ENGO must undertake activities showing that this interest is pursued in practice, see *Wiggers-Rust, supra* note 71, in particular, at p. 82 with further references. The interest must be suitable for pooling, see Dutch Supreme Court (Hoge Raad) 26 February 2010, ECLI:NL:HR:2010:BK5756. See also The Hague District Court (Rb. Den Haag) 14 September 2011, ECLI:NL:RBSGR:2011:BU3529 and ECLI:NL:RBSGR:2011:BU3538. The interests of future generations can also play a role, Proceedings of the Second Chamber of the States General, *Handelingen II* 28 October 1993, 18-1295, in which the Secretary of State Kosto mentions that Article 3:305a of the Dutch Civil Code can offer redress to environmental damage the effects of which is only noticeable for future generations. See also Opinion delivered by AG Spier in Dutch Supreme Court (Hoge Raad) 8 June 2007, ECLI:NL:HR:2007:BA2075, para. 4.13.3.

<sup>78</sup> See *Wiggers-Rust, supra* note 71 at, p. 79 with reference to Dutch Supreme Court (Hoge Raad) 17 June 1986, ECLI:NL:HR:1986:AD3741 and Dutch Supreme Court (Hoge Raad) 18 December 1992, ECLI:NL:HR:1992:ZC0808. Cf. *Faure et al., supra* note 71 at p. 117, which, however, provides only a brief analysis of Article 3:305a of the Dutch Civil Code and does not provide arguments in favor of the argument that general interest can be protected under this provision.

<sup>79</sup> Dutch Supreme Court (Hoge Raad) 9 April 2010, ECLI:NL:HR:2010:BK4547.

<sup>80</sup> Cf. *United Nations Economic Commission* 2015, *supra* note 71 at p. 57 in which the authors states that, in theory, it is possible to rely on Article 3:305a of the Dutch Civil Code BW in case of 'ecological damage'. In our opinion, this statement is correct only if the authors of this statement include human health under ecological damage. At p. 54, the authors of this report do indeed mention that interests protected under Article 3:305a must



judgment of a Dutch civil court.<sup>81</sup> This case concerns an action brought by an ENGO against Shell in order to block test drillings. The civil court denied to give a ruling on the case as Shell had not acted unlawfully against the ENGO, but against a general interest of environmental protection.<sup>82</sup> This judgment shows the relevance that the relativity principle, regulated under Article 6:163 of the Dutch Civil Code, can have on the effectiveness of Article 3:305a.<sup>83</sup> It can render judicial procedures under this provision ineffective. Moreover, account should be taken with the fact that in an action brought by an ENGO under Article 3:305a of the Dutch Civil Code, only the view that the ENGO adding the court is known to the judge hearing the case. This can be a serious limitation to the possibility to adjudicate claims based on a general interest under Article 3:305a.<sup>84</sup> Judges could be reluctant to adjudicate a claim based on a general interest in the absence of clear societal agreement about the importance of such an interest. It is therefore understandable that civil law cases under Article 3:305a are consistent on requiring that the interest defended by the ENGO must be capable of being pooled.<sup>85</sup>

As not all environmental interests can be pooled, we are of the opinion that there are cases in which not even ENGOs will be able to rely on tort law to challenge the validity of a plan or programme. This is a clear breach of the obligations stemming from the Aarhus Convention, as discussed in section 2. Although an interpretation of Article 3:305a of the Dutch Civil Code in conformity with Article 9(3) of the Aarhus Convention as required in the *Zoskupenie* case does not seem impossible, this is not yet occurred.

The third problem concerning the use of civil law procedures to ensure judicial protection against plans and programmes affecting the environment concerns the effectiveness of the procedure. In the literature, it has already been indicated that an action based on Section

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be capable of being pooled, and refer to this extent to Dutch Supreme Court (Hoge Raad) 26 February 2010, ECLI:NL:HR:2010:BK5756.

<sup>81</sup> See *Wiggers-Rust*, *supra* note 71 at p. 79.

<sup>82</sup> See *Wiggers-Rust*, *supra* note 71 at p. 79, with reference to the relativity principle is private law. This principle is regulated under Article 6:163 of the Dutch Civil Code.

<sup>83</sup> See *L. Enneking & E. de Jong*, *Regulering van onzekere risico's via public interest litigation?*, NJ 2014 (23), p. 1550.

<sup>84</sup> See Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1991/92, 22 486, nr. 3 p. 22. See also Opinion delivered by AG Spier in Dutch Supreme Court (Hoge Raad) 8 June 2007, ECLI:NL:HR:2007:BA2075 para. 4.13.3.

<sup>85</sup> See Dutch Supreme Court (Hoge Raad) 14 June 2002 ECLI:NL:HR:2002:AE2185; Dutch Supreme Court (Hoge Raad) 26 February 2010 ECLI:NL:HR:2010:BK5756; The Hague District Court (Rb. Den Haag) 14 September 2011 ECLI:NL:RBSGR:2011:BU3529 and The Hague District Court (Rb. Den Haag) 14 September 2011 ECLI:NL:RBSGR:2011:3538.

3:305a in order to protect ecological values would only lead to a declaratory or injunctive judgment.<sup>86</sup> Moreover, in the context of plans and programmes the requirement of proving a causal link will most probably make it impossible to successfully rely on tort law. In most of the cases, a plan or programme does not state that a specific action is required. Hence, the damage does not come from the plan, but by the human activity itself. The so-called *toerekenbaarheid criterium* (attributability criterion), which is part of the causal link criterion under Dutch civil law, is hence not fulfilled.<sup>87</sup> Moreover, it cannot be excluded that the environment would have been damaged even if the plan or programme challenged in court was not unlawful. Under Dutch civil law, this means that the *conditio-sine-qua-non* criterion, which is another component of the causal link criterion, is not fulfilled.<sup>88</sup>

In light of the shortcomings highlighted above, we share the view of those authors that consider Dutch tort law as not offering effective judicial protection in the field of environmental law.<sup>89</sup> ENGOs seem to be aware of this. There is indeed very little case law in which they relied on tort law to protect the environment.<sup>90</sup> Even fewer cases concern actions against plans and programmes affecting the environment.<sup>91</sup> Accordingly, there is no judicial practice, either under administrative, criminal or civil law, which would allow the ACCC to conclude that Article 9(3 and 4) of the Convention has been fulfilled by the Netherlands. In conclusion, the Netherlands, and by allowing this the European Union, is in breach of Article 9(3 and 4) of the Aarhus Convention as well as of Article 19(1) TEU. From the perspective of the functioning of preliminary ruling procedure, this breach affects the possibility to activate this procedure.

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<sup>86</sup> See *United Nations Economic Commission for Europe* 2015, *supra* note 71 at p. 58; see also *Faure et al.*, *supra* note 71 at p. 141.

<sup>87</sup> About the attributability criterion, see *L. Di Bella*, *De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad*, 2014, Chapter 3, in particular, pp. 78-82, with further references. See also *L. Di Bella*, *Besluitenaansprakelijkheid en causaal verband*, NALL 2012, April-June. More generally, see, eg *A.S. Hartkamp & C.H. Sieburg*, *Verbindenissenrecht, Deel II Verbindenissen in het algemeen*, tweede gedeelte, 14th edition, 2013, pp. 79-87. Problems concerning the attributability criterion are mentioned also in the literature on the *Urgenda* case, e.g. case note of *Ch.W. Backes*, AB 2015/336 who refers to the multiple causality in the field of climate change.

<sup>88</sup> About this principle see, e.g. *Di Bella* 2014, *supra* note 87 at Chapter 3, in particular, 48-78 and *Kortmann*, *supra* note 71 at p. 7 and 216. Problems with the *conditio-sine-qua-non* are also indicated in the literature on the *Urgenda* case, see e.g. *Bergkamp*, *supra* note 72.

<sup>89</sup> See *United Nations Economic Commission for Europe* 2015, *supra* note 71 at p. 58.

<sup>90</sup> *Id.*, p. 57.

<sup>91</sup> Dutch Supreme Court (HR) 21 March 2003 ECLI:NL:HR:2003:AE8462 (Waterpakt), mainly dealing with the lack of a nitrate action programme. The Supreme Court held that a judge is not allowed to issue an order to the legislature to act. In August 2016, Milieudefensie has started a case based on Article 6:162 j° Article 3:305a of the Dutch Civil Code before the Den Hague District Court (Rb. Ren Haag) against the Dutch State for failure to meet EU air quality standards.

#### 4. The duty to reconsider definitive acts and judicial protection against plans and programmes

In the previous paragraphs we have shown that there are cases, such as in the Netherlands, in which judicial protection against plans and programmes affecting the environment is lacking. There is hence a lacuna in the manner in which Article 9(3 and 4) of the Aarhus Convention is implemented in the European Union and at least some of its Member States. There is also a shortcoming in the manner in which Article 19(1) TEU is pursued at national level. This section argues that the case law of the Court of Justice of the European Union in the context of procedural autonomy, in particular as regards the duty to reconsider definitive acts, can serve to put pressure on the Member States about the need to redress this lacuna. This possibility is illustrated by applying the duty to reconsider definitive acts to the Dutch legal order.

As well known the interpretation that the Court of Justice gives to provisions of EU law does not have a constitutive character *ex nunc*.<sup>92</sup> The Court of Justice interprets EU law as it was meant to be from the moment in which it was established. It is not uncommon that judgments of the Court of Justice shade light about breaches of EU environmental standards brought about by a national plan or programme which have acquired the status of *res judicata* under national law. Such a plan or programme has thus become definitive under national law. It is in this circumstances that the case law of the Court of Justice concerning procedural autonomy is relevant. In particular those judgments about the duty to reconsider a definitive act can provide for a solution to the lack of specific requirements in EU environmental law concerning judicial protection against plans and programmes. Indeed, according to the case law of the Court of Justice in this field, it is possible that national authorities are under a duty to reconsider their decisions, in our case plans and programmes affecting the environment.<sup>93</sup> The presence of a duty to reconsider a definitive act triggers the possibility to challenge the

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<sup>92</sup> See Case C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, ECLI:EU:C:2004:17 (*Kühne & Heitz*), paras. 21 and 22. Still the effects of a judgment can be limited in time, hence apply only for future situations, e.g. Case C-41/11, *Inter-Environnement Wallonie*, ECLI:EU:C:2012:103. See also Case C-379/15, *Association France Nature Environnement*, ECLI:EU:C:2016:603, also available in AB 2016/308, with a note of R. Ortlep. See also *R. van der Hulle & R. van der Hulle*, *Op weg naar een minder strikte toepassing van de voorrangsregel*, SEW 2012/12, pp. 490-501; *H. Schmitz & S. Krasniqi*, *Die Beschränkung der zeitlichen Wirkung von Urteilen in den Mitgliedstaaten der Europäischen Union — ein allgemeiner Rechtsgrundsatz mit Beachtungspflicht des EuGH in Vorlageverfahren*, EuR 2010/2, p. 189-206; *T. Lock*, *Are there exceptions to a Member State's duty to comply with the requirements of a Directive?* *Inter-Environnement Wallonie*, CMLRev 2013, pp. 217-230.

<sup>93</sup> On this issue see, *R. Ortlep*, *De aantasting van stabiele bestuursrechtelijke rechtsvaststellingen in het licht van het Unierecht*, 2011, pp. 447 et seq., including references.

refusal of the reconsideration request before a court. Such a procedure could then serve as a backdoor to gain judicial protection in the context of plans and programmes affecting the environment.

The normative framework for the duty to reconsider a definitive act derives from the principle of sincere cooperation under Article 4(3) TEU, read in conjunction with the principle of procedural autonomy.<sup>94</sup> There is no Treaty provision or another provision of EU law that regulates such a duty. Under the principle of procedural autonomy, this means that Member States are free to regulate the duty of reconsider definitive acts themselves. Such a freedom is limited by the well known principles of equivalence and effectiveness. In a nutshell, the useful effect of EU law limits the autonomy of the Member States as regards the duty to reconsider definitive acts. In the case law of the Court of Justice concerning this duty, the tension between, on the one hand, the useful effect of EU law and, on the other hand, the autonomy of Member States is visible. Yet, this case law is not crystallized as there have been only few cases dealing with it.<sup>95</sup> Moreover, many aspects under this jurisprudential line are still under development. So far, only the fact that the duty to reconsider definitive acts has an exceptional character seems to have a consolidated status.<sup>96</sup> Indeed, the main rule is that there is not such a duty. This main rule is justified by the fact that EU law recognizes the importance of legal certainty.<sup>97</sup> Yet, there are exceptions to the main rule and hence to the level in which legal certainty must be guaranteed. It is in the context of such exceptions that uncertainty as regards the EU requirements is visible. From the case law of the Court of Justice we have been able to identify 5 exceptions, which could be reduced to 4. Following the names of the cases in which these exceptions were used for the first time, these exceptions are:

- 1) the *Kühne & Heitz* exception,
- 2) the *i-21 Germany and Arcor* exception,
- 3) the *Byankov* exception,

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<sup>94</sup> Among others, *R. Ortlep*, Het arrest Byankov: specifieke Unierechtelijke plicht tot heroverweging van een in rechte onaantastbaar besluit, NALL 2013 DOI: 10.5553/NALL/.000012.

<sup>95</sup> E.g. *Kühne & Heitz*; Joined Cases C-392/04 and C-422/04, *i-21 Germany and Arcor*, ECLI:EU:C:2006:586; Case C-234/04, *Rosmarie Kapferer v Schlank & Schick GmbH*, ECLI:EU:C:2006:178; Case C-161/06, *Skoma-Lux*, ECLI:EU:C:2007:773; Case C-2/06, *Willy Kempster KG v Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:2008:78 (*Kempster*); Case C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti*, ECLI:EU:C:2012:608 (*Byankov*); Case C-2/08, *Fallimento Olimpclub*, ECLI:EU:C:2009:506.

<sup>96</sup> See *Ortlep* 2011, *supra* note 93 at p. 473.

<sup>97</sup> E.g. *i-21 and Arcor* case and Case C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683.

- 4) the *Ciola* exception,<sup>98</sup> which could be integrated in the *Byankov* exception, and
- 5) the *Commission v Germany* exception.

#### 4.1. The *Kühne & Heitz* exception

The first exception, which is also the exception which has been used the most in the case law of the Court of Justice, is based on the *Kühne & Heitz* judgment. This case concerns a dispute between *Kühne & Heitz* and the Dutch Authority for Poultry and Eggs (*Productschap voor Pluimvee en Eieren*). *Kühne & Heitz* had challenged the decision of the Authority concerning the classification of legs poultry as falling under a certain custom tariff. This appeal was unsuccessful as the national court agreed with the categorization made by the authority. When a later judgment of the Court of Justice clarified that both the authority and the national court were wrong, *Kühne & Heitz* asked for a revision of the decision, which had become definitive. The authority rejected this request. In appeal against such a rejection the national court hearing the case made a preliminary reference asking, in essence, whether EU law requires to reconsider definitive acts. In this case the Court of Justice has formulated four cumulative<sup>99</sup> conditions in order to establish a duty to reconsider definitive acts:

- 1) national law allows public authorities to reconsider their acts;
- 2) the act has become definitive following a judgment of a national court against which no appeal is possible;
- 3) in light of a later judgment of the Court of Justice, it is possible to establish that such a national judgment has been based on a wrongful interpretation of EU Law, while no preliminary questions had been asked to the Court of Justice;<sup>100</sup> and
- 4) the party that had challenged the national act before the national court has requested the public authority concerned to reconsider its act immediately<sup>101</sup> after having had knowledge of the later judgment of the Court of Justice.

As we can see, this exception offers a solution only for those cases in which the request to reconsider a definitive act has been made by the same party who had unsuccessfully challenged the act before a national court. In the context of the study performed in this contribution, the impact of such an exception seems thus limited. It can be established right

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<sup>98</sup> Case C-224/97, *Erich Ciola v Land Vorarlberg*, ECLI:EU:C:1999:212 (*Ciola*).

<sup>99</sup> *Ortlep & Widdershoven*, *supra* note 11 at p. 392.

<sup>100</sup> In *Kempter* the Court of Justice clarified that it is not necessary for the national party to have relied upon EU law during the first review procedure.

<sup>101</sup> In *Kempter*, the Court of Justice clarified that with immediately, it means that reasonable deadlines for the making the reconsideration request shall apply.

away that the *Kühne & Heitz* exception does not offer a solution to the lack of effective judicial protection. Actually, the *Kühne & Heitz* exception if applicable implies that judicial protection was possible, thus that no lacuna exists. Indeed, one of the conditions to rely on this exception is that all judicial remedies have been exploited. If judicial remedies are available against plans and programmes, then there is no breach of Article 9(3) of the Aarhus Convention, nor of Article 19(1) TEU.

The other exceptions have a broader scope of application. In the *i-21 Germany and Arcor* case and the *Byankov* case the party requiring the reconsideration of the definitive act did not fulfil the *Kühne & Heitz* requirements, as they had not challenged the act before a national court.<sup>102</sup> Still the Court of Justice ruled that the national authority had to reconsider its act.<sup>103</sup>

#### 4.2. The *i-21 Germany and Arcor* exception

In the *i-21 Germany and Arcor* judgment, the Court of Justice was called upon to rule on presence of a duty to reconsider a decision of a German authority. This case concerns a dispute between two telecommunication companies, *i-21 Germany* and *Arcor*, against the German authority for the fee charged by the latter for the license to operate on the German telecommunication network. Both companies had paid the fee at first. Once a judgment of the German Supreme Administrative Court (*Bundesverwaltungsgericht*) had clarified that similar fees charged upon other operators were in breach of public law, *i-21 Germany* and *Arcor* asked for the reconsideration of the fee that they had paid, which in the meanwhile had become definitive. Having the competent authority refused their reconsideration request, *i-21 Germany* and *Arcor* added the national court which made a preliminary ruling to the Court of Justice. As we can see, the second and third requirements of the *Kühne & Heitz* ruling were not fulfilled by *i-21 Germany* and *Arcor*. Still the Court of Justice ruled that there is a duty to reconsider definitive acts, if such a duty also exists under national law.<sup>104</sup> Clearly, in answering the preliminary question, the Court of Justice linked the duty to reconsider a definitive act with the principle of equality. Accordingly, we are of the opinion that this exception is based on two conditions:

- 1) the presence of a duty to reconsider a definitive act, and

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<sup>102</sup> See *Ortlep* 2013, *supra* note 94.

<sup>103</sup> *Id.*

<sup>104</sup> *i-21 Germany and Arcor*, in particular para 69.

2) that the act to be reconsidered is manifestly in breach of a higher norm, which needs to be assessed in light of national law, taking into account the useful effect of EU law.

The *i-21 Germany and Arcor* exception would be available in the Netherlands. Under Article 4:6 of the Algemene wet bestuursrecht (General Administrative Law Act; GALA), competent authorities are under an obligation to reconsider a definitive act if a *novum* occurs. A judgment of the Court of Justice is considered a *novum*.<sup>105</sup> Hence, it is just a matter of considering whether the breach of EU law is manifest, taking into account the specific circumstances of the case. The problem with this remedy is that it is based on the principle of equality. It is thus dependent upon the presence of national law establishing a duty to reconsider in the case of a *novum*. Therefore, as already indicated in the literature,<sup>106</sup> this remedy does not apply throughout the whole European Union. It could be that this remedy suffices to redress the problem existing in the Netherlands, while a similar problem existing in another Member State cannot be solved. The *Ciola & Byankov* exception does not have this limitation.

#### 4.3. The *Ciola & Byankov* exception

The *Byankov* case concerns a dispute between Mr. Byankov and the Bulgarian Ministry of Home Affairs. The latter prohibited Mr. Byankov to leave Bulgaria until he had paid a debt towards a private party. Mr. Byankov did not challenge the decision until three years of its adoption, hence after that the decision had become definitive under national law. Similarly to *i-21* and *Arcor*, Mr. *Byankov* did not comply with the second and third requirements of the *Kühne & Heitz* ruling. Differently than in the *i-21 Germany and Arcor* judgment, the Court of Justice relied on the principle of effectiveness to hold that national law restricting the possibility to ask the reconsideration of a definitive act was in breach of EU law.<sup>107</sup> The application of the principle of effectiveness implies a balancing exercise in which the various involved norms are taken into account.<sup>108</sup> In this case, the Court of Justice evaluated whether the degree of harm to the principle of legal certainty weighed more than the degree of benefit to the useful effect of the EU provision which had been violated, namely Articles 20 and 21 TFEU, taking into account the specific circumstances of the case.

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<sup>105</sup> See Dutch Supreme Court for Business Affairs (*College van Beroep voor het bedrijfsleven*) 22 September 2004 ECLI:NL:CBB:204:AR3068; see also *Ortlep & Widdershoven*, *supra* note 11 at p. 393.

<sup>106</sup> See *Ortlep & Widdershoven*, *supra* note 11 at pp. 389-399.

<sup>107</sup> *Byankov* paras. 72-82.

<sup>108</sup> See *Ortlep* 2013, *supra* note 94.

Similarly to the *Byankov* case, in *Ciola* the Court of justice relied on the useful effect of the EU provision at hand. This case regards a proceedings brought by Mr Ciola against fines imposed on him for exceeding the maximum quota of moorings on the shore of Lake Constance reserved for boats whose owners are resident abroad. Under a decision adopted in 1990, before that Austria joined the European Union, a maximum had been established on moorings reserved for boats whose owners are resident abroad. After that Austria had joined the EU, Mr Ciola was fined for having breached this requirement. The appeal of Mr. Ciola led to two preliminary questions, one of which concerned the duty to reconsider the 1990 decision, which had become final in the meanwhile. Differently than in the *Byankov* case, in *Ciola* the Court of Justice relied on useful effect outside of the context of the principles of equivalence and effectiveness.<sup>109</sup> The useful effect of the provisions on the free movement of services justified the establishment of a duty to reconsider. A similar conclusion was reached in the *Lucchini* case, concerning state aid.<sup>110</sup> It could be argued that the difference between the approach followed by the Court of Justice in *Byankov*, on the one hand, and that in *Ciola* and *Lucchini*, on the other, can be disregarded as the former approach is a *species* of the *genus* dealt with by the latter approach. At the end both exceptions are based on the same requirement, namely:

- 1) the harm to the justification ground of the national act weighs less than the benefit to the useful effect of the EU provision which has been breached, taking into account the specific circumstances of the case.

This exception could apply throughout the whole European Union. The problem is that it is unclear how the Court of Justice will balance environmental protection with legal certainty, or another national value used to justify the breach of EU law, in the specific case. The next exception can bypass this limitation.

#### 4.4. The *Commission v Germany* exception

In 2015, a fifth exception has been introduced during an infringement procedure against Germany.<sup>111</sup> This exception is particularly interesting in the context of this contribution as it deals with the wrongful implementation of an EU environmental standard in conjunction with

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<sup>109</sup> See *R. Ortlep & M.J.M. Verhoeven*, The principle of primacy versus the principle of national procedural autonomy, NALL, 2012, DOI: 10.5553/NALL/.000004.

<sup>110</sup> Case C-119/05, *Lucchini*, [2007] ECR I-6199.

<sup>111</sup> C-137/14, *Commission vs. Germany*, ECLI:EU:C:2015:683.



a breach of the EU standards on access to justice in environmental matters formulated under the EIA Directive, which is worded similarly to the Industrial Emissions Directive.<sup>112</sup>

As well known by the readers of this journal, German administrative law was considered to be in breach of the provisions on access to justice in environmental matters under both Directives in the *Trianel* case.<sup>113</sup> More precisely, in *Trianel* the Court of Justice had concluded that German law did not comply with several elements of the legal regime previewed under Article 10a of the EIA Directive, which serve to implement Article 9(2) of the Aarhus Convention. Germany had amended its administrative law in order to comply with the Directive, but according to the Commission this reform was not enough. One of the points contested to Germany was that the amendments only applied *ex nunc* and not *ex tunc*. This means that the amendments only applied for cases which were pending as to 12 May 2011, or to cases which started after this date and were still open on 29 January 2013. The EIA Directive requires that judicial review must be possible for those activities which have been authorized after 25 June 2005.<sup>114</sup> Before the Court of Justice, Germany relied explicitly on the principles of *res judicata* and legal certainty to justify the limited temporal scope of the amendments. The Court of Justice replied stating:

97 None the less, it must be noted in that regard that the Federal Republic of Germany cannot rely on compliance with the principle of *res judicata* when the limits on temporal scope, provided for in Paragraph 5(1) and (4) of the UmwRG, as amended, read in conjunction with Paragraph 2(5) thereof, affect administrative decisions which have become enforceable.

98 Moreover, the fact that, following the late transposition into German law of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17), which amended Directive 85/337 as regards public participation and access to justice, itself codified by Directive 2011/92, the Federal Republic of Germany restricted the temporal scope of the national provisions implementing the latter directive amounts to allowing that Member State to grant itself a new

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<sup>112</sup> Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment OJ [2012] L26/1 and Directive 2010/75/EU of 24 November 2010 on industrial emissions OJ [2010] L334/17.

<sup>113</sup> Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, ECLI:EU:C:2011:289 (*Trianel*). On this case see *Wegener, supra* note 3. See also the contribution of Eliantonio & Grashof in this special issue of JEEPL.

<sup>114</sup> See Case C-72/12, Gemeinde Altrip and others, ECLI:EU:C:2013:712, para. 31.

transposition period (see, by analogy, judgment in *Commission v Portugal*, C-277/13, EU:C:2014:2208, paragraph 45).

99 Accordingly, the argument of the Federal Republic of Germany that the limits on the temporal scope of the UmwRG were necessary in order to comply with the principle of *res judicata* as regards administrative procedures which have become definitive must be rejected.

As highlighted by Klinger in his annotation to this judgment in this journal,<sup>115</sup> the Court of Justice has concluded that all the acts that under German law have acquired the status of *res judicata* must be open to judicial review. This conclusion was reached without making reference to *Kühne & Heitz, i-21 Germany and Arcor*, or *Ciola & Byankov*. Although this duty seems different from the one of reconsidering a definitive act, the effect is the same. Indeed, an act which had become definitive under national law can now be reviewed by a court, allowing thus judicial protection. Accordingly, from this infringement procedure, we derive the following two conditions for triggering the application of the fifth exception, and hence the duty to reconsider a definitive act:

- 1) an EU duty to judicial protection has been breached, and consequently
- 2) it is impossible to challenge a wrongful implementation of an EU provision before a court of law.

The infringement procedure just analyzed concerns an EU duty to judicial protection established under the EIA Directive. It concerns thus a case of positive integration by means of harmonization. As visible at paragraph 98 of the judgment, the date by which the Directive had to be correctly implemented was explicitly relied upon by the Court of Justice to reach its conclusion. In section 3, it has been shown that only as regards Article 9(2) of the Aarhus Convention the EU has passed harmonizing measures. Hence, it seems that this exception is only relevant in the context of Article 9(2) of the Aarhus Convention. It is not relevant as regards Article 9(3) of the Convention, which forms the focal point of this contribution. Yet, it can be argued that the *Commission v Germany* exception can be expanded so as to cover a duty to ensure judicial protection stemming from EU primary law. To this extent, as stated above, Article 19(1) TEU requires effective legal protection in the fields covered by EU law.

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<sup>115</sup> R. Klinger, Remarks on ECJ judgment in C-137/14 – EU Commission vs. Germany of 15 October 2015, JEEPL 2016 (1), pp. 117-119.

This includes the implementation of provisions in EU environmental measures prescribing the adoption of plans and programmes. A conjunctive reading of Article 19(1) TEU and Article 9(3) of the Aarhus Convention with the provisions in EU environmental measures prescribing the use of plans and programmes provides a basis for extending the *Commission v Germany* exception beyond Article 9(2) of the Convention. If this is the case, then this exception would provide for a solution. Indeed, there is no doubt that an EU duty of judicial protection has been breached by the Netherlands and that this breach precludes to review whether national plans and programmes affecting the environment comply with EU law. In such circumstances, the obligation to ensure effective judicial protection against plans and programmes would be triggered.

#### **4.5. The duty to reconsider definitive acts as a catalyst for allowing judicial protection against plans and programmes**

In light of the analysis performed under sections 4.1-4.4, we can conclude that at least two of the four exceptions analyzed above can lead to a duty to reconsider a definitive plan or programme in the Netherlands, as well as in other Member States which do not allow for judicial protection against plans and programmes affecting the environment. Indeed, both the *I-21 Germany and Arcor* exception and the *Ciola & Byankov* exception could apply. The *Kühne & Heitz* and the *Commission v Germany* exceptions are, in their actual form, irrelevant, respectively not applicable. Yet, the latter exception, if extended so as to cover also the duty of judicial protection established under Article 19(1) TEU read in conjunction with Article 9(3 and 4) of the Aarhus Convention and the provisions under EU secondary law requiring the adoption of plans and programmes in the field of the environment, could serve the purpose of allowing judicial protection against plans and programmes affecting the environment.

It should be noted that the normative framework presented above is not consolidated. New developments can be expected, including the addition of new exceptions. Moreover, this line of cases damages legal certainty at national level. Accordingly, we are of the opinion that the use of these exceptions leading to the establishment of a duty to reconsider definitive acts should only be used as a tool to put pressure on the EU and national legislatures. These exceptions can be allowed judicial litigation which can serve as a catalyst for the development of specific legal requirements on judicial protection against plans and programmes.

## 5. Conclusions

This article focused on judicial protection against plans and programmes affecting the environment. It highlighted the lack of legal requirements in EU secondary law in this field. This contribution has shown in section 2 that plans and programmes affecting the environment are covered by Article 9(3) of the Aarhus Convention, at least when they are of a regulatory nature, rather than a policy-making nature. It has also demonstrated that in the Netherlands judicial protection against certain plans and programmes having regulatory nature as such is impossible or not effective. This finding means that there is a lacuna in the manner in which Article 19(1) TEU and Article 9(3 and 4) of the Aarhus Convention are implemented in the European Union.

Further, we have demonstrated how the case law of the Court of Justice on the duty to reconsider definitive acts could lead to judicial protection against plans and programmes. Given the intrusive nature of this solution for legal certainty, we are of the opinion that this solution is not enough to fully ensure effective judicial protection. The best solution would be to add specific provisions on access to justice against plans and programmes in all those (EU) acts that make use of plans and programmes to regulate public and private activities.

Accordingly, the solution proposed in this article is only meant to be used to put pressure on the EU and national legislatures in order to persuade them to implement fully Article 9(3) of the Convention and Article 19(1) TEU as regards the review of plans and programmes. So far, the EU legislature has not been able to achieve an agreement about the implementation of Article 9(3) of the Aarhus Convention. At national level, while Germany seems to be moving in the right direction, other Member States such as the Netherlands do not seem to be willing to allow judicial protection against plans and programmes affecting the environment. These deadlocks could be removed if the solution described in this article is applied consistently throughout the European Union. The destabilizing nature of a duty to reconsider definitive acts could convince the Member States to change attitude towards Article 9(3) of the Aarhus Convention. As the *Urgenda* case shows, judicial litigation is able to change governments attitudes towards environmental protection.